

**ALASKA LEGISLATURE**

**HOUSE and SENATE FINANCE COMMITTEE FILES,**

**1993-1994**

**1213**

287

applicable federal regulations for determining when phasing is appropriate in Section 8 of version U of the CSSB 308.

The Coastal District representatives also asked that the legislature take no action on S.B. 308, and that instead it support deferral of any action until a broad-based working group addresses phasing in greater depth.

In the best of all possible worlds, we might have the luxury of a more lengthy process. It was never our intent that the legislature have to deal with these issues at all, much less under the pressures of having to bring controversial legislation forward during a session when many important issues must be addressed. However, we find ourselves having to respond to decisions by the Court, the timing of which was beyond our control.

The effect of those decisions has been to place all leasing decisions at risk to successful challenges absent amendment of both Title 38 and Title 46 as proposed in CSSB 308. As a result, we all find ourselves having to deal with these issues under less than perfect circumstances. Nevertheless, we have listened carefully to the concerns of everyone who has participated in the working group meetings on this legislation, and we have tried to accommodate those concerns where we can.

In addition to the amendments described above, version U of the CS for CSSB 308 also reflects the following amendments:

- The requirement to issue a preliminary best interest finding for oil and gas lease sales has been codified in statute. Further, the amendments provide that the preliminary finding will be issued no later than six months before a scheduled sale, and that the public will have no less than 60 days in which to comment.
- The public notice provisions for preliminary and final best interest findings have been enhanced. New minimum standards have been established to assure that notice for oil and gas disposal decisions will consist of legal notices, display ad notices, notice by electronic media and at least one other method.
- The proposed amendment to A.S. 38.05.035 (g) to limit discussion of fish and wildlife species and their habitats to those within the sale area has been deleted.

- Appeal procedures have been drafted which clarify and make more predictable for all parties the standards and timelines for appeals of final best interest findings.

Comments received during and after the hearing on April 8th are being addressed by the following amendments:

- Section 4 (B) is being amended to require that the final best interest findings for oil and gas lease sales will be issued 90 days before a scheduled sale instead of 21 days as is currently required. This amendment responds to concerns raised by Trustees for Alaska that appeal rights might otherwise be truncated.

- In response to comments received from the Kenai Peninsula Borough, an amendment is being drafted to assure that the director addresses in writing both issues either raised during public review or otherwise required by statute to be considered regardless of whether or not they are determined by the director to be material to the phase of the proposed disposal or project under consideration. The director will have to rationalize in writing the basis for his determinations of materiality.

Finally, as you well know, it is difficult, if not impossible to adopt every proposed amendment to any piece of legislation. To do so in the case of CSSB 308 would inevitably lead to legislation that would not be responsive to the problems which the Courts have identified. Nevertheless, I believe the current version of CSSB 308 represents a good faith effort to be responsive to the concerns of the Coastal Districts and others without diminishing the intent of the legislation.

If I can answer any additional questions, please feel free to call

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPT. OF NATURAL RESOURCES

### DIVISION OF OIL AND GAS

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DATE: March 28, 1994

FILE NO.:

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FROM: Barbara Fullmer  
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SUBJECT: SB308 - Litigation  
Summary

### Resources Disposal Litigation Summary

#### BACKGROUND

Under current law, the Department of Natural Resources ("DNR") may not dispose of state land, resources, or property, or interests in them, unless the Commissioner first determines that such action will serve the best interests of the state and issues a written finding to that effect. Except in the context of oil and gas lease sale best interest findings, however, the legislature has not directed specific requirements for a best interest findings analysis. Rather, the generally applicable best interest finding provision simply states, in pertinent part:

Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property or interests in them, and, in addition to the conditions and limitations imposed by law, may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will serve the best interests of the state. . . . [T]he director shall make available to the public a written finding that sets out the facts and applicable law upon which the determination that the sale, lease, or other disposal will best serve the interests of the state was based.

AS 38.05.035(e). The legislature has chosen not to define the scope of DNR's best interests analysis or even to suggest specific things that should be included in the written finding. The current statute merely requires that DNR "set out the facts and applicable law" which form the basis for its best interests determination. The legislature, therefore, apparently intended to leave the details concerning the proper

scope of the written finding and the review upon which it is based to the expertise and discretion of DNR.

The Alaska Supreme Court, however, has not been content to let DNR define the scope of its best interests finding or coastal consistency determination in light of the uses to be authorized by the proposed disposal of land or resources. Instead, beginning in 1990 with its first decision on Oil and Gas Lease Sale 50 (Camden Bay), the Supreme Court has repeatedly reversed superior court decisions upholding DNR's best interest findings and coastal consistency determinations, particularly when DNR deliberately limited the scope of the finding challenged in accordance with limits on the uses directly authorized by the disposal. In short, the Court disapproves of DNR deferring consideration of remote, speculative impacts that possibly could result if the uses authorized pursuant to a best interest finding and coastal consistency determination lead to future development -- none of which could happen without further review and authorization.

The following chronologies of the administrative appeals to DNR, the appeals to the superior courts and the Supreme Court, and the subsequent remands, graphically illustrate both the scope and complexity of this litigation.

#### OIL AND GAS LEASE SALE 50 (CAMDEN BAY)

In the Trustees for Alaska v. State ("Camden Bay I") decision, issued on March 16, 1990, the Supreme Court ruled on the six issues raised by Trustees in their points on appeal:

- 1) The Court rejected Trustees' claim that they had been denied a fair opportunity to comment on the issues concerning offshore development, holding that the preliminary best interest finding gave sufficient notice that offshore facilities were contemplated.
- 2) The Court rejected Trustees' argument that DNR's best interest finding, in general, did not sufficiently explain the basis for its decision that the sale was in the best interest of the state.
- 3) The Court rejected Trustees' claim that DNR did not adequately address the cumulative effects of its leasing decision.
- 4) The Court agreed with Trustees' claim that DNR did not adequately consider the methods and risks of oil transportation from Camden Bay if ANWR remains unavailable for onshore support facilities.
- 5) The Court rejected Trustees' argument that leasing Camden Bay was unreasonable because oil production and transportation would not be economically feasible without onshore support facilities in ANWR, holding that "this court need not inquire into the feasibility of future development."

6) The Court agreed with Trustees' assertion that AS 44.19.145(a)(11) required the office of Management and Budget ("OMB"), rather than DNR, to render the conclusive consistency determination under the Alaska Coastal Management Program ("ACMP").

The Court remanded the Sale 50 final best interest finding stating that DNR omitted "any discussion" of the facilities necessary to transport oil from the Sale 50 area if ANWR's status remains unchanged.

The state petitioned the Court for rehearing of its Sale 50 decision asserting that the Court overlooked the fact that DNR did discuss transportation issues, including specific potential alternatives and their risks and benefits, in the final finding to the extent feasible at the lease sale stage. DNR argued that, given the uncertain nature of the quantity, quality, and location of oil deposits, and of the nature of the technology used to produce any deposits discovered, detailed hypothetical studies of alternative development scenarios at the lease sale stage are "unfair and unwise," "speculative," and "a gross misallocation of resources." See Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1989); Park County Resource Council V. United States, 817 F.2d 609, 624 (10th Cir. 1987); County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1378 (2d Cir. 1977) cert. denied, 434 U.S. 1064 (1978); Village of False Pass v. Watt, 565 F.Supp. 1123, 1134 (D.Alaska 1984), aff'd, 733 F.2d 605 (9th Cir. 1984).

The Court never acted on the state's petition for rehearing. DNR, therefore, issued a supplemental best interest finding in September 1990 to comply with the Court remand. The Court's ruling in Sale 50, however, also led to the enactment of new legislation intended to clarify the Title 38 best interest finding requirement for oil and gas lease sales. See AS 38.05.035 (g).

Two weeks after the Camden Bay I decision was issued, then-Governor Cowper requested that the Alaska Legislature enact legislation addressing the Court's decision. Two bills were introduced at the Governor's request. SB 539 provided for ratification of the Camden Bay lease sale. SB 540 amended AS 44.19.145(a) to make clear that DNR and the other resource agencies have the authority to render conclusive consistency determinations if a project involves only the permits of that agency.<sup>1</sup> The Governor also requested that amendments be introduced to HB 128 to

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<sup>1</sup> Although the Senate overwhelmingly passed SB 539 to ratify the Camden Bay lease sale, the House Resources Committee did not move the bill to the floor for a vote before the legislature adjourned. The legislature did, however, enact SB 540, which clarified that DNR was the proper agency to render the conclusive consistency determination for oil and gas lease sales. The

identify the subjects that DNR must discuss in its best interest finding for oil and gas lease sales. The Governor explained the purpose of the proposed legislation as follows:

The proposed amendments to SCS CSHB 128 (RES) respond to the court's holding that the best interest finding for Oil and Gas Lease Sale 50 (Camden Bay), required by AS 38.05.035(e), failed to consider the environmental safety of transportation facilities should the Arctic National Wildlife Refuge (ANWR) remain unavailable for shore-based support facility siting under federal law. The decision overlooks the fact that the best-interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, the Department of Environmental Conservation (DEC) and the Department of Fish and Game (ADF&G).

1990 Senate Jour. 3132 (emphasis added). The Governor further explained that the proposed legislation was intended to clarify that in preparing its best interest finding, "DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot be reasonably foreseen at the time of leasing."

The legislature enacted SCS CSHB 128 (FIN) which in its final form added a new subsection (g) to AS 38.05.035. The new subsection provides a complete list of what must be considered and discussed in a written best interest finding for an oil and gas lease sale. The director's duty to consider and discuss facts is limited to "facts that are known to the director at the time of preparation of the finding and that are material to the [matters listed in the statute] or to issues that were raised during the period allowed for receipt of public comment." Governor Cowper signed this bill into law on June 14, 1990.

In May 1991, Trustees initiated their second appeal of Sale 50 on issues regarding the Alaska Coastal Management Program ("ACMP"). After briefing and oral argument, the Supreme Court, in its second opinion in the Sale 50 litigation ("Camden Bay II"), remanded DNR's coastal consistency determination for additional findings. This second remand was based, in part, on an erroneous predicate: that DNR's determination of geophysically hazardous areas was limited to "a summary statement that the entire Sale 50 area is a 'known geophysical hazard.'" In its Opinion, however, the Court understated DNR's efforts to identify geophysical hazards, and the extensive

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legislature removed the inconsistency between the regulations and the statute by amending the statute retroactively. The Governor signed this bill into law on May 11, 1990.

Sale 50 administrative record established that DNR advanced more than a "summary statement" that the entire sale area is a known geophysical hazard.

In its Sale 50 finding, under the heading "Potential Geological and Geophysical Hazards in Camden Bay, " DNR noted:

Geophysical surveys conducted in the Camden Bay region (Grantz et al, 1982) have delineated several potential hazards to oil and gas exploration and production which may be of greater significance to the Sale 50 area than other sale areas on the North Slope. Recent uplift on the Beaufort Sea shelf north of Camden Bay and the occurrence of numerous faults and shallow earthquakes indicate that this area may be an active tectonic zone. The magnitude of earthquakes recorded in the Sale 50 vicinity range from less than 1.0 to 5.3 on the Richter Scale. In addition, documented slump features indicate that sediments are susceptible to liquefaction and tectonically triggered sliding or slumping in the deeper waters. The instability of poorly consolidated sediments on the Beaufort Sea shelf may present a potential hazard to pipelines, platforms, and artificial islands.<sup>2</sup>

In its assessment of geological and geophysical hazards in the Sale 50 finding, DNR specifically cites to a detailed survey of geophysical hazards in the Camden Bay area: "Map cross sections and chart showing late Quaternary faults, folds, and earthquake epicenters on the Alaskan Beaufort Shelf: USGS Miscellaneous Investigations Series, Map I-1182-C, scale 1:500,000," Grantz, A. and others, 1982.<sup>3</sup> In fact, at the time of

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<sup>2</sup> In its Opinion, the Court quotes from the federal environmental impact statement ("EIS") prepared for OCS Sale 97 (in the Beaufort Sea adjacent to the Sale 50 tracts) and states that: "The federal statement deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document." However, a comparison of the statement in the Sale 50 finding, quoted in the text above, with that quoted favorably by the Court, shows that the Sale 50 statement is at least as detailed, if not more, than the federal statement. The federal statement on faults and earthquakes in the OCS Sale 97 EIS states in full: "Earthquakes indicate active movement along the faults in the Camden Bay area and tend to occur along the axes of anticlines and synclines. They are part of the central Alaska Seismic system. Most of the earthquakes recorded since 1968 range in magnitude from 3.0 to 4.0."

<sup>3</sup> The U.S. Fish and Wildlife Service referred this survey to DNR in its comments on proposed Sale 50. DNR specifically relied on the Grantz survey ("Grantz et al., 1982") in its analysis of geophysical hazards. DNR also compiled and considered additional

its final finding for Sale 50, DNR incorporated by reference the only publicly available maps and cross-sections of known geophysical hazards.

In Camden Bay II, the Court remanded the finding to DNR "to identify and report on known and substantially possible areas of geophysical hazards within Sale 50." When preparing the best interest finding and coastal consistency determination, however, DNR "conduct[ed] a survey of available sources" and "report[ed] the results." Specifically, DNR identified known geophysical hazards based on the only survey of the Camden Bay area then available, the Grantz survey. In addition to addressing and identifying known hazards, DNR imposed stipulations and terms of sale to mitigate the currently unknown but potentially discoverable geophysical hazards that subsequently may be determined to exist at specific exploratory or development sites. It took this step to ensure the sale's compliance with 6 AAC 80.050. Unless the Court wished DNR to go beyond the express language of the regulation -- and in its Opinion, the Court specifically "excludes a requirement to conduct field studies" for geophysical hazards -- there was nothing more to be done at the lease sale stage.

In the Camden Bay II decision, the Court also misinterpreted the geophysical hazards standard (6 AAC 80.050) of the ACMP. Under the geophysical hazards standard (6 AAC 80.050) of the ACMP, state agencies must "identify known geophysical hazard areas and areas of high development potential in which there is a substantial possibility that geophysical hazards may occur." In its Opinion, the Court interprets this to mean that DNR must "identify known or substantially possible hazard areas." This is not what the regulation requires. There is a subtle, but crucial difference in the language of the regulation which the Court overlooked.

The regulation clearly requires identification of only two types of areas: (1) those with known geophysical hazards, and (2) those having high development potential in which there is a substantial possibility that geophysical hazards may occur. As discussed above, DNR identified those areas of known geophysical hazards in the sale area. However, the second type of area, areas of high development potential, obviously cannot be identified at the leasing stage because the exploration necessary to define the location of any oil deposits has not taken place. Therefore, DNR requires surveys and site specific mitigation for geophysical hazards when -- but not before -- specific activities are proposed at specific sites.

The Court rejected DNR's reasonable approach to identifying and mitigating geophysical hazards, and it did not defer to agency expertise as courts generally do in decisions involving complicated technical matters. In the same decision, however, the Court deferred to DNR's expertise and acknowledged that DNR utilized the preferred

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information regarding geophysical hazards generally, and seismicity in particular, in the Sale 50 area.

approach when addressing transportation concerns: "Until exploration is proposed and, in all likelihood, until and unless a commercially exploitable discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes." The same logic the Court used in upholding DNR's approach to addressing transportation issues under the ACMP, applies to DNR's handling of geophysical hazards because development potential is unknown until after exploration has taken place.

Finally, in its Camden Bay II decision, the Court overlooked extensive evidence that DNR's consistency determination complied with the historic, pre-historic and archeological standard (6 AAC 80.150) of the ACMP. Under 6 AAC 80.150: "Districts and appropriate state agencies shall identify areas of the coast which are important to the study, understanding, or illustration of national, state, or local history or prehistory." In its Opinion, the Court interprets the regulation to require, "the identification of known archeological sites at the initial sale stage." Identification of known cultural resource sites requires, according to the Court, "literature surveys and personal contact with individuals who may have knowledge concerning such sites."<sup>4</sup>

The Court's conclusion that "DNR did not attempt to identify archeological sites within the sale area," was wholly mistaken. In its consistency determination, DNR surveyed the known data, set out the results, and stated its conclusions. Specifically, DNR found that:

It is not likely that any cultural resources sites would be identified within the proposed sale area since it is offshore. However, no cultural resource surveys have been conducted in the area, and the discovery of sites, especially in nearshore areas, should not be ruled out.

This conclusion was based directly on comments submitted by Judith E. Bittner, Chief, State of Alaska Office of History and Archeology:

The offshore aspects of the proposed sale offer little impact to cultural resources of the north slope. There are currently no known cultural resource sites with the submerged lands identified in Sale 50, and the potential for encountering such sites would be low due to ice scouring. Be that as it may, appropriate stipulations should be applied to the leases for the protection of any as yet unknown cultural resources in the sale area.

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<sup>4</sup> In its Opinion, the Court specifically rejects the need to conduct field surveys and exploration in an effort to identify unknown sites.

Furthermore, contrary to the Court's conclusions, DNR did not leave to its lessees the discretion to determine how and when identification of cultural sites would occur. Rather, in compliance with Ms. Bittner's suggestions, DNR noted the potential for discovery of sites in the nearshore areas, and established lease terms and stipulations in recognition that future oil and gas related activity may result in the identification of currently unknown resource sites.

Specifically, stipulation 1 to the Sale 50 leases requires the lessee to report the discovery of any site, structure, or object of historical or archeological significance and to make every reasonable effort to preserve and protect the site until DNR issues directions regarding its protection. Additionally, at the permitting stage, lease term 3 requires consistency with the ACMP, and term 22 requires that the lessee complete an archeological survey before exploration and development activities are undertaken.<sup>5</sup> Each of these points was brought to the Court's attention in the state's request for reconsideration of its decision. Although the Court took that opportunity to correct the factual errors in its original decision, it declined to reverse its decision.

#### OIL AND GAS LEASE SALE 55 (DEMARCATIION POINT)

In its Sale 55 Opinion, issued in December 1993, the Supreme Court determined that DNR failed to consider what the Court viewed to be a "salient" factor - the possible effects of the lease sale on the Porcupine Caribou Herd and the subsistence use of that herd by the residents of the City of Kaktovik. In so doing, however, the Court failed to defer to agency expertise and simply substituted its judgment for that of DNR in determining what is a "salient" factor for purposes of a best interests finding in support of a decision to lease. To compound its error, the Court disregarded the fact that the Sale 55 administrative record supports DNR's decision that offshore activities in the Sale 55 area would not foreseeably have an adverse impact on the caribou herd located onshore.

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<sup>5</sup> Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat of site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. 470hh. Therefore, even if there were information on known sites offshore in the sale area, DNR is required to withhold specific information regarding those sites until the plan of operations stage when the director of the Division of Oil and Gas and Division of Parks and Outdoor Recreation can work with the lessee to develop site specific mitigation measures.

Subsection (g) of AS 38.05.035 currently provides a complete list of what DNR must consider and discuss in a best interests finding for an oil and gas lease sale. The statute requires that DNR consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area. However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd clearly is not found in the sale area, a marine environment, DNR did not violate the statute. Ruling otherwise, however, the Supreme Court created an undefined zone around the sale area which DNR must somehow, without guidance or restriction, delineate and evaluate. Extension of this logic makes it virtually impossible for DNR to assure that it has considered all the species in all the areas that may be alleged to be material.

#### GOODNEWS BAY OFFSHORE PROSPECTING PERMIT DISPOSAL

In the Goodnews Bay offshore prospecting permit case, decided in January of 1994, the Supreme Court again redefined the scope of DNR's best interest analysis. The Court rejected DNR's decision to defer consideration of the possible effects that might result from future mining if workable mineral deposits were found, even though the kind and number of mining operations that might result and whether mining would indeed take place were matters of speculation, and, more important, DNR's subsequent approval of mining leases (and of mining plans of operation) would have been required before mining actually could have taken place. Though the superior court had upheld DNR's best interest finding, the Supreme Court disregarded these uncertainties and the retained authority of DNR, concluding that DNR should have fully analyzed the potential impacts of mining in the region at the prospecting permit stage.

The Supreme Court remanded the Goodnews Bay finding to DNR with instructions to prepare a best interest finding which takes a "hard look" at the effects of mining, including the cumulative regional effects, that might eventually result from the limited exploration to be authorized by the offshore prospecting permits. In response to DNR's argument that its best interest analysis had been as complete as possible at the prospecting permit stage where no development was authorized or even contemplated, the Court suggested that DNR should have emulated the federal practice of conducting environmental impact studies in which a range of possible scenarios are considered.

#### OIL AND GAS LEASE SALES 57 AND 75A

DNR's legislatively mandated administrative proceedings provide a constructive forum where issues regarding lease sales are fleshed out and addressed.

This process is involved, costly and time-consuming. The current system, however, is subject to abuse which unnecessarily delays administrative decisions and obstructs the administrative decision making process. The Sales 57 and 75A appeals are examples of this abuse. Abuse which cost the state significant amounts of money for staff time and resources at DNR and the Department of Law. More important than these direct costs incurred as a result of such abuse, are the indirect costs of chilling participation in the state's leasing program by signaling that Alaska is more vulnerable to litigation over leasing than other areas.

#### Oil and Gas Lease Sale 57 (North Slope Foothills)

DNR's administrative review for Sale 57 began on June 4, 1986, when it issued the first general call for comments on the proposed lease sale. A second call for comments was issued on August 21, 1986, requesting consideration of two proposed leasing schedules involving five proposed lease sales, including Sale 57. Two more calls for comments were issued for Sale 57 on August 14, 1987 (general call for comments), and on March 13, 1989 (request for specific comments on fish and wildlife populations, human uses of those resources, and the potential effects of the sale on those resources and uses).

On June 27, 1990, DNR was forced to defer the date for several lease sales, including Sale 57, because of budget reductions in fiscal year 1990. As a result of the re-scheduling of Sale 57, DNR started the public comment process over again, issuing a general call for comments on September 17, 1990. On May 26, 1992, DNR issued another call for comments (requesting socioeconomic and environmental information and comments). Later, the public was encouraged to comment yet again following the issuance of the preliminary finding on March 23, 1993. Oral testimony on the proposed lease sale also was taken at a public hearing held April 19, 1993, in the community of Anaktuvuk Pass.

DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment during the Sale 57 administrative proceedings. Only once, however, did Trustees for Alaska and Alaska Center for the Environment ("Trustees"), appellants in the case filed with the superior court, avail themselves of those opportunities. And then, Trustees only submitted one short paragraph of general comments on the sale.

Trustees' one paragraph of general comments was submitted in response to DNR's August 21, 1986 call for comments on two proposed leasing schedules involving five proposed lease sales, one of which was Sale 57. The one paragraph addressing Sale 57 in Trustees' September 2, 1986 submission, contains a general criticism of DNR for failing to mention the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve in the initial public notice. Trustees also

stated that there are questions about the transportation of oil and possible socioeconomic effects in the village of Anaktuvuk Pass associated with the sale.<sup>6</sup> Aside from these broad conclusory statements, Trustees did not explain their concerns. Nor did Trustees submit further comments, scientific data, specific criticisms or testimony.

In fact, during the lengthy administrative review process that followed Trustees' September 2, 1986 generalized and brief criticism of the initial public notice, Trustees never submitted additional comments on Sale 57. Trustees never responded to the four additional calls for comment. Trustees failed to participate in the public hearing held in Anaktuvuk Pass. And Trustees did not submit comments on DNR's preliminary best interest finding -- the document that "describes the proposed sale area and presents the department's review of the areas resources," and which formed the basis for DNR's final best interest finding.

Submission of one paragraph of generalized comments at the very start of a seven year administrative review does not constitute sufficient participation in an administrative proceeding for the purpose of standing to appeal. In the present case, beyond a general criticism of DNR's alleged failure to mention in the public notice the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve, Trustees did not raise any specific concerns regarding Sale 57. Throughout the seven year administrative review, when DNR was actively soliciting public comments (and when criticism would have been constructive), Trustees failed to sufficiently participate. Only after time and resources were spent in conducting a critical review of Sale 57, did Trustees decide to voice their concerns through the appeals process in the courts.

#### Oil and Gas Lease Sale 75A (Colville River Exempt)

The Alaska Supreme Court has held that under the state's Administrative Procedure Act, an appellant must meet three requirements in order to have standing to challenge an administrative agency decision. First, the appellant must have a direct interest in the proceedings. Second, the appellant must be factually aggrieved (suffered an actual injury) by the agency decision. And, third, the appellant must have participated at the agency level. In their appeal of Oil and Gas Lease Sale 75A, Trustees for Alaska and Alaska Center for the Environment ("Trustees") failed at least two of the three requirements established by the Court. Trustees were not factually

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<sup>6</sup> Noticeably absent from that one submission are any concerns regarding riparian areas or archeological resources, or any specific comments regarding impacts of the sale on the Gates of the Arctic National Park and Preserve, which are the issues Trustees subsequently brought on appeal to the superior court.

aggrieved by the DNR's decision to lease tracts of land in Sale 75A. In addition, Trustees did not participate in DNR's administrative proceedings for Sale 75A.

First, Trustees lacked standing to challenge DNR's decision to proceed with Sale 75A because Trustees suffered no actual injury as a result of DNR's decision to lease tracts of land in the sale area. In their points on appeal filed with the superior court, Trustees maintained they were organizations "concerned about sustaining the many values of the region, including the cultural, fish, wildlife, scenic and other values." This abstract concern, however, is not a special damage different in kind from that of the public generally, and it is not the concrete personal injury required by the Court to establish that Trustees were factually aggrieved by DNR's decision to offer the Sale 75A lands for lease.

With respect to the members of the appellant organizations, Trustees' only claim was that their members use and enjoy the sale area for a variety of purposes such as recreation, cultural activities, hunting, fishing, wildlife observation and scientific studies. However, the surface estate of the Sale 75A area is private property wholly owned by the Kuukpik Corporation. The members of the appellant organizations thus have no right to use the privately held surface estate for their activities. Consequently, Trustees could not honestly assert that any individual member their organizations sustained an actual injury when DNR determined that leasing the Sale 75A area was in the best interests of the state.

In order to establish standing to appeal Sale 75A, Trustees also needed to demonstrate that they participated in the administrative proceedings below. DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment on proposed Sale 75A. See, e.g., January 15, 1993 Call for Comments; and March 23, 1993 Notice of Intent to Issue a Final Finding (inviting the public to submit written comment on any aspect of the sale, and giving notice of an April 14, 1993 public hearing scheduled in accordance with AS 38.05.180(d)(2)). Trustees never availed themselves of those opportunities. Therefore, Trustees lacked standing to challenge DNR's decision and their appeal of Sale 75A was frivolous.

#### OIL AND GAS LEASE SALE 78 (LOWER COOK INLET)

The appeal of Oil and Gas Lease Sale 78 was initiated on November 19, 1993, when the appellants filed their notice of appeal, statement of points on appeal

and designation of record with the superior court in Kenai.<sup>7</sup> Seven weeks after filing their appeal, on the eve of the sale, the appellants filed their "emergency" motion for stay. Late on January 24, 1994, less than 18 hours before the sale was scheduled to occur, the superior court issued its decision staying Sale 78.

In its order staying the sale, the court held that DNR did not comply with 6 AAC 80.040 when making its coastal consistency determination. The court's superficial analysis on this point states in full:

First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependant and [sic] activities? Or, is oil and gas [sic] a water related activity? The Court cannot determine whether the sale is consistent with either standard absent a finding.

With this limited analysis, the court failed to recognize the "plain meaning" of the regulation, and it ignored both DNR's discussion of this regulation and the restrictions DNR placed through the terms of its leases and mitigating measures on potential future offshore oil and gas development.

6 AAC 80.040(a) states that "[i]n planning for and approving development in coastal areas, districts and state agencies shall give in the following order, priority to . . . ." As was discussed in detail in DNR's Opposition to the Stay -- and apparently conceded to by the court -- an oil and gas lease sale is not itself "development." Development, if and when it ever occurs, requires permits, plans of operation, and other authorizations. Therefore, the relevant part of this regulation would be "planning for . . . development." The oil and gas lease sale itself has no direct impact on other water-dependent activities, and in planning for potential future

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<sup>7</sup> The appellants' statement of points on appeal for Sale 78 wholly fails to identify any specific issues with regard to DNR's best interest finding and coastal consistency determination. The appellants only allege that DNR's Sale 78 best interest finding is arbitrary and capricious because: (1) it fails to "properly weigh the pros and cons of the lease sale," and (2) it fails to "evaluate standards in AS 38.05.035 (e), (g), the ACMP, and applicable local coastal management plans." The appellants did not identify any of the "cons" DNR failed to address, nor do they specify which of the standards in the cited statutes and regulatory programs DNR failed to evaluate. Even after the state asked the court to require a more specific description of the points on appeal, the court refused, thereby indicating its willingness to accept anything.

activities, DNR cannot give priority to either of these two water-dependent uses (fishing and the offshore oil and gas industry) because neither by its nature has a priority over the other.

The appellants argued, and the court appeared to accept without question, that potential offshore oil and gas development is not a water-dependent activity.<sup>8</sup> However, the appellants' argument that offshore development cannot be water-dependent simply ignores the plain meaning of the term "offshore,"<sup>9</sup> a characteristic of areas of this sale described over and over in the final finding and the preliminary finding.

Moreover, the appellants acknowledged the water-dependency of potential offshore oil and gas activity when they stated in their Memorandum that "DNR should have required in the lease terms directional drilling to access all tracts south of Kasilof and tracts 20 and 21 wherever possible." If directional drilling is not possible and yet the oil or gas prospect is offshore, the appellants' statement concedes to the obvious: that the exploration or development of that prospect cannot be carried out without being in or on the water and therefore must be "water-dependent."

The appellants and the court ignored the numerous Mitigation Measures imposed to avoid potential conflicts between two such activities that must each be carried out in or on the water.<sup>10</sup> Since no specific projects can or have been proposed at the lease sale stage, DNR cannot determine if, where or when any restriction might be invoked, but it has planned for such. Where possible, in order to avoid conflict, DNR has reserved the right to require that fishing be accorded accommodation by allowing only directional drilling in offshore oil and gas development. Where such measures are not possible, no priority exists between

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<sup>8</sup> "[W]ater-dependent" means a use or activity which can be carried out only on, in or adjacent to water areas because the use requires access to the water body." An offshore oil or gas deposit cannot be found anywhere except in water.

<sup>9</sup> Although DNR did not make an explicit and redundant statement of the obvious, the water-dependent status of potential offshore oil and gas development is reflected in DNR's statement in the Preliminary Finding that "[t]he following proposed Mitigation Measures are designed to prevent significant interference with other water-dependent and water-related activities . . . ."

<sup>10</sup> For example, Mitigation Measures 9(b) (addressing offshore pipelines); 13 (restrictions to avoid conflict with fishing); 16(d) (offshore disposal); 20 (offshore seismic activities).

these two activities, neither of which can be carried out onshore, but other measures to mitigate any potential conflicts between the two uses have been imposed. Therefore, DNR's consistency determination complied with 6 AAC 80.040, and deference should have been given to its decision.

The superior court's order also stated summarily that DNR's consistency determination does not discuss the requirements of 6 AAC 80.130(d) and therefore cannot be consistent with the ACMP standards. The court failed, however, to acknowledge that 6 AAC 80.130(d), upon which it relies exclusively in this argument, is invoked only when "uses and activities in the coastal area which will not conform to the standards contained in (b) and (c) of [6 AAC 80.130]" exist. The court never discussed or analyzed the requirements of 6 AAC 80.130 (b) or (c). 6 AAC 80.130(b) states as follows:

The habitats contained in (a) of this section must be managed so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources.

6 AAC 80.130(c) provides a standard for the management of each of the different habitats listed in 6 AAC 80.130(a) excluding "important upland habitat." The court did not discuss or cite evidence that the habitats are not being managed so as to maintain such characteristics or standards.

DNR took a hard look at the requirement and issues of 6 AAC 80.130.<sup>11</sup> First DNR imposed numerous stipulations and mitigation measures that are specifically designed to achieve maxim compliance with the 6 AAC 80.130(c) standards of maintaining and enhancing the coastal habitats.<sup>12</sup> DNR's analysis points out that:

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<sup>11</sup> DNR's discussion of and actions taken in response to 6 AAC 80.130 reflect that, to the extent possible at the lease sale stage, DNR has dealt with the "knowns," and further, even tried to provide for future possibilities by requiring mitigation measures. This comported fully with the Supreme Court's recent case law under the ACMP developed in the Camden Bay II decision (DNR must identify known hazards and known archeological sites). Still, the superior court did not accept or defer to the agency's analysis and decision.

<sup>12</sup> There is no requirement that DNR include all of its analysis in its conclusive consistency determination. The Supreme Court had held that DNR must only "establish a record which reflects the basis for [its] decision."

Issuance of oil and gas leases in itself authorizes no uses or activities in the sale area. The measures discussed in this section of the consistency analysis are designed to minimize the impact of post-lease sale oil and gas activity on the environment and to conform to 6 AAC 80.130(b) 6 AAC 80.130 (c), and the MSBCMP and KPBCMP policies.

Second, DNR acknowledged that despite these precautions, "[p]articularly if oil and gas deposits are discovered in the proposed sale area, there may be uses or activities in the sale area which will not 'maintain or enhance the biological, physical, and chemical characteristics' of the coastal habitat in which they are located." DNR then parsed through, analyzed, and responded to each of the three parts of 6 AAC 80.130(d).

Therefore, since the court held that there was no irreparable harm shown nor any clear showing of probable success on the merits of the appellants' arguments against the best interest finding, and there is no basis for any showing of probable success on the merits with regard to 6 AAC 80.140 and .130, the stay of Sale 78 should not have been imposed and was issued in error. Nevertheless, DNR's appeal of this obviously flawed decision was summarily dismissed by the Alaska Supreme Court in a one sentence order.

## CONCLUSION

Only the legislature can take some of the unpredictability out of judicial review of DNR's best interest findings and coastal consistency determinations. To do so, Title 38 and Title 46 must be amended to explicitly grant DNR the discretion to define the scope of its analyses and to require that issues be brought to DNR's attention during public review of a proposed disposal if they are later to be the subject of an appeal to the courts.

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2580

(907)762-2547

March 3, 1994

Clement Lewsey, Acting Chief  
Coastal Programs Division  
United States Department of Commerce  
National Oceanic and Atmospheric Administration  
National Ocean Service  
Office of Ocean and Coastal Resource Management  
Washington, D.C. 20235

Dear Mr. Lewsey:

I am writing to you in my capacity as Director of the State of Alaska's Division of Oil and Gas, an agency both interested in and affected by the proposed statutory amendments contained in Alaska Senate Bill 308. I have reviewed a copy of your March 2, 1994 letter responding to a March 1, 1994 letter from Ms. Riki Ott. Your letter raises several questions.

As a preliminary matter, I agree with your statement that it is premature for OCRM to decide whether it would approve the changes resulting from SB 308. The bill is proposed legislation and is still undergoing the committee review process. It may be modified several times as its intent is clarified and public concerns are addressed. I also understand that any changes to an approved state coastal management program must be formally submitted for review by your agency. Since this bill is not yet approved or enacted, such a submittal, obviously, has not yet been made.

Is it a standard procedure for your federal agency to comment on proposed state legislation? Committing to a written statement on a legislation which is currently before Alaska's Legislature under the signature and letterhead of agency authority appears unusual, at best, and gives the impression that the federal agency is actively taking a position on the proposed state legislation. If that is indeed your intent, please describe your agency's authority for and policy on commenting on proposed state legislation.

Further, the comments in your letter lead me to believe that your agency does not understand the bill's composition. In the third paragraph of page 1 of your letter, you state that SB 308 would narrow the scope of review for state agency decisions including the disposition of state land, property, and resources. That described effect is not part of the proposed amendment to the Alaska Coastal Management Program ("ACMP"). Only Section 3 of the bill, proposed statute AS 46.40.094, would affect the ACMP. The first two sections

Clement Lewsey, Acting Chief  
Coastal Programs Division  
March 3, 1994  
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of the bill address amendments to the Alaska Land Act (Alaska Statutes Title 38, chapter 5), a set of statutes dating from statehood which is independent of and not part of the ACMP statutory scheme.

Even if a federal agency properly may comment on proposed state legislation, a federal agency cannot possibly have any basis to comment on proposed amendments to state statutes which are not in any way under the control of a federal program. Although some decisions eventually issued under the Alaska Land Act may require a prior independent consistency determination under the ACMP (Alaska Statutes Title 46, Chapter 40), the vast majority do not.

I would ask that you reconsider the accuracy of and appropriateness of your comments presented on page 1, paragraph 3 of your letter. If, after such reconsideration, you still feel that your comments are accurate and appropriate, please clarify and specify how they apply to the particular sections of SB 308 and what conflicts result.

Your second comment (page 2, paragraph 1) also appears to address the portions of the bill proposing amendments to the Alaska Land Act. The last sentence of paragraph 1, page 2 refers to the location of an activity. Nothing in Section 3 of the bill, the only section affecting decisions under the ACMP, refers to location of an activity; the only such reference is in Section 2 of SB 308. Again, such comments appear to arise from a faulty understanding of the bill and, as a result, are inaccurate and inappropriate.

If indeed your second comment does address Section 3 of SB 308, the comment remains unclear as to how the ACMP, if amended pursuant to Section 3 of SB 308, might contradict federal statutes or regulations and cause problems. You refer to CZMA section 307(c)(1) (codified at 16 U.S.C. § 1456(c)(1)) which requires consistency of federal agency activities "to the maximum extent practicable with the enforceable policies of approved State management programs," (emphasis added) and you then provide H.R. Conference Report No. 964 describing the intent of Congress in enacting the 1990 amendment to that section.

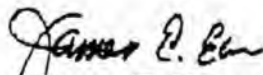
You do not, however, provide any cites to federal statutes or regulations which, in the event that Section 3 of SB 308 is enacted in its current form, could create a conflict between the ACMP and existing federal requirements for state coastal management programs (16 U.S.C. § 1455(d)). What specific statutes or regulations exist (since intent language must be used to construe existing language) that would cause a conflict between the ACMP and the federal requirements for state programs if Section 3 of SB 308 is enacted? What would be the result of any alleged conflict? I request clarification and specifics of how OCRM anticipates that Section 3 of SB 308 would violate state program requirements.

Clement Lewsey, Acting Chief  
Coastal Programs Division  
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Your third comment (page 2, paragraph 2) does appear to address Section 3 (phasing of consistency determinations). However, it seems to agree that the use of phasing is consistent with the CZMA. Indeed, Section 3 of SB 308 appears to conform with the intent of 15 C.F.R. § 930.37(c) by providing for review "at major decision points for a long-term project and ensur[ing] that the project, taken as a whole, is consistent . . . with the state coastal management program." If there is a conflict, please specify how you believe Section 3 of SB 308 conflicts with the federal CZMA requirements for state programs.

I am impressed by the quick response you provided to Ms. Ott and request that I be accorded the same consideration. As Ms. Ott pointed out, proposed legislation may move quickly and if concerns or potential problems exist, they should be addressed now. I look forward to a written response in the next day or two. Our facsimile number is (907)562-3852. If a prompt written response is not possible, perhaps you will be available to provide comments by telephone to a state legislative committee considering this bill. In that case, please call me at (907)762-2547 so I can arrange for a telephonic conference.

Sincerely,

  
James E. Eason  
Director



400 pm 7/2/94  
UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL OCEAN SERVICE  
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT  
Washington, D.C. 20235

Riki Ott, Ph.D.  
United Fishermen of Alaska  
211 Fourth Street, Suite 211  
Juneau, Alaska 99801

MAR 2 1994

Dear Dr. Ott:

Thank you for your letter of March 1, 1994, regarding Alaska Senate Bill 308 (SB 308). SB 308 would affect the way the Alaska Coastal Management Program (ACMP) reviews decisions by state agencies regarding the disposition of state land, property and resources. Your letter raises several issues regarding SB 308 and asks for clarification on the federal role in this particular legislation. Because we have not had time to conduct an in-depth review or legal analysis of SB 308, the comments that follow must be viewed as a preliminary programmatic response.

The Office of Ocean and Coastal Resource Management (OCRM) is the federal office responsible for overseeing the implementation of state coastal management programs developed pursuant to the Coastal Zone Management Act of 1972, as amended (CZMA). In addition to initially approving state programs, OCRM is charged with reviewing and approving or denying changes to the state's coastal management program. Thus, if SB 308 were enacted, the resultant changes to the ACMP would have to be submitted to OCRM for approval as a program change pursuant to 15 C.F.R. 923 Subpart I.

As mentioned above, we have completed a preliminary review of SB 308, and it would be premature to decide whether OCRM would approve the changes resulting from SB 308. We can, however, point out several aspects of SB 308 for which OCRM has significant concerns. First, as presented, SB 308 would narrow the scope of review for state agency decisions including disposition of state land, property and resources. In essence, this would create a double standard for review under the ACMP: one standard for federal agency actions, and a narrower, less strict standard for state agency actions. In order to apply state coastal management enforceable policies to federal agencies through the CZMA's federal consistency provisions, the standard of review applicable to the federal agency must be the same standard that applies to all public and private entities under the state's jurisdiction.




Second, in narrowing the scope of review, SB 308 would be contrary to the direction set by Congress in the 1990 reauthorization of the CZMA regarding state review of direct federal activities under section 307(c)(1) of the CZMA. Specifically, the changes require that each federal agency activity affecting any land or water use or natural resource of the coastal zone be conducted in a manner which is consistent to the maximum extent practicable with the enforceable policies of an approved state coastal management program. Further, Congress intended that in determining the effects of the activity, the federal agency must consider both direct and indirect effects, including reasonably foreseeable cumulative effects of the proposed activity.<sup>1</sup> It is also important to emphasize that the trigger for review of an activity is whether it affects the land or water uses or natural resources of the coastal zone, not the location of the activity.

Finally, you have raised the question of whether the federal program allows for phasing the review of certain activities. Federal regulations at 15 C.F.R. 930.37(c) allow, under certain circumstances, for the phased review of federal activities. This section is not intended to curtail the scope of the review at any particular phase. In fact, this section provides an opportunity for state review at major decision points for a long-term project and ensures that the project, taken as a whole, is consistent to the maximum extent practicable with the state coastal management program.

I hope that this letter answers your questions. Enclosed are some background materials regarding the reauthorization of the CZMA and federal consistency. If you would like to discuss the matter further, please contact John King of my staff at 301/713-3121.

Sincerely,



Clement Lewsey, Acting Chief  
Coastal Programs Division

enclosures

cc: Paul Rusanowski, DGC  
Beth Kerttula, DOL

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<sup>1</sup> H.R. Conference Report No. 964, 101st Congress, 2d Session at 970, 971 (1990)



# UNITED FISHERMEN OF ALASKA

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Juneau, Alaska 99801  
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Fax: 907/463-2545

John King  
Office of Oceans & Coastal Resource Management  
National Oceanic & Atmospheric Administration  
Rockville, MD

VIA FAX: (301) 713-4367

March 1, 1991

Dear Mr. King;

Several days ago, we provided you with a copy (via fax) of Senate Bill SS303 and background information. From our perspective, SS303 is a radical shift in public policy regarding the public input process under Alaska's coastal management plan of the Coastal Zone Management Act. We have several key concerns.

#1) This bill gives resource agency directors the power to limit the scope of issues addressed during the initial administrative review. Would similar powers be granted to federal resource agency directors on federal land disposals under the consistency determinations? Or would two standards go into effect: one on federal lands and one on state lands?

#2) This bill institutionalizes multi-phasing on state lands by allowing review of "relevant" public concerns during the appropriate project phase. We are concerned that multi-phasing increases the likelihood of erroneous land disposals because the process lacks a thorough cost/benefit analysis and best interest finding during the initial review phase. This seems counter to the entire concept of the CZMA. Does the federal government allow multi-phasing of projects on federal lands as maintained by state officials?

#3) Limiting the range of effects during the review process to "foreseeable, significant and direct" seems to eliminate most effects. Didn't Congress clarify "direct" to include secondary, cumulative and indirect? If so, how can the federal government approve language that they themselves do not use?

#4) Limiting the range of effects on fish and wildlife to "within the scope of the lease sale area" seems extremely arbitrary and unrealistic. This would exclude effects on migratory wildlife, including fish, marine mammals and birds, and also effects on wildlife immediately adjoining the lease sale area.

## MEMBER ORGANIZATIONS

Alaska Crab Coalition • Alaska Longline Fishermen's Association • Alaska Trollers Association • Area K Seiners Association  
Bering Sea Fishermen's Association • Bristol Bay Outrigger Association • Concerned Area "M" Fishermen  
Cook Inlet Aquaculture Association • Copper River Fishermen United • Ketchikan Peninsula Fishermen's Association  
North Pacific Fishery Association • Northern Southeast Regional Aquaculture Association • Peninsula Marketing Association  
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative  
Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association

In summary, could you clarify the role of the federal government in this legislation? Would the federal government have to approve the changes proposed in S8306 should this bill become law? What is the likelihood of federal approval given the legal history of the CZMA?

This bill is on an extremely fast track. Your haste in answering these questions--even a preliminary review--would be greatly appreciated.

Sincerely,

*Riki Ott*

Riki Ott, Ph.D.  
Chairman of the Habitat Committee

SB 308

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
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(907)762-2547

March 3, 1994

The Honorable Jalmar Kerttula  
Alaska State Legislature  
State Capitol, Room 427  
Juneau, Alaska 99801-1182

Dear Senator Kerttula:

Thank you for taking the time to meet with me earlier this week to discuss the CS for SB 308 (RES). At the conclusion of our meeting, you requested that I review and comment on the testimony submitted by Mr. Jon Isaacs and Ms. Ricki Ott before the Senate Finance Committee during Monday morning's hearing on that Bill. My comments on the issues raised in that testimony are provided below. They address the testimony of Mr. Isaacs first, and conclude with a response to the issues raised by Ms. Ott. I also have enclosed copies of both statements to assist you in your review.

Mr. Isaacs' testimony identifies four broad areas which he feels make the CS for SB 308 (RES) unacceptable. Each of these is addressed separately beginning, in each instance, with a verbatim cite of Mr. Isaacs' concerns.

Mr. Isaacs' Comments:

Issue: "There have been procedural problems with Best Interest Findings resulting from shortage of staff and funding; some of these could have been avoided with assistance from the Division of Governmental Coordination or other agencies."

Response: I was not aware of any procedural problems with the division's Best Interest Findings, either as a result of staff shortages or a lack of funds. Without further elaboration from Mr. Isaacs, I had no way of judging why he believes that those "problems" could have been avoided with the assistance of the Division of Governmental Coordination or other agencies. I called Mr. Isaacs yesterday evening to see if he could give me specific examples of procedural, staffing or funding problems which he believes have existed. He replied that he did not know of any specifics, but that he had a general feeling that the Lease Sales section of the Division of Oil and Gas could use more funds and more staff. He further indicated that there was a broader perception among some in the Coastal Districts that staffing and funding problems exist; however, he was unable or unwilling to provide specific examples.

Issue: "Giving broad discretion to division directors reduces the coastal district role in decision-making, key terms are undefined, adding to agency discretion, particularly when tied (sic) project phasing language."

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Response: As you and I have discussed, and as I have said repeatedly in testimony on the CS for SB 308 (RES), I believe that the legislature has already delegated broad discretion to the commissioner through the provisions of Title 38. Our attempt in the CS for SB 308 (RES) is not to broaden that discretion, but to define and clarify that discretion, as well as the commissioner's/director's responsibilities when acting within the bounds of that discretion. That clarification need not diminish the coastal districts, or the public's role in decision making. It is not the intent of this legislation to do so.

Under the legislature's delegation of responsibility to balance state-wide concerns in determining the state's best interest, someone has to be the decision maker on behalf of the state. That fact, however, does not mean that the director's decisions or the exercise of his discretion in reaching those decisions is, or should be, unbridled. The written best interest findings and consistency decisions, as required by this legislation, must be well reasoned and supported by the record. Otherwise, those decisions would be subject to challenge as being arbitrary and capricious, and if they are not supported by the record, they obviously would be vulnerable to such challenges.

Mr. Isaacs' comment that agency discretion is expanded by tying the discretion to phasing language is unfounded, in my view. The legislation seeks to clarify the legislature's intent that the director, under carefully controlled conditions, be allowed to make a determination of whether or not a sale or disposal is in the state's best interest and consistent with the ACMP, without having a perfect knowledge of all future events. However, it does not allow for those decisions to occur unless the director provides for subsequent reviews of individual projects by the responsible agencies to assure that they are also consistent. Phased considerations cannot occur under the proposed legislation unless the director assures that the state has the authority to further condition subsequent projects to assure that they are consistent with the ACMP.

Issue: "This statute change sets a more lenient standard for Best Interest Findings compared to similar federal approvals, and may lead to federal legal challenge of the amendment to (sic) coastal management program."

Response: Title 38, as presently codified, already establishes a "more lenient" standard for best interest findings in support of oil and gas leasing, as compared to the Environmental Impact Statements and other NEPA-related analyses required for federal Outer Continental Shelf sales. The CS for SB 308 (RES) simply provides clarification regarding the timing, scope and discretion within which the director must operate in developing the state's best interest finding.

Requiring an EIS-like analysis, with its attendant costs, has always been an option which the legislature could require; however, the legislature chose in 1978, and reconfirmed in its 1990

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amendments to Title 38, not to do so. The basis for Mr. Isaacs' comment that the CS for SB 308 (RES), through its amendments to the best interest finding provisions, could increase the likelihood of federal challenge to the state's leasing statutes is unclear.

I am unaware of any basis for the federal agencies to challenge a policy decision of the Alaska legislature regarding the leasing of Alaska's lands. To the extent that the provisions of Title 38 have always been "inconsistent" with their federal counterparts, whatever basis, if any, for such a challenge would already exist. The best interest finding amendments, as well as those related to Title 46, have been reviewed very carefully by the Department of Law. Based upon that review, I do not believe that these amendments, whether to Title 38 or Title 46, would lead to federal challenge, much less to decertification of the state's ACMP program, as some have suggested in the public testimony on the CS for SB 308 (RES).

Issue: "Deferring full project review to later phases of a project under the recommended changes to AS46 has implications that are broader than just Best Interest Findings; it impairs adequate evaluation of potential impacts and benefits and can lead to manipulation of the process." (emphasis added)

Response: The CS for SB 308 (RES) does not, per se, require deferral of project reviews. Rather, it acknowledges the director's authority under certain conditions and with appropriate safeguards based upon the law, the regulations, the facts and the record, to decide that a phased consistency determination is appropriate. It is not the intent of the legislation to impair full public review and evaluation of potential impacts and benefits. It simply acknowledges that, at the leasing stage, no one can properly evaluate all potential impacts and benefits that ultimately will follow from having awarded someone the exclusive right to explore for oil and gas for a pre-determined period of time.

The legislation will assure that the state retains, in those instances where phasing is appropriate, full authority to further condition specific projects to assure that they are consistent. As I have said before, this is not a novel concept, nor is it a "radical change in policy," as some have said on the record. It is precisely the process contemplated under federal law and regulations to be used in those instances, i.e., a lease sale, in which not enough is known at the leasing stage to conduct one conclusive consistency determination for all projects that may follow.

Ms. Ott's Comments:

Issue: "The bill is fiscally irresponsible." Multi-phase projects will cost the state, because state and industry investments in a project will bias DNR's analysis of later project stages in favor of project completion. Since buy-back of land once disposed is not a fiscally

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realistic option, this bill will favor development regardless of costs to competing resource users.

Response: Since most of Ms. Ott's expressed concerns relate, in one manner or another, to a belief that lease buy-backs are likely to be more common should the CS for SB 308 (RES) be passed, I have attached a copy of my March 1, 1994 letter to Senators Pearce and Frank addressing those concerns in detail. It is also important to note that DNR's review and approval of post-lease sale projects is but one of the many agency reviews and public review that are required before permit approval. DNR does not, and will not, under the provisions of the CS for SB 308 (RES), have the unilateral authority to approve any post-lease projects, such as the drilling of a well or the placement of facilities, pipelines or any other development-related facilities.

Permits for such activities entail multiple agency review and approval. As a consequence, their review is coordinated by the Division of Governmental Coordination (DGC), not DNR. As the coordinating agency for the state, DGC is responsible for assuring that those permit/project reviews are thorough, and that any resulting permits are appropriately conditioned to be sure that they are consistent with the ACMP. State agencies typically participating in those reviews include the Alaska Departments of Fish and Game, Natural Resources, Environmental Conservation, and the Division of Governmental Coordination; federal agencies typically include the Environmental Protection Agency, the U. S. Fish and Wildlife Service, the Corps of Engineers, the National Park Service, the National Marine Fisheries Service, and others. In addition to these agencies, the Coastal Districts review the permits, and there is opportunity for public review, as well. Thus, the fear that DNR can control this process is completely unfounded.

Issue: "Mr. Eason has misrepresented the fiscal impacts of this bill to the state. This can be demonstrated by the following three scenarios comparing the financial risks of initial versus multi-phase development."

Response: Rather than speculate on the potential fiscal impacts of alternative scenarios, none of which have any basis in fact, it is more reasonable to review the record to see what the fiscal impacts of having issued almost 1800 leases with provisions allowing the state to subsequently preclude development have been (see attached letter to Senators Pearce and Frank).

Issue: Multi-phase developments are not in the public's best interest. Because this bill institutionalizes multi-phase developments, this bill does not protect the public interest.

Response: Tautologies are insidious; this one particularly so. The CS for SB 308 (RES) does not "institutionalize" multi-phase developments. Multi-phase developments are the

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norm in real life. For example, no one contemplated when the leases overlying the Prudhoe Bay Field were issued in 1967 and 1969, that an expanded oil recovery phase, including construction of the central conditioning facilities at Prudhoe Bay Field, would occur 20 years later. No one predicted that phase, nor could they have, because the technology required did not then exist. Nevertheless, the fact that the facilities were constructed nine years after production began, and that they ultimately will result in the incremental production of billions of barrels of liquids with attendant royalties and taxes, calls into question whether the project's development should be summarily dismissed as "not protecting the public's interest."

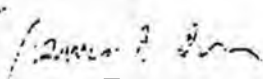
While Ms. Ott presumably would insist that we should have known beforehand whether technology may be developed and whether additional oil ultimately may be recovered in order to "better" understand the costs and benefits of oil development before leasing, it is infeasible for us to do so. I continue to believe that the fact that we cannot foresee the future does not necessarily mean that developments which result from our initial decision to lease with less than perfect knowledge are necessarily not in the public interest.

Issue: "Mr. Eason has misrepresented the impacts of this bill to the public. It does affect the public review process, because timing is everything. What this bill takes away is full public input at the beginning for the lease sale or lease disposal process."

Response: Ms. Ott's comment mischaracterizes both the intent and the effect of the CS for SB 308 (RES). As drafted, the bill encourages full public comment on lease sales and disposals. In addition, it defines the sideboards within which the director defines the scope of review, based on both those comments and the criteria listed in 38.05.035(g). Further, it places the burden upon the director to determine, in writing, all material facts and issues related to the proposed sale. In so doing, he must also explain in writing the basis for any determinations of non-materiality.

If you have additional questions or require further clarification on any of my responses, please call. I am hopeful that your careful consideration of the record concerning the CS for SB 308 (RES) will lead you to agree that there is a compelling need for this legislation and that it represents a careful balancing of the public interests.

Sincerely,

  
James E. Eason  
Director

Enclosures

503 301

## TESTIMONY BEFORE SENATE FINANCE COMMITTEE

Jon Isaacs

Jon Isaacs and Associates

Madame Chair, committee members, I appreciate the effort by the Chair to continue testimony for those who did not have a chance to do so last Friday. My name is Jon Isaacs, of Jon Isaacs and Associates. I am a planning consultant and have worked with municipalities and other coastal districts for the past 13 years. I am working with a group of districts who have been evaluating the proposed legislation.

- As a group, we feel that there is no process better than coastal management for bringing everyone to table to resolve concerns and result in the best possible development, the DNR Best Interest Finding included.
- Coastal management gives municipalities a guarantee that the state and federal government will treat them as equals and take their positions seriously (think about how the state complains of treatment by the federal government).

Over the last year, when there has been need to make changes in the coastal management program on issues such as oil spill contingency plans and Coastal Policy Council procedures (pending SB 238, SB81 last year), coastal districts, agencies, representatives of the oil industry, and environmental groups have worked together to develop consensus solutions. Please note the broad support and lack of objection these bills have experienced.

Coastal districts recognize the importance of oil and gas sales and other state resources to state and local economies. I agree that the Superior Court decision on lease sale 78 has created a problem for the Division of Oil and Gas with regard to Best Interest Findings and coastal consistency determinations. The primary questions relate to:

- what is a reasonable scope of analysis for a best interest finding,
- what level of analysis is applied to disposal of interest and subsequent phases of development, and

- how should multi-phased projects be addressed under the coastal consistency determination

I appreciate the intent of the recent amendments. However, this bill, even with the proposed amendments, is not yet an acceptable solution.

- there have been procedural problems with Best Interest Findings resulting from shortage of staff and funding; some of these could have been avoided with assistance from the Division of Governmental Coordination or other agencies

- giving broad discretion to division directors reduces coastal district role in decision-making. Key terms are undefined, adding to agency discretion, particularly when tied project phasing language

- this statute change sets a more lenient standard for Best Interest Findings compared to similar federal approvals, and may lead to federal legal challenge of the amendment to coastal management program

- deferring full project review to later phases of a project under the recommended changes to AS46, has implications that are broader than just Best interest findings; it impairs adequate evaluation of potential impacts and benefits and can lead to manipulation of the process

We are pleased that some initial discussions on perspectives were held with the Department of Natural Resources, and we hope to meet again to discuss language that might reduce the problems faced by DNR without creating new problems for others. We are currently working on language changes, but do not want to rush amendments to the table and repeat the inadequate public involvement problems that have plagued this legislation to date. We respectfully request that the Senate Finance Committee delay action on this bill for a week in order to develop amendments that can best meet the interests of all parties.

*also have a stake in this matter.*

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# UNITED FISHERMEN OF ALASKA

2/28/94

211 Fourth Street, Suite 112

Juneau, Alaska 99801

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TESTIMONY FOR SENATE FINANCE ON SB308

UFA opposes this legislation. We are not anti-development. However, this legislation allows DNR to ignore resource use conflicts, transportation issues and environmental issues during the initial administrative review prior to disposal of lands.

This bill is fiscally irresponsible. Multi-phase projects will cost the state, because state and industry investments in a project will bias DNR's analysis of later project stages in favor of project completion. Since buy-back of land once disposed is not a fiscally realistic option, this bill will favor development regardless of costs to competing resource users.

Mr. Jason has misrepresented the fiscal impacts of this bill to the state. This can be demonstrated by the following three scenarios comparing the financial risks of initial versus multi-phase development.

Scenario #1 is initial phase development in which the state, industry and the public discuss and resolve all issues prior to the state disposing the land and depositing the money into the general account. If, at some later time, the state finds it erroneously disposed the land, even with the best information available to it during the initial review, the state assumes the financial risk for its mistake and must pay just compensation to the lessee. This is the way things are done under existing law.

Multi-phasing introduces a new element of financial risk, because it increases the likelihood of erroneous land disposals. UFA does not believe this financial risk should be borne by the state or the public. Rather, if the developer is in such a hurry to start a project that they cannot take the time to have the state do a thorough cost/benefit analysis and best interest finding prior to a land disposal, then the developer should bear all or part of the increased financial risk.

Scenario #2 is multi-phase development in which the developer proceeds at their own risk. Approval for land disposal does not vest the person with a property right. The state would not have to compensate the lessee for the land disposal, including interest, any investments made by the person based upon the approval and lost potential, if DNR disapproves later project phases.

In scenario #3, the developer and the state share the financial risk of proceeding with a multi-phase development. Money for a land disposal is transferred into an escrow account until the

#### MEMBER ORGANIZATIONS

Alaska Crab Coalition • Alaska Longline Fishermen's Association • Alaska Trollers Association • Area K Seiners Association  
 Spring Sea Fishermen's Association • Bristol Bay Driftnetters Association • Concerned Area "M" Fishermen  
 Cook Inlet Aquaculture Association • Cordova District Fishermen United • Kona Peninsula Fishermen's Association  
 North Pacific Fisheries Association • Northern Southwest Regional Aquaculture Association • Peninsula Marketing Association  
 Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative  
 Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association  
 United Cook Inlet Crab Association • Western Alaska Cooperative Marketing Association

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P. 22

state completes its final best interest finding. If the project is approved, the money is transferred into the state's general account. If the project is denied, the money is returned to the lessee. However, the lessee bears the risk for all investments it made based upon project approval, including lost potential.

Mr. Eason has presented this bill as no additional risk to the state. This is not true. The bill does not address the additional risk to the state. I wish to emphasize that UFA strongly believes that the state should be required to conduct a thorough best interest finding prior to a land disposal in every case -- which the necessary information is available to the state at the time of the initial administrative review.

Multi-phase developments are not in the public's best interest. Because this bill institutionalizes multi-phase developments, this bill does not protect the public interest.

Mr. Eason has misrepresented the impacts of this bill to the public. It does affect the public review process, because timing is everything. What this bill takes away is full public input at the beginning of the lease sale or land disposal process.

This is a critical point. At the lease sale stage, DNR functions as a public agency and it controls the conflict resolution process with minimal bias because it does not, at this point, have a vested interest in the project. However, after the land is disposed, the state and lessee work closely together: there are contractual obligations and financial investments to which the public is not privy. During later public comment periods, the public is fighting an uphill battle against both the lessee and the state, which now is a vested partner in the project. Public input at later project stages simply does not carry the same weight it would have had at the initial review stage.

Mr. Eason has also testified that this bill does not limit the scope of issues addressed during its review. This is not true as can be seen on page 2, line 9, with the word "may." To ensure that the full spectrum of effects will be covered during the review, "may" should be changed to "shall." Further, while the word "significant" has been substituted for "non-speculative," there is no definition for either "significant" or "direct." It is impossible to determine if the original intent of the language "non-speculative," that is, to severely limit the scope of issues raised, has changed.

Mr. Eason has misrepresented the ramifications of this bill to the state and the public. This is a serious breach of the public trust. This bill is a radical shift in public policy: as such, this bill is both unnecessary and undesirable. UFA urges this committee to scrutinize this bill with people who are familiar with its legal history, such as the state attorneys who litigated Lease Sales 50, 53 and 78, to determine if the current law really needs "fixing."

Further, UFA requests that, if SB308 is passed out of this committee, it should be referred to the Senate Judiciary Committee to deal with issues of constitutionality, conformity with the Coastal Zone Management Act, just compensation and potential state liability for buy-backs.

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

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(907)762-2547

March 1, 1994

The Honorable Drue Pearce and Steve Frank  
Co-Chairmen, Senate Finance Committee  
Alaska State Legislature  
State Capitol, Rooms 508 and 518  
Juneau, Alaska 99801-1182

Dear Senators Pearce and Frank:

A recurrent theme in public testimony on SB 308 is that the department is exposing the state to large fiscal risks should it be necessary to repurchase oil and gas leases if they are subsequently determined to be too environmentally sensitive for development. In her testimony earlier this week before the Finance Committee, Ms. Ricki Ott even went so far as to suggest that conflicts will undoubtedly occur, resulting in the need for lease buybacks. Her comments, as well as those of others testifying on SB 308, suggest that there will be extraordinary financial exposure for the state should SB 308 be passed.

Those concerns seem to arise from a belief that "history will repeat itself," and that the state will be faced with the need to repurchase tracts, as resulted after the legislature decided, as a matter of policy, not to allow leasing in Kachemak Bay. For two reasons, I do not believe that passage of SB 308 will produce such dire consequences.

First, as a result of the Kachemak Bay decision, as well as general concerns about oil and gas leasing, the statutes governing oil and gas leasing underwent comprehensive revision in 1978. A major provision of those revisions was the adoption of a five-year schedule with its predictable timelines. The requirement that sales which the department proposes to conduct must be on the five-year schedule for a minimum of two calendar years was adopted at that time. The implicit purpose of this requirement was that the legislature have sufficient notice of potentially controversial sales so that it could act to set broad policy in those instances where it was the will of the legislature not to lease. SB 308 in no way diminishes the legislature's ability to review areas under consideration for leasing and to remove those which it chooses.

Secondly, the fiscal exposure about which Ms. Ott and others speculate already exists. However, the presumption that massive lease buybacks conflicts will occur as a result of that exposure conflicts with the record. Rather than speculating on the effects of having a

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situation where leasing might occur with the need to later disallow development, one should look to that record.

Since 1979, the Department of Natural Resources has included as a term in its leases a provision which makes clear that the lessee purchases the lease with the risk that it may ultimately not be allowed to develop the lease. That provision, Paragraph 20, entitled *Default and Termination; Cancellation*, provides in pertinent part:

...(b) The state may cancel this lease at any time if the state determines, after the lessee has been given notice and a reasonable opportunity to be heard, that:

(1) continued operations pursuant to this lease probably will cause serious harm or damage to biological resources, to property, to mineral resources, or to the environment (including the human environment);

(2) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

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(c) Any cancellation under subparagraph (b) will entitle the lessee to receive compensation as the lessee demonstrates to the state is equal to the lesser of:

(1) the value of the cancelled rights as of the date of cancellation, with due consideration being given to both revenues from this lease and anticipated costs, including costs of compliance with all applicable regulations and stipulations, liability for clean-up costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated under this lease; or

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Since that provision was incorporated in the state's leases, 40 competitive oil and gas lease sales have been held, with more than 1758 leases having been issued. In total, leases comprising more than four million acres currently are conditioned by this provision.

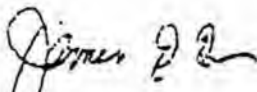
To date, there have been no conflicts which required the state to exercise this option. To the contrary, there have been instances in which major accommodations were required of lessees to assure that their proposed development plans were made compatible with competing surface resources. I have cited for the record during prior testimony on SB 308 the state's experience in permitting the Niakuk and Lisburne developments on the North Slope. In both cases the lessees' proposed developments were considerably reconfigured and conditioned to assure minimal environmental impact and compatible development. Thus, perception that the state is somehow forced into incompatible development after issuing oil and gas leases has never materialized.

Similarly, I have addressed on the record that the "conflicts" which were alleged by the plaintiffs to be inevitable should Sale 78 proceed without deletion of the fishing corridor acreage. Those supposed "conflicts" simply do not comport with the record. As noted in my February 28, 1994 letter to the committee, the corridor area has been the site of leasing in the past, as well as the drilling of four exploratory wells. There are active leases in the area today. These facts, again, are being disregarded.

The record compiled from more than 40 lease sales since 1978 reflects that adequate mitigation measures and terms have been adopted at the lease sale stage to assure that the department can condition subsequent projects with demonstrated success to assure that they are in the state's best interest and consistent with the ACMP. However, the courts' decisions demonstrate that they are unwilling to allow the department to proceed beyond leasing to the second stage, that of reviewing specific project proposals, identifying conflicts that must be resolved, and working with the responsible state agencies, the public and lessees to provide creative solutions to address those conflicts.

It is for that reason that passage of SB 308 is crucial. Without the legislature's clear guidance, the courts will continue to set oil and gas leasing policy.

Sincerely,



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Director

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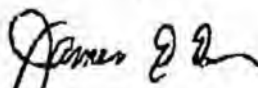
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March 1, 1994

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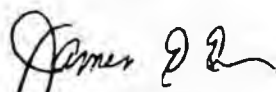
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Director

2-28-94  
Eason

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February 28, 1994

The Honorable Drue Pearce and Steve Frank  
Co-Chairmen, Senate Finance Committee  
Alaska State Legislature  
State Capitol, Rooms 508 and 518  
Juneau, Alaska 99801-1182

Dear Senators Pearce and Frank:

I appreciated the opportunity to testify before the Senate Finance Committee last Thursday morning concerning SB 308. During the public comment period following my testimony there were several comments made which need to be addressed in order to clarify the record regarding Sale 78, as well as the background of the litigation which precipitated this legislation.

The order in which I address the comments below reflects the order in which they were given during the testimony. I have included names of those testifying on each specific issue where my notes reflected them. In other instances, I have simply indicated the location from which the comments came as reflected in my notes. Also, I have paraphrased the comments, as I was unable, given the pace of the testimony, to take down verbatim notes.

Mr. Loman, representing the North Slope Borough, suggested that "...Minerals Management Service's (MMS) way is the way to reduce lawsuits." He went on to explain that MMS starts much earlier in its leasing process to gather public comments, identify concerns and build consensus. He indicated that were we to have followed that agency's model, we would have avoided this litigation, and we wouldn't be here discussing the legislation." The record suggests otherwise.

I have previously submitted for the record a two page document addressing the relative costs and litigation risks of the federal EIS/NEPA pre-sale analyses conducted by MMS. The record reflects that MMS has conducted 15 lease sales over the 17 year period since it began OCS leasing in Alaska in 1976. In Cook Inlet alone, where two sales were held in the late 1970s, MMS spent over \$72 million for pre-sale environmental studies.

Notwithstanding this extraordinary investment and the scope and timing of their public outreach efforts, half of MMS's lease sales were the target of lawsuits; two of those sales were enjoined by the court, and two sales were postponed by MMS. Therefore, contrary to Mr. Loman's proposed solution, the record indicates that MMS's process is not less

The Honorable Drue Pearce and Steve Frank  
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vulnerable to litigation risk. Rather, based on the statistics, the MMS's process appears to be more vulnerable, even though its costs are an order of magnitude higher and its pace is dramatically slower than the state's process. Less than 15 percent of the state's lease sales have been challenged in the corresponding period vs. 50 percent of MMS's sales.

Mr. Loman also suggested that "...because Sale 55 tracts extended to shore," it was appropriate for the Alaska Supreme Court to find DNR's best interest finding deficient for allegedly not considering in "enough" detail the impacts of Sale 55 on the Porcupine Caribou herd onshore in ANWR. Mr. Loman's recollection of the sale configuration is simply wrong. Submerged lands immediately seaward of the ANWR uplands and lying between those uplands and the barrier islands offshore of ANWR are subject to the Beaufort Sea title litigation. Since the ownership of that area is in dispute, it was not offered for lease in either Sale 50 or 55. Therefore, as I said originally, our sale tracts were well offshore of the ANWR uplands, and we did consider the effects of that sale on habitat and species within the sale area. The Supreme Court, in substituting its judgment, simply said we had not considered those effects "enough."

One of the comments received from Homer suggested that, "...had we only agreed to institute a no surface entry policy in the three mile corridor offshore of the Nikiski area," we would not be involved in this lawsuit (Sale 78)." Again, the record suggests otherwise.

First, the allegations which the appellants made in the Sale 78 litigation were much broader than this comment would suggest. The appellants verbatim claim was that DNR's findings are "...arbitrary, capricious, unsupported by record evidence and otherwise contrary to law, because they fail to properly weigh the pros and cons of the lease sale in deciding whether the sale is in the state's best interest, evaluate standards in AS 38.05.035(e), (g), the ACMP and applicable local coastal zone management plans relating to the individual and cumulative impacts of proposed development projects on fisheries, wildlife and specially designated resources and landscape values in the Cook Inlet region, human uses of those resources (e.g., sport and commercial fishing, subsistence and tourism, archaeological resources and privately-owned land in the region)."

Also, the record reflects that the lawsuit alleged multiple violations and oversights affecting numerous resources and involving several concerns in addition to fishing-related concerns. This fact clearly contradicts the assertion that, had we only prohibited surface entry on certain tracts, the lawsuit could have been avoided. Deleting certain offshore tracts would not have responded to alleged failures to properly consider cumulative impacts to archaeological resources, privately-owned land in the region and other vaguely defined concerns. Thus, there is no credible evidence that had we done so, we could have avoided a lawsuit.

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Page 3

Either the lawsuit actually was filed primarily on behalf of commercial fishing interests and focused solely on protecting certain nearshore waters to assure their exclusive use of those areas or it was, as the plaintiffs contended in their lawsuit, much broader in scope. For a fuller understanding of this issue and the ambiguities between what apparent concerns were and what was alleged in the lawsuit, please see the enclosed letter dated February 10, 1994 from Assistant Attorney General Mary Ann Lundquist to Mr. Peter Van Tuyn declining Trustees' offer of settlement.

However, a broader issue arises from the comment that we could have avoided this lawsuit and the need to amend the statutes had we but listened to those who demanded that we remove certain acreage from the sale, even though the "conflicts" which they alleged may never materialize. The legislature has reserved to itself the right to remove acreage from consideration for oil and gas leasing, and it has chosen to do so sparingly, once in Kachemak Bay, and again in the instance of the state-owned submerged lands in Bristol Bay.

However, in 1978 the legislature established in statute a process that requires preparation and submittal of the department's five year oil and gas leasing schedule to the legislature. This process assures that the legislature will know well in advance those areas which the department proposes to lease. The statutes require that sale areas be on the five year schedule for a minimum of two years before they can be offered, with certain limited exceptions (exempt sales).

As a result of this process, the legislature has the opportunity to provide its policy guidance to the department regarding those areas which it may choose not to lease. I question whether we would be fulfilling our responsibility in administering the lease program simply to presume conflicts exist where none has been shown to exist and, acting on such a presumption, to close broad areas to oil and gas leasing. While it may benefit certain special interests to do so, I believe our responsibility to be broader under the legislature's delegation to assure that oil and gas leasing be in the best interests of all Alaskans.

Finally, there was a comment, also from Homer (or perhaps from Kenai), that we had disregarded the "obvious conflicts" which exist in the fishing corridor. It was pointed out that this is the most heavily fished area on the peninsula. The record again reflects otherwise.

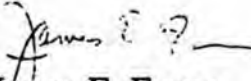
There are currently four tracts under lease in this corridor, with the most recent lease having been issued in September 1991. In addition, four exploratory wells have been drilled in those offshore tracts, all without creating a conflict. That record, it seems, has been disregarded. Nevertheless, it represents a record of compatible operations and multiple use of areas which have valuable surface and subsurface resources. Against the backdrop of 35

The Honorable Drue Pearce and Steve Frank  
Co-Chairmen, Senate Finance Committee  
February 28, 1994  
Page 4

years of compatible usage, the Superior Court chose to accept allegations of conflicts, to disregard the facts, and to adopt those purely speculative conflicts as a basis for enjoining Sale 78.

The Alaska Supreme Court subsequently compounded the Superior Court's error in refusing even to consider the state's petition for reconsideration. As a result, the state's leasing program is in jeopardy, and will remain so, until the legislature acts to clarify its intent regarding the scope and timing of best interest findings under Title 38 and Coastal Zone Consistency Determinations under Title 46.

Sincerely,

  
James E. Eason  
Director

Enclosure

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697

KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 451-2811  
FAX: (907) 451-2848

P.O. BOX 110300 - STATE CAPITOL  
FAIRBANKS, ALASKA 99711-0300

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 10, 1994

Mr. Peter Van Tuyn  
Trustees for Alaska  
725 Christensen Drive  
Anchorage, Alaska 99501

Re: Ninilchik Traditional Council v. State  
AGO File No. 221-94-0515 Civ.

Dear Mr. Van Tuyn:

I am responding to your Offer of Settlement dated February 7, 1994. It has come to my attention that the substance of Trustees' settlement offer, which was labeled "Confidential - For Settlement Purposes Only" has been widely disseminated in Juneau since it was presented to the state. Since the state has treated this letter as a confidential document up to this point, we can only assume that Trustees of Alaska have chosen to selectively disseminate the terms of this offer of settlement. In light of the general knowledge of this settlement offer, the state will not be treating the letter, nor this response on behalf of the Department of Natural Resources, as confidential.

The terms of settlement you propose are not acceptable, and the Department of Natural Resources is reluctant to entertain settlement of the Lease Sale 78 administrative appeal at this time.

Our reasons for declining your offer should be readily apparent. First, you do not offer dismissal of the lawsuit with prejudice. You simply point out the obvious - that it is unlikely, absent the Supreme Court's reversal of the Superior Court's injunction or legislative intervention, that the state can proceed with Sale 78 until mid-1998. Then you suggest that "settlement may be possible within a time frame which would allow the state to proceed with the sale this year." Feb. 7, 1994 letter (emphasis added). Therefore, Trustees' offer of settlement may not offer the state anything for settling.

Presumably, Trustees mean by its settlement offer that it would cooperate to have the injunction removed, allowing the sale to be held while litigation on the underlying issue continues. The state would still be exposed to the continuing costs of pursuing this and other sale-related litigation in which it is engaged with Trustees. Both the state and its lessees would

TO: Peter Van Tuyn  
RE: AGO file no. 221-94-0515

February 14, 1994  
Page -2-

be subjected to prolonged uncertainty regarding the validity, terms and conditions of any leases which might be issued under those circumstances.

Moreover, dismissal of the Sale 78 litigation in its entirety does not address the broader question of the substantial risks to the state's ability to conduct its competitive leasing programs which have been created by the lawsuits which Trustees have pursued against Sales 50, 55 and 78 (as well as the appeal of the department's Good News Bay decision). The legislature will shortly be addressing the broader question and exploring legislation to clarify its intent regarding what the scope and content of Best Interest Findings and ACMP Consistency Determinations should be.

I think that it is also important to note that while the Trustees have alleged (albeit vaguely) wide-reaching problems with respect to the Final Best Interest Finding and the Consistency Determination, it appears from your settlement offer that the Trustees' concerns are, in fact, much narrower. If the public interest litigants are willing to trade off their much broader concerns, as were alleged in the appeal, for the much narrower concerns of the commercial fishing industry, then perhaps we should revisit the public interest litigant status of the appellants.

In conclusion, the state has determined that it would set a bad precedent to settle the injunction while continuing the costs of litigation and perpetuating the uncertainty which has been cast over the state's leasing program. The state also sees no advantage to settling this appeal in its entirety. Further, while the Superior Court has granted the Trustees' motion for stay of Lease Sale 78, the state has petitioned the Alaska Supreme Court regarding the correctness of the Superior Court's decision. If the Supreme Court timely reverses the Superior Court with regard to the stay, Lease Sale 78 will be able to proceed in a timely manner.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:



Mary Ann Lundquist  
Assistant Attorney General

MAL:ARS

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE (907) 762-2553

(907)762-2547

February 24, 1994

The Honorable Drue Pearce and Steve Frank  
Co-Chairmen, Senate Finance Committee  
Alaska State Legislature  
State Capitol, Rooms 508 and 518  
Juneau, Alaska 99801-1182

Dear Senators Pearce and Frank:

Today the Senate Finance Committee is scheduled to take up SB 308. Based upon my experience in prior hearings on this bill before the Senate Resources Committee and its counterpart, HB 474, before the House Special Committee on Oil and Gas, I expect that you will hear many concerns expressed that this legislation is intended to diminish public and agency review of project approvals. To the contrary, SB 308 is intended to provide guidance to the department in defining the scope and timing of reviews for best interest findings for sales and disposals of interest in state lands and for coastal zone consistency determinations for discreet phases of projects.

The CS for SB 308 (RES) should make clear that the amendments are not intended to affect the review and approvals of project permits. Those reviews will continue to be conducted under existing statutory and regulatory authorities. Many of those who have testified have suggested that they will have diminished opportunities to condition or limit projects should this legislation be passed. It think it is very important that the committee members understand how thorough post sale project-specific review is under typical circumstances so that they can have a full appreciation of the multiple opportunities for agency and public review of projects.

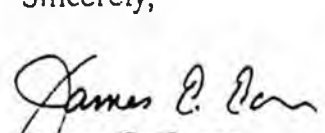
To that end, I have enclosed an affidavit submitted by Representative Joe Green, then in his capacity as an engineer for ARCO, in the Sale 50, Camden Bay, litigation. Trustees, et al., had requested that the Supreme Court enjoin the drilling of the ARCO Stinson No. 1 well. Representative Green's affidavit was submitted to the court to document the numerous permits and reviews which would be required before that well could be drilled. I have also enclosed the attachment to Representative Green's affidavit which summarizes the permits required. It should be clear from a review of these documents that there are numerous permits and conditions attached to the drilling of exploration wells once the locations for those wells have been proposed.

The Honorable Drue Pearce and Steve Frank  
Co-Chairmen, Senate Finance Committee  
Alaska State Legislature  
February 24, 1994  
Page 2

Similarly, should a commercial discovery be made, permits related to subsequent development are even more numerous, often requiring the preparation of environmental impact statements (EIS) under federal law. The public has, and will continue to have, numerous opportunities to comment on and participate in the decisionmaking regarding the issuance of those permits.

Please feel free to call if you have additional questions or concerns.

Sincerely,

  
James E. Eason  
Director

Attachments

0222-24399

AFFIDAVIT OF JOSEPH P. GREEN

STATE OF ALASKA                    )  
  ) ss.  
THIRD JUDICIAL DISTRICT )

JOSEPH P. GREEN, being duly sworn, does state the following:

1. I am employed by ARCO Alaska, Inc. as a Permit Coordinator. Prior to my employment at ARCO, I was the Director of the Division of Minerals and Energy Management for the State of Alaska, and prior to that I was the Petroleum Administrator for Santa Barbara County, California. I am a registered geologist in the State of California, and a registered engineer in the State of Oklahoma.

2. As a part of my job responsibilities at ARCO, I either obtained or assisted/coordinated the obtaining of all of the permits, authorizations and approvals necessary to drill the ARCO Stinson No. 1 Well.

3. Attached is a chart listing the more significant permits, authorizations and approvals for the ARCO Stinson No. 1 Well. The chart also describes the agency(ies) responsible and gives a brief description of the purpose of the permit, authorization or approval.

4. These permits, authorizations and approvals do not give ARCO the authority to transport Camden Bay oil, if it is discovered. Numerous additional reviews by the federal, state and local governments will be required prior to any transportation of oil from Camden Bay.

5. In my opinion, there is very little flexibility in the drilling schedule for the ARCO Stinson No. 1 well. The primary constraint is the Beaufort Sea ice pack, which immobilizes the Concrete Island Drilling Structure ("CIDS") from approximately November to June every year. Also, the Bowhead whale migration and subsistence hunt during September and October of each year make this a controversial time period to conduct oil and gas exploration. Furthermore, oil exploration activity is restricted during unstable ice conditions in the spring (May-July) and fall (October-November) due to oil spill containment and cleanup capability concerns. There is thus very little flexibility in the time of drilling operations.

For these reasons, cessation of drilling operations on the ARCO Stinson No. 1 well would have grave implications. It would very likely require a second entire drilling season to complete the well, which would be extremely expensive.

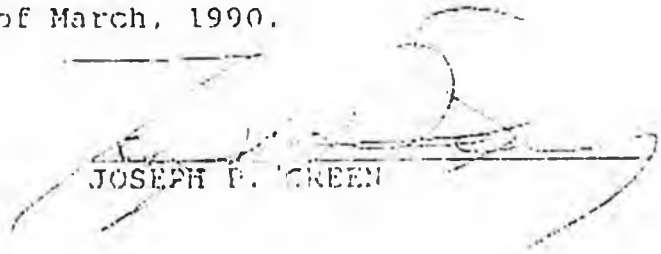
6. In the course of my work in the petroleum industry, and in particular in the course of obtaining approval of the oil spill contingency plan for the ARCO Stinson No. 1 Well, I have reviewed data concerning the risk of a blowout occurring (other potential oil spills should be nominal in size [maximum 200 gallons] and should be capable of containment on the CIDS). The Oil Spill Risk Analysis model (OSRA) utilized by the MMS in its Environmental Impact Statements (EIS) assigns zero as the probability that a significant oil spill will occur during exploration (none has ever occurred from exploratory drilling on

the U.S. Outer Continental Shelf). Dr. Frank B. Martin, Department of Applied Statistics, at the University of Minnesota analyzed MMS blowout statistics for U.S. O.C.S. areas in 1986. The data indicates that 31 blowouts (these were apparently gas blowouts and did not result in any significant oil spill) were reported for 4,824 exploratory wells drilled between 1971 and 1984. Dr. Martin concluded that, based on historical data, the probability of a blowout not occurring is 99.36 percent. The probability that a significant oil spill will not occur is 99.9996 percent. In any event, ARCO's oil spill contingency plan addresses the remote possibility that a blowout could occur.

7. If the Supreme Court were to order DNR to suspend all industrial activity in Camden Bay, several dire consequences would result. First, helicopter flights to the CIDS would have to continue, in order to evacuate the approximately 75 people on the CIDS. Second, safety concerns would require a skeleton crew to maintain the CIDS. Navigational lighting is necessary to protect passing aircraft and watercraft. Third, if the CIDS cannot be removed from Camden Bay during the limited open water season, it would be forced to stay where it is. This would have enormous economic impact on either ARCO or the owner of the CIDS (who would be denied the ability to use it elsewhere).

Further this Affiant Sayeth Naught.

DATED this 27 day of March, 1990.

  
 JOSEPH P. GREEN

FEB 23 1990  
BUSH B...  
1

SUBSCRIBED AND SWORN TO before me this 20th day of  
March, 1990.

George M. Berry  
NOTARY PUBLIC IN AND FOR ALASKA  
My Commission Expires: 12-31-90

STINSON PERMITS, AUTHORIZATIONS, PLANS, ETC.

<u>Permit/Authorization/Plan, Etc.</u>	<u>Agency</u>	<u>Comments</u>
Coastal Zone Consistency Determination	Alaska Division of Governmental Coordination	Coordinates the review by state (Depts. of Environmental Conservation, Fish and Game and Natural Resources), federal (Environmental Protection Agency, Corp. of Engineers, Fish and Wildlife Service) and local government (North Slope Borough), to minimize possible inconsistencies between the various agencies' permit requirements, to ensure all agencies' concerns have been addressed, and to implement the District Coastal Management Plan.
Oil Spill Contingency Plan	Alaska Dept. of Environmental Conservation	Requires advance planning for any potential oil spill that could happen. This includes an assessment of oil spill risks and advance response and notification planning. The plan also requires on-site oil spill containment and cleanup equipment and off-site backup equipment. In addition, it requires training of on-site cleanup crews; response teams from Deadhorse, Prudhoe Bay and Kuparuk, the villages of Kaktovik and Nuiqsut; and provides for scheduled and unscheduled inspections and spill cleanup drills.

National Pollutant Discharge  
Elimination System (NPDES)  
Permit

Environmental  
Protection  
Agency

Regulates discharges from the Concrete  
Island Drilling Structure (CIDS).

Lease Operations Approval

Alaska Dept.  
of Natural  
Resources  
(Div. of Oil  
& Gas)

Requires:

- barge traffic must be at least one  
mile offshore
- environmental orientation program  
for CIDS occupants
- polar bear interaction plan
- coordination with whalers
- oil spill drill
- activities be limited to those con-  
tained in Plan of Operations

Certificate of Reasonable  
Assurance

Alaska Dept. of  
Environmental  
Conservation

Issued pursuant to Section 401 of the  
Clean Water Act. Certifies reasonable  
assurance that all drilling activity  
will comply with the Clean Water Act.

Development Permit

North Slope  
Borough

Assures activities are in compliance  
with Borough ordinances.

Drilling Permit

Alaska Oil &  
Gas Conserva-  
tion Commission

Requires adherence to sound engineer-  
ing principles and practices to  
prevent resource waste, protect corre-  
lative rights, and conduct safe  
drilling operations.

Spill Prevention Control and Countermeasure

Alaska Dept. of Environmental Conservation, Alaska Dept. of Natural Resources

A document detailing the procedures followed and special actions taken to prevent hydrocarbon spills; and if a spill occurs, to prevent the material from getting off the drilling structure.

Section 10 Anchoring Permit

Corp of Engineers

Allows CIDS to rest on ocean bottom - stipulations require:

- 1500' minimum flight altitude to avoid disturbing wildlife
- plan approval by U.S. Fish & Wildlife Service covering wildlife disturbance, oil spill plans, etc.
- polar bear monitoring plan

Air Quality (Flaring)

Alaska Dept. of Environmental Conservation

Provides strict air emissions standards which must be met, including:

- maximum opacity of smoke
- maximum pollutant discharges from combustion engines
- no test oil burning

Plan of Operations

All Agencies

A comprehensive review of the entire operations to be conducted at the Stinson location from move in through drilling/testing, to move out.

Liquid Waste Disposal  
- down hole

Alaska Dept. of  
Environmental  
Conservation

Stipulates rates and total volumes of liquid that can be pumped down the well's annuli. Includes review of pipe integrity and ensures that formation being pumped into has no value as a possible future fresh water source.

H<sub>2</sub>S Contingency Plan

Alaska Oil &  
Gas Conservation  
Commission

A detailed plan outlining tests for the presence of H<sub>2</sub>S, actions to be taken if present, and safety equipment, escape plans and emergency aid reviews.

Whale Monitoring Plan

Alaska Dept. of  
Natural Resources

Determines the need for and degree of monitoring plan for areas within whale migration route.

Oil/Whalers Agreement

Whaling Village  
Representatives

Agreement limiting activities to what is acceptable to the whalers during the whale migration. Also includes supplies and services furnished to the Native whalers.

Seasonal Drilling Restrictions

Alaska Dept. of  
Natural Resources

Outlines the areas and degrees of restricted activities during the whale migrating season.

Water Use Permit (Seawater)	U.S. Fish & Wildlife Service	Provides standards for using seawater as a source of making freshwater (in this case, through reverse osmosis).
Water Use Permit (Freshwater)	Alaska Dept. of Natural Resources (Div. of Land & Water Management)	Allows use of fresh water for drilling purposes.
Notice of Financial Responsibility	Alaska Dept. of Environmental Conservation	An agency requirement that the company or individual conducting drilling operations have financial responsibility sufficient to perform properly.
Evacuation Plan (CIDS)	U. S. Coast Guard	For safe evacuation of the Concrete Island Drilling Structure (CIDS) in the event an emergency occurred.
Aids to Navigation Approval	U. S. <u>Coast</u> Guard	Requires fog horn and visual markings on CIDS.
Landing Permit	Federal Aviation Administration	Ensures helicopters and pilots are capable of safe landing on the CIDS.

Food and Drink Permit

Alaska Dept. of  
Environmental  
Conservation

Requires strict adherence to health  
and cleanliness regulations for  
serving human consumables and for  
handling associated waste.

FEB-23-94 WED 14:17

ANCH HCU UH

FAX NO. 907/980-4111

P. 11

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

February 23, 1994

The Honorable Drue Pearce  
Alaska State Legislature  
State Capitol, Room 508  
Juneau, Alaska 99801-1182


Dear Senator Pearce:

As you requested during the Senate Resources Committee hearing on SB 308 yesterday, I have enclosed two documents which demonstrate the milestones from the first announcement of a posted oil and gas lease sale to the lease sale itself. The first enclosure is a table from page 7 of the 1993 Five-Year Oil and Gas Leasing Program. This enclosure demonstrates the "generic" timetable to which all lease sales, with the exception of exempt sales, are applicable.

In addition to the "minimum" number of events outlined in enclosure No. 1, there may be additional hearings or other notices related to a specific sale. For example, I have enclosed a chronology for the milestones related to Sale 78, the proposed Cook Inlet Sale, that was recently enjoined by the Superior Court.

If you have additional questions or need other materials, please feel free to call.

Sincerely,

  
James E. Eason  
Director

Enclosures

02294dp,je



# FIVE-YEAR OIL AND GAS LEASING PROGRAM

ALASKA DEPARTMENT OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

Proposed Sale Area & Date	1992			1993					1994					1995					1996					1997																		
	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D			
76 & Cook Inlet 1-93	F			S																																						
67A-W Cook Inlet 1-93	F			S																																						
77 & Nunashuk 5-93				P	M	F		S																																		
70A-W Kupuruk Uplands 5-93					F			S																																		
57 North Slope Foothills 9-93					P		M	F		S																																
78 Cook Inlet 1-94								P		M	F		S																													
79 Cape Yakutaga 7-94					L		C <sub>3</sub>						P		M	F		S																								
80 Shaviovik 11-94							L		C <sub>3</sub>						P		M	F		S																						
81 Beaufort Sea 4-95									L		C <sub>3</sub>				P		M	F		S																						
82 Icy Cape 7-95									L		C <sub>3</sub>				P		M	F		S																						
83 Western Beaufort Sea 11-95										L		C <sub>3</sub>					P		M	F		S																				
84 Copper River 4-96					A								L		C <sub>3</sub>					P		M	F		S																	
85 Cook Inlet / Shelikof Strait 7-96					A									L		C <sub>3</sub>				P		M	F		S																	
86 Western Beaufort Sea 11-96					A										L		C <sub>3</sub>				P		M	F		S																
87 Kupuruk Uplands 4-97					A												L		C <sub>3</sub>					P		M	F		S													
88 North Slope Foothills 7-97					A												L		C <sub>3</sub>					P		M	F		S													
89 Eastern Beaufort Sea 11-97					A														L		C <sub>3</sub>					P		M	F		S											

A = Proposed Sale Area Added to 5-Year Program.

C = Call for Comments:

1 = New Sales and 5-Year Program Revisions Made 6 months prior to Additions (A).

2 = Request for General Information

3 = Request for Socioeconomic and Environmental Information

L = Preliminary Land Status Check

P = Preliminary Finding / Notice of Intent to Issue Final Finding (AS 38.05.945(a)(3)) / ACHP Consistency Analysis. (If required.)

M = Public Meeting or Teleconference

F = Final Finding and/or Notice of Sale and Terms [AS 38.05.945(a)(4)]

S = Sale

## Oil and Gas Lease Sale 78 Public Notification Process

The Division of Oil & Gas mailing list for notification of proposed lease sales is comprised of the following:

- State and federal agencies
- Oil companies
- Boroughs, municipalities and village councils
- Newspapers
- Radio and TV stations
- Environmental and pro-development organizations
- Individuals expressing interest in lease sales
- All legislators

The sequence of public notification was as follows. Only those notifications in **bold** print were required by law; all others were done voluntarily by the Division of Oil and Gas:

- Oct 9, 1989 : Call for Comments (lists areas to be added to leasing schedule)  
sent to all on mailing list
- Jan 1991: **Sale Added to Five-Year Leasing Program**  
published in Five-Year Oil and Gas Leasing Program
- Feb 26, 1991: Call for Comments (General Information)  
sent to all on mailing list
- Oct 22, 1991: Supplemental Call for Comments (area expanded to Homer)  
sent to all on mailing list
- Jul 21, 1992: Call for Nominations  
sent to oil companies on mailing list
- Oct 27, 1992: Call for Comments (Socioeconomic and Environmental Info)  
sent to all on mailing list
- Jul 15, 1993: **Notice of Intent to Issue Final Finding and Decision**  
sent to all on mailing list  
ads in newspapers (Anchorage, Juneau, Fairbanks, Kenai, Homer\*)  
\*Also published on Jul 22  
sent to all affected post offices within sale area for posting

**Certified Letter to Boroughs and Municipalities**

sent to affected boroughs and municipalities

**Preliminary Finding of the Director**

sent to state and federal agencies

multiple Copies sent to local libraries and to State Library in Juneau

sent to boroughs and municipalities

sent to organizations and individuals who have commented

**Public Service Announcement**

sent to local radio and TV stations

Aug 12, 1993: Kenai Peninsula Borough Public Hearing in Homer

Aug 13, 1993: Notice of Extension of Deadline for Comments Until Aug 24  
published in Anchorage, Juneau, Kenai, Fairbanks, and Homer papersOct 19, 1993: **Final Finding of Director**

sent to state and federal agencies

sent to legislators from affected area

sent to all who commented on Preliminary Finding

multiple copies sent to local libraries and to State Library in Juneau

**Certified Letter to Boroughs and Municipalities**

sent to affected boroughs and municipalities

**Sale Announcement**

sent to all on Mailing List

published in local and statewide papers (same as for Aug 13 Notice)

posted at all affected post offices within sale area

**Public Service Announcement**

sent to local radio and TV stations

Nov 18, 1993: Kenai Peninsula Borough Assembly Public Hearing in Ninilchik

Jan 25, 1994: **Lease Sale 78** (Stayed by the Superior Court)

**DEPT. OF NATURAL RESOURCES**

**DIVISION OF OIL AND GAS**

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

February 23, 1994

Walt Furnace, General Manager  
The Alliance  
4220 "B" Street, Suite 200  
Anchorage, Alaska 99503-5911

Via Fax 561-8870


Dear Mr. Furnace:

Late yesterday afternoon the Alaska Supreme Court acted on the state's Petition for Review of Judge Cranston's Injunction of Lease Sale 78, Cook Inlet. I have enclosed a copy of the Order from the Supreme Court. You will note that the Supreme Court denied our petition for review and, in so doing, provided no indication of its reason for doing so.

Those of you who have participated in hearings on SB 308 or HB 474 are no doubt aware that a constant theme of those who are opposed to this legislation is that "there is no problem" or "there is no need for rapid legislative action." Those comments are seriously undercut by the Alaska Supreme Court's decision yesterday. That decision emphatically underscores the need for legislative action this session to reestablish a reasonable balance to the administration of the state's leasing program. Absent this legislation, virtually every lease sale which the state proposes to conduct under its current Five-Year Schedule is at jeopardy.

We urge you to review this issue carefully and to support passage of SB 308 and HB 474.

Sincerely,

  
for James E. Eason  
Director

Enclosure

cc: Kyke Parker

Post-Net brand fax transmittal memo 7871 # of pages 1

TO: KYLE PARKER	FROM: MARY ANN LINDQUIST
CO: Governor's Office	CA: DOL
Dept.	PHONE: 269-5266
Fax #	Fax #

APPELLATE COURTS CLERK  
 383 K STREET  
 ANCHORAGE, AK 99501

RECEIVED  
 Department of Law

FEB 22 1994

Case Title: STATE V NINILCHIK TRADITIONAL

Attorney General  
 Branch  
 Anchorage, Alaska

\*\*\*\*\* O R D E R \*\*\*\*\*

02/22/94

IT IS ORDERED: THE PETITION FOR REVIEW FILED ON JANUARY 28, 1994, IS DENIED. ENTERED AT THE DIRECTION OF THE SUPREME COURT ON FEBRUARY 22, 1994. (CHIEF JUSTICE MOORE NOT PARTICIPATING; JUSTICE BRYNER, PRO TEM).  
 CC: JUSTICES, JUDGE CRANSTON, CLERK OF THE TRIAL COURT  
 ANN-93-1174 CIVIL

TRW

Clerk of The Appellate Courts

MARY ANN LINDQUIST ESQ  
 ASSISTANT ATTORNEY GENERAL  
 DEPARTMENT OF LAW  
 1021 W 4TH AVE  
 ANCHORAGE AK 99501

SB 308

State of Alaska, Department of Natural Resources  
DIVISION OF OIL AND GAS - DIRECTOR'S OFFICE  
3601 C Street, Suite 1380, Anchorage, Alaska 99503

FAX 907/562-3852  
PHONE 907/762-2549

FAX TRANSMITTAL

DATE & TIME: 2/23/94 11:15

TO: Senator Rescoe

FAX NUMBER: 465-3872

FROM: Jim Eason

NUMBER OF PAGES, INCLUDING COVER: 5

COMMENTS:

Ret 3/11/94  
SFC  
[Signature]

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES****DIVISION OF OIL AND GAS**P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2661

(907)762-2547

February 23, 1994

The Honorable Drue Pearce  
Alaska State Legislature  
State Capitol, Room 508  
Juneau, Alaska 99801-1182


Dear Senator Pearce:

As you requested during the Senate Resources Committee hearing on SB 308 yesterday, I have enclosed two documents which demonstrate the milestones from the first announcement of a posted oil and gas lease sale to the lease sale itself. The first enclosure is a table from page 7 of the 1993 Five-Year Oil and Gas Leasing Program. This enclosure demonstrates the "generic" timeline to which all lease sales, with the exception of exempt sales, are applicable.

In addition to the "minimum" number of events outlined in enclosure No. 1, there may be additional hearings or other notices related to a specific sale. For example, I have enclosed a chronology for the milestones related to Sale 78, the proposed Cook Inlet Sale, that was recently enjoined by the Superior Court.

If you have additional questions or need other materials, please feel free to call.

Sincerely,

  
for James E. Eason  
Director

Enclosures

122943



# FIVE-YEAR OIL AND GAS LEASING PROGRAM

## ALASKA DEPARTMENT OF NATURAL RESOURCES

### DIVISION OF OIL AND GAS

Proposed Sale Area & Date	1992				1993				1994				1995				1996				1997																									
	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J						
76 & Cook Inlet 1-93	F			S																																										
67A-W Cook Inlet 1-93	F			S																																										
77 & Nanushuk 5-93			P		M	F		S																																						
78A-W Kuparuk Uplands 5-93					F			S																																						
57 North Slope Foothills 9-93						P			M	F		S																																		
78 Cook Inlet 1-94								P			M	F		S																																
79 Cape Yakataga 7-94						L			C				P		M	F		S																												
80 Shavlovik 11-94							L			C				P		M	F		S																											
81 Beaufort Sea 4-95								L			C				P		M	F		S																										
82 Icy Cape 7-95								L				C			P		M	F		S																										
83 Western Beaufort Sea 11-95											L			C			P		M	F		S																								
84 Copper River 4-96						A																L		C			P		M	F		S														
85 Cook Inlet / Shelikof Strait 7-96						A									L			C								P		M	F		S															
86 Western Beaufort Sea 11-96						A												L		C							P		M	F		S														
87 Kuparuk Uplands 4-97						A																L		C					P		M	F		S												
88 North Slope Foothills 7-97						A																L		C						P		M	F		S											
89 Eastern Beaufort Sea 11-97						A																					L		C									P		M	F		S			

**A** = Proposed Sale Area Added to 5-Year Program.  
**C** = Call for Comments:  
 1 = New Sales and 5-Year Program Revisions Made 6 months prior to Additions (A).  
 2 = Request for General Information  
 3 = Request for Socioeconomic and Environmental Information

**L** = Preliminary Land Status Check  
**P** = Preliminary Finding / Notice of Intent to Issue Final Finding [AS 38.05.945(a)(3)] / ACMP Consistency Analysis. (if required.)

**M** = Public Meeting or Teleconference  
**F** = Final Finding and/or Notice of Sale and Terms [AS 38.05.945(a)(4)]  
**S** = Sale

## Oil and Gas Lease Sale 78 Public Notification Process

The Division of Oil & Gas mailing list for notification of proposed lease sales is comprised of the following:

- State and federal agencies
- Oil companies
- Boroughs, municipalities and village councils
- Newspapers
- Radio and TV stations
- Environmental and pre-development organizations
- Individuals expressing interest in lease sales
- All legislators

The sequence of public notification was as follows. Only those notifications in **bold** print were required by law; all others were done voluntarily by the Division of Oil and Gas:

- Oct 9, 1989 : Call for Comments (lists areas to be added to leasing schedule)  
sent to all on mailing list
- Jan 1991: **Sale Added to Five-Year Leasing Program**  
published in Five-Year Oil and Gas Leasing Program
- Feb 26, 1991: Call for Comments (General Information)  
sent to all on mailing list
- Oct 22, 1991: Supplemental Call for Comments (area expanded to Homer)  
sent to all on mailing list
- Jul 21, 1992: Call for Nominations  
sent to oil companies on mailing list
- Oct 27, 1992: Call for Comments (Socioeconomic and Environmental Info)  
sent to all on mailing list
- Jul 15, 1993: **Notice of Intent to Issue Final Finding and Decision**  
sent to all on mailing list  
ads in newspapers (Anchorage, Juneau, Fairbanks, Kenai, Homer\*)  
*\*Also published on Jul 22*  
sent to all affected post offices within sale area for posting

**Certified Letter to Boroughs and Municipalities**

sent to affected boroughs and municipalities

**Preliminary Finding of the Director**

sent to state and federal agencies

multiple Copies sent to local libraries and to State Library in Juneau

sent to boroughs and municipalities

sent to organizations and individuals who have commented

**Public Service Announcement**

sent to local radio and TV stations

Aug 12, 1993: Kenai Peninsula Borough Public Hearing in Homer

Aug 13, 1993: Notice of Extension of Deadline for Comments Until Aug 24  
published in Anchorage, Juneau, Kenai, Fairbanks, and Homer papersOct 19, 1993: **Final Finding of Director**

sent to state and federal agencies

sent to legislators from affected area

sent to all who commented on Preliminary Finding

multiple copies sent to local libraries and to State Library in Juneau

**Certified Letter to Boroughs and Municipalities**

sent to affected boroughs and municipalities :

**Sale Announcement**

sent to all on Mailing List

published in local and statewide papers (same as for Aug 13 Notice)

posted at all affected post offices within sale area

**Public Service Announcement**

sent to local radio and TV stations

Nov 18, 1993: Kenai Peninsula Borough Assembly Public Hearing in Ninilchik

Jan 25, 1994: **Lease Sale 78** (Stayed by the Superior Court)

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697

KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-2579  
PHONE: (907) 451-2911  
FAX: (907) 451-2946

P.O. BOX 110300 - STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-6755

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 22, 1994

James Eason, Director  
State of Alaska  
Department of Natural Resources  
Division of Oil and Gas  
P.O. Box 107034  
Anchorage, Alaska 99510-0734

Dear Jim:

You have asked that the Department of Law comment on the authority of the Department of Natural Resources (DNR) to restrict or condition an oil and gas lessee's use of leased lands after issuance of a lease.<sup>1</sup> DNR may condition a lessee's right to use of the lands within a lease on authority arising from two bases: (1) the statutory right to include conditions in leases when issued and (2) the state's police power to regulate uses to protect the public health, safety, and welfare.

The Alaska Land Act provides the statutory right to include conditions in a lease, as follows:

Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property or interest in them, and, in addition to the conditions and limitations imposed by law, may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will best serve the interests of the state.

AS 38.05.035(e). Therefore, when a final finding that the sale of oil and gas leases is in the best interest of the state includes mitigation measures restricting or reserving the right to restrict uses, those measures must then be incorporated into leases issued pursuant to that sale. Any bidder is therefore on

<sup>1</sup> This letter addresses only oil and gas leases and does not address subsequent permits or authorizations by other agencies.

notice that restrictions pursuant to the mitigation measures may be imposed on any lease issued in that sale and that a bid submitted is presumed to account for such risks. In order for a lease to be validly executed, a potential lessee must execute and return both a lease form and the attached mitigation measures which are incorporated by reference into the lease. The lessee has then taken the lease subject to such potential future restrictions.

The director may also, through the police power of the state, regulate uses to protect the public health, safety, and welfare when approving a plan of exploration, development, or operations. Exercise of this power is reflected in both AS 38.05.035(3) (above) and in the current lease form (DOG 9208) subparagraph 9(f) which states:

In approving a lease or unit plan of operation, or an amendment of a plan, the state will require amendments it determines necessary to protect the state's interest, including the environment. The state will not require any amendment that would be inconsistent with the terms of sale under which the lease was obtained or with the terms of the lease itself, or would deprive the lessee of reasonable use of the leasehold interest.

When police power restrictions deprive a property owner of use of the property involved, the question arises of whether a "taking" of property has occurred that requires compensation under the Fifth Amendment to the U.S. Constitution. The Supreme Court recently delineated when compensation for such is required in Lucas v. South Carolin. Coastal Council, 112 U.S. 2886 (1992). Under Lucas, compensation is not required if "regulatory action [has] the effect of eliminating the land's only economically productive use" when the use would not have been allowed under "existing rules and understandings." 112 U.S. at 2900, 2901. Therefore, where requirements such as compliance with the Alaska Coastal Management Plan and other environmental restrictions (including the sale terms, lease terms, and mitigation measures) exist at the time of lease issuance, imposing restrictions pursuant to those requirements, even if the restrictions eliminate all economically productive uses of the property, does not give rise to a taking requiring compensation.

Under the current lease terms (subparagraph 9(f) above), a restriction that is consistent with the sale terms, lease terms, mitigation measures, or environmental regulatory schemes existing at the time of the lease issuance will not be a taking requiring compensation because the lessee bid and accepted the lease with notice of such potential restrictions.

Additionally, under the last standard of the limits on such restrictions in that subparagraph, any use contrary to such a restriction cannot be a "reasonable use" of the leasehold interest that was offered to and accepted by the lessee.<sup>2</sup>

In summary, DNR may restrict or condition uses of leased areas based on its statutory and police power authority. The terms, mitigation measures, statutes, and regulations existing at the time of the lease issuance determine when such restrictions result in a taking which requires compensation.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By: *Barbara F. Fullmer*

Barbara F. Fullmer  
Assistant Attorney General

BFF/lwr

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<sup>2</sup>Under subparagraph 20 of the current lease form, the state may cancel a lease with appropriate compensation under certain situations involving "continued operations [that] probably will cause serious harm or damage to biological resources, to property, to mineral resources, or to the environment (including the human environment)" where "the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time" and the advantages of cancellation outweigh the advantages of continuing the lease. Such a cancellation differs from a restriction that eliminates beneficial use of a lease because it is a voluntary and discretionary act on the state's part to terminate all rights under the lease under certain conditions, without regard to whether a compensable taking under Lucas has occurred.

## SALE 78 – THE PROBLEM – A CASE STUDY

### TRUSTEES CREATE A CONFLICT:

“There is ample—and uncontroverted—evidence that these uses and activities simply cannot coexist with certain oil and gas exploration and development activities. To take a simple example, assume that an oil company purchases a marine tract south of Kasilof and, during exploration, discovers a commercially viable deposit of oil. The company then places a production platform on its tract, in the heart of the fishing grounds. Given the area's extreme tides and strong currents no fishing could occur within, at best, a half-mile circle around the platform. The danger is simply too great that a net, or a boat, will get wrapped up with the platform.”

Trustees, et al. “Response to State's Petition to the Alaska Supreme Court for Review of Sale 78 Injunction”

### REALITY:

There is no evidence of incompatibility—ample, uncontroverted or otherwise—just allegations and speculation. That speculation, however, is inconsistent with the actual “evidence” of coexistence of fishing, subsistence, and oil and gas exploration and development activities in Cook Inlet. The “fishing corridor” itself currently has valid leases within its boundaries and it has in the past been the site of several exploratory wells. Nevertheless, the Superior Court accepted Trustees' “evidence” of incompatibility as a basis for its Injunction of Sale 78.

In the case of Sale 78, there are no known, absolute conflicts at the lease sale stage. As in all lease sales, there is the potential for conflicts, depending upon what is proposed to occur, when it may occur, where it may occur, and for how long it may occur. By retaining flexibility to entertain alternative proposals which may be conditioned to achieve “consistency,” the state remains able to at least try to accommodate competing uses of its resources. In those instances where accommodation is impossible, it retains the authority to disallow the proposed activity.

Under the Sale 78 lease provisions, for example, the following alternative scenarios could be accommodated.

- The “corridor” tracts may or may not receive bids—if there were no bids, there is no conflict.
- If bids and leases within the corridor are issued, there still is no assurance of a conflict. There may or may not ever be an application to drill an exploratory well on the tracts. If there isn't, there is no conflict.
- If there is an application, it may or may not be for a location which creates a conflict. For example, it may be accessible from adjacent acreage—either onshore or offshore.
- It may present a potential conflict that can be avoided through alternative site selection or scheduling so that the activity can be conducted when there are no commercial, subsistence or sport fishing activities.
- If an exploratory well can be accommodated, it may or may not result in a commercial discovery. If there is no commercial discovery, there is no conflict from development that will not occur.

In selecting Sale 78 lease terms, DNR adopted Term 13 to allow for a subsequent site-specific evaluation of alternatives in light of potential conflicts, while retaining full authority to disallow activities which cannot be made consistent with the ACMP or which are found not to be in the state's best interest.

**“Term 13:** To prevent conflicts with subsistence and commercial fishing operations, the Director may restrict lease-related use. In enforcing this term the division, during review of plans of operation, will work with other agencies and the public to assure that potential conflicts are identified and avoided to the fullest extent possible. Available options include alternative site selection, requiring directional drilling, and seasonal drilling restrictions.”

**Adopt This Legislation To Fix The System**

## **THE ALASKA SUPREME COURT WOULD HAVE DNR DO NEPA-LIKE BEST INTEREST FINDINGS FOR ITS LEASE SALES**

“The record indicates that the federal government has conducted environmental impact studies....DNR can emulate these studies.”

Alaska Supreme Court—Goodnews Bay Decision

### **WHAT WOULD BE THE COST?**

DNR's Best Interest Findings, prepared by a staff of five, average \$105,000 each

- The Minerals Management Service (MMS) EIS's average \$500,000 each
- MMS employs 53 people in their leasing section, which is responsible for producing the EIS
- MMS has spent \$72.6 million for environmental studies within the Cook Inlet region

**DNR Would Have To Greatly Increase Its Operating Budget And Staff Level In Order To Fund The Necessary Environmental Studies And Prepare The Document**

#### **Would The Number Of Sales Decrease? YES!**

- In 14 years of leasing since 1979, DNR has held 42 lease sales, averaging three sales per year
- MMS has held only 15 Alaska OCS lease sales in the 17 years since 1976, when the Federal program began in Alaska
- With increased best interest finding requirements, DNR would be able to conduct only one lease sale every 18 months

#### **Would EIS's Prevent Lawsuits? NO!**

- Based on alleged NEPA violations and on the EIS findings, lawsuits were filed against half of the MMS lease sales
- These lawsuits resulted in two sales being enjoined, and two sales being postponed by MMS

## **CONCLUSION:**

Given the required funding for staff and environmental studies, DNR could emulate the federal EIS process.

However, doing so would mean a tremendous increase in operating costs; a significant reduction in the number of lease sales held; a decrease in state revenue; a delay in future revenue resulting from new discoveries; and no guarantee that litigation would be reduced.

**DESPITE THE STUDIES, DESPITE THE TREMENDOUS EXPENSE**

**NO OIL OR GAS HAS BEEN PRODUCED FROM ALASKA'S  
FEDERAL WATERS**

## TITLE 38 AND THE ACMP STATUTES NEED TO BE AMENDED

### IF THIS LEGISLATION IS NOT ADOPTED

- We must accept jeopardizing ALL future lease sales
- We must accept the inevitable loss of revenue
- We must accept the increased costs of litigation
- We must accept the court's opinion that oil and gas leasing is not in the public interest
- We must accept the court's opinion that oil and gas exploration cannot coexist with fishing
- We must accept that spending tens of millions of dollars for more "studies" is a necessary use of revenue
- We must accept that leasing cannot occur if there is an alleged risk to the environment, no matter how remote or unlikely that risk may be

### WITHOUT THIS LEGISLATION

We must accept the continuing erosion of the Legislature's authority and judgment to special interest groups and the courts

### THE RECORD SENDS THE FOLLOWING MESSAGES . . .

#### **Consistency with the ACMP (Sale 78)**

##### *Trustees for Alaska:*

"Direct conflicts exist between oil and gas exploration and development activities and fishing and large vessel traffic. Consequently, oil and gas exploration and development activities must give way to those activities which are of higher priority; fishing and large vessel traffic...the decision to proceed with Sale 78 is not consistent with 6 AAC 80.040 and thus not consistent with the ACMP."

"...Noah fails adequately to evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such analysis."

*Alaska Superior Court:*

"...the Court cannot divine the basis for the consistency determination. First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities? Or, is oil and gas a water related activity?...There is no discussion of a significant public need for the lease sale ...6 AAC 80.130(d) requires a finding of no feasible prudent alternative to meet the public need for the proposed use and a finding that all feasible and prudent steps to maximize conformance with standards will be taken."

*DNR:*

Analysis of ACMP consistency was included in the Preliminary Best Interest Finding which the court failed to look at when making its decision to stay the sale. The court appears to accept without question that potential offshore oil and gas development is not a water-dependent activity. DNR took a hard look at the requirements and issues of 6 AAC 80.130. The court created of its own accord the argument that DNR did not comply with 6 AAC 80.130, then relied on its own unsupported argument, without examination of the relevant parts of the record or response from DNR, to impose the stay.

*Trustees for Alaska:*

"The Court has further stated that environmentally protective purposes "require that at the time DNR reviews any...permit application it consider the probable 'cumulative impact' of all anticipated activities which will be part of [the project in question] whether or not the activities are part of the project under review. If DNR determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved." (emphasis added)

## **Best Interest Finding (Sale 78)**

*Trustees for Alaska:*

"Because Noah has failed to adequately address these issues in the 'best interest' finding and explain how they fit into the 'best interest' equation, the finding is legally deficient".

## **Geophysical Hazards (Sale 50)**

*Trustees for Alaska:*

DNR violated the ACMP "by utterly failing (emphasis added) to identify known geophysical hazard areas within the Sale 50 area as required by 6 AAC 80.050(a). DNR does not consider geophysical hazards until it reviews a company's plans of operations. In contrast, MMS has demonstrated that an identification of geophysical hazards is practical at the lease sale stage."

*Alaska Supreme Court:*

"The geophysical hazards in a given area could be such as to make any use or activity inconsistent with the ACMP...we conclude that this case must be remanded to DNR with instructions to identify and report on known and substantially possible areas of geophysical hazards within Sale 50...a draft environmental impact statement for a federal sale just north of Sale 50 deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document."

*DNR:*

"The Court has understated DNR's efforts to identify geophysical hazards...On the basis of its consideration of the existing information, DNR identified and discussed the known

potential geophysical hazards in the Sale 50 area....Unless the court is to require DNR to go beyond the express language of the regulation, there is nothing more to be done.”

DNR's petition for rehearing was denied.

## **Archeological Resources (Sale 50)**

### *Trustees for Alaska:*

DNR failed to identify or describe any of the historic, prehistoric and archeological resources in the Sale 50 area; and DNR deferred analysis of such data to the exploration and production stages of development.

### *Alaska Supreme Court:*

“DNR's decision to defer identification of archeological sites does not comply with 6 AAC 80.150. The regulation clearly requires the identification of archeological sites, but it does not state when they are to be identified. In our view the regulation is most reasonably interpreted to require...the identification of known archeological sites at the initial sale stage...DNR must comprehensively survey the known data, set out the results, and state its conclusions.”

### *DNR:*

“Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat to site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. § 47 (O)...DNR is required to withhold specific information regarding those sites until the plan of operations stage...”

DNR's petition for rehearing was denied.

## **Transportation (Sale 55)**

### *Trustees for Alaska:*

“DNR failed to discuss how development would occur, the riskiness of any methods chosen, and whether, in light of the risk, the lease sale was in the best interests of the state...”

### *Alaska Supreme Court:*

“DNR did not take a hard look at the transportation issue in making its best-interest determination for Sale 55...the Finding concludes that offshore development would be “feasible” without use of ANWR, but does not discuss how the oil would be transported or what risks these methods would pose.”

### *DNR:*

“DNR, in its final finding, ...requires that lessees submit a detailed plan of operations for approval before conducting any exploratory or development operations, and imposes 26 restrictions or terms as a condition of the approval of plans of operations...Seven of these terms...specifically address environmental concerns arising from the transportation of oil and gas. DNR recognizes that the transport of oil and gas by pipeline is environmentally preferable to transport by tanker. DNR carefully considered the impact that the unchanged legal status of ANWR might have, and the risks presented by various oil and gas transportation methods that might be necessary to develop Sale 55 tracts.”

## **The Porcupine Caribou Herd (Sale 55)**

### *Trustees for Alaska:*

"The Final Best Interest Finding... does not address the impacts of the sale on the Porcupine Caribou Herd nor does it indicate how these impacts are factored into the 'best interest' equation. This failure on behalf of DNR also reveals the inadequacy of DNR's analysis of the effect of the sale on the subsistence activities of the people of Alaska."

### *Alaska Supreme Court:*

"Although DNR asserts that development 'should not' affect ANWR or the caribou that utilize ANWR, DNR has made no finding to this effect. Rather, it has simply made the unsupported assumption that offshore development cannot affect caribou."

### *DNR:*

"[AS 38.05.035(g)] requires that DNR thoroughly consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area (emphasis added). However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd is clearly not found in the sale area, DNR did not violate the statute."

DNR's petition for rehearing was denied

## **Goodnews Bay Offshore Prospecting Permit (OPP) Disposal**

### *Alaska Supreme Court:*

"The State's argument that it could have done little more to fully assess the impacts of mining in the region than it did at the OPP stage is significantly undercut by evidence of comparable federal studies. The record indicates that the federal government has conducted environmental impact studies for offshore mining based on various mining scenarios. **DNR can emulate these studies.**" (emphasis added)

**FAILURE TO ADOPT THIS LEGISLATION WILL  
MAINTAIN THE STATUS QUO—AND GUARANTEE AN  
UNCERTAIN ECONOMIC FUTURE FOR ALASKA**

# THEY SAY OIL & GAS LEASING IS BROKEN

*Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities?*

*... no discussion of a significant public need for the lease sale*

*Appellants' motion to stay (lease sale 78) is granted*

Superior Court order staying Lease Sale 78

*... DNR should undertake seismic studies prior to the sale to identify particular areas having special hazards*

*DNR has not demonstrated that it has taken all feasible and prudent steps to maximize conformance with the ACMP*

Brief to the Supreme Court by:

Trustees for Alaska  
Alaska Environmental Center  
The Sierra Club  
Nat'l Parks and Conservation Assoc.  
The Wilderness Society

*... Noah fails to adequately evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such an analysis*

Brief to the Superior Court on Sale 78 by:

Trustees for Alaska  
Ninilchik Traditional Council  
Alaska Environmental Center  
Greenpeace  
Kenai Peninsula Fishermen's Assoc.  
United Cook Inlet Drift Assoc.

*DNR failed to take a hard look at the impact of (offshore) Sale 55 on the (onshore) Porcupine Caribou Herd, and on the subsistence users of this herd.*

Alaska Supreme Court

## YOU CAN FIX IT

# IT'S A FACT

Since The Inception Of Competitive Leasing in 1959:

- Over 75 Lease Sales Have Been Held
- Over 80 Best Interest Findings Have Been Compiled
- Over 25 Million Acres Have Been Offered For Lease And Over 11 Million Acres Have Been Leased
- Over 3,800 Wells Have Been Drilled
- The State Has Collected Over \$45 Billion In Bonuses, Rents, Royalties and Taxes
- Competitive Oil And Gas Lease Sales Have Been The Cornerstones On Which Alaska's Economy Has Been Built—And Have Provided Benefits To ALL Alaskans