

SCOMM

78:7

Alaska State Legislature

Senate Committee on Oil and Gas

Senator Sam Cotten, Chairman
Senator Drue Pearce, Vice-Chairman
Senator Bettye Fahrenkamp
Senator Lyman F. Hoffman
Senator Dick Shultz



P. O. Box V, State Capital
Juneau, AK 99811
(907) 465-3711

To: Members, Senate Oil and Gas Committee

From: Sam Cotten, Chair

Re: Russell Douglass Confirmation (AOGCC)

Attached is the letter for your signature on the Russell Douglass confirmation. Mr. Douglass' resume is attached. If you have any questions, please contact Deborah Vogt of my staff.

After you have signed the letter, I would appreciate it if you would circulate it to the next senator named (except Senator Fahrenkamp) and, finally, return it to my office.

Thanks.



Alaska State Legislature

SENATE

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

Date May 8, 1991

The Honorable Dick Eliason
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

In accordance with AS 39.05.080, the Senate Special Committee on Oil and Gas reviewed the following with regard to confirmation of the Governor's appointment:

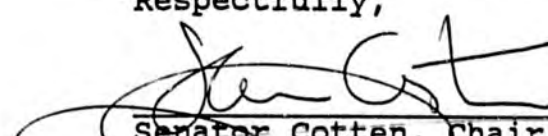
Alaska Oil and Gas Conservation Commission

Douglass, Russell - Anchorage

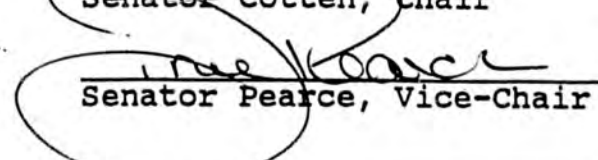
Term began 11/26/90 expires 12/31/94

There were no stated objections to the confirmation of the named individual by committee members. This does not reflect an intent by any of the members to vote for or against him during any further sessions.

Respectfully,

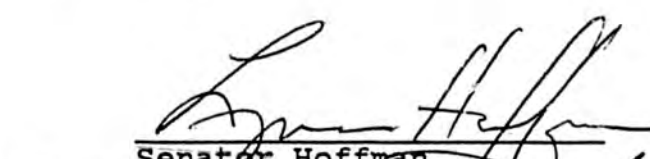


Senator Cotten, Chair

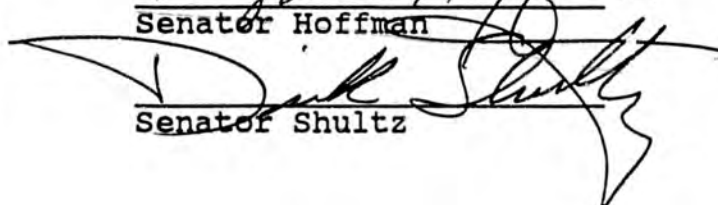


Senator Pearce, Vice-Chair

Senator Fahrenkamp



Senator Hoffman



Senator Shultz

Orig. to
Sen. Sec.
5/9



OFFICIAL BUSINESS

Alaska State Legislature
Senate

Office of the Secretary

PO. BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99801

April 26, 1991

M E M O R A N D U M

TO: Senator Cotten, Chair
Senate Special Committee on Oil and Gas

FROM: Nancy Quinto
Secretary of the Senate

RE: Confirmation of Governor's Appointees

Pursuant to AS 39.05.080, President Eliason has referred the position noted to your committee for a hearing, recommendation and report:

Alaska Oil and Gas Conservation Commission
Douglass, Russell - Anchorage
Term began 11/26/90 expires 12/31/94

w/attached resume

SENT BY XEROX TELECOPIER 10/20/81 2:10 PM

BOARDS & COMMISSIONS

Russell A. Douglass
6750 Teshlar Drive
Anchorage, Alaska 99507
Hm. (907) 349-5696
Bus. (907) 279-1433

FEB 14 1991

EDUCATION: B.S. in Petroleum Engineering, May 1973
Colorado School of Mines - Golden, Colorado

Graduate Courses, University of Alaska Anchorage
Spring 1981: Well Testing Analysis
Fall 1981: Waterflood/Secondary Recovery Technology
Fall 1978: Arctic Engineering

EXPERIENCE:

August 1984 - Present: Senior Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. In addition to responsibilities of the Reservoir Engineering position, prepare reports for the Commission concerning oil and gas reservoir performance in the State. Prepare draft conservation orders and administrative decisions relating to oil and gas operations in the state. Supervise two statistical technicians on the Commission staff.

July 1982 - August 1984: Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Same responsibilities as Acting Reservoir Engineer.

December 1980 - July 1982: Acting Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Responsible for updating 3-D reservoir model of the Prudhoe Bay Sadlerochit Reservoir. Gather and analyze well logs, well tests, fluid data and core data for ultimate input into 3-D simulator and overall reservoir surveillance. Preparation of reports and recommendations to Commission concerning model and reservoir performance (GOC movement, well test analysis, log analysis and well performance). Initiate studies of new fields and discoveries in Alaska.

August 1976 - November 1980: Petroleum Engineer for the Oil & Gas Conservation Commission. Responsible for reviewing oil and gas exploration and production operations taking place in the State of Alaska with particular attention to safety aspects, prevention of physical waste and protection of correlative rights. Make recommendations to Commission on problems and situations arising as a result of oil and gas operations in Alaska. Witness well tests and crude oil measurements to insure proper production accounting in the State's interest. Estimate reserves of oil and gas, reservoir potential and evaluate recovery methods and their efficiency. Furnish technical advice on problems associated with but not limited to well spacing, equipment, safety, pollution, unitization and secondary recovery methods.

May 1978 - June 1976: Petroleum Engineer with H.K. van Poolen and Associates Inc. Responsible for general petroleum engineering such as log interpretation, reservoir fluid analysis, well test design and analysis, well stimulation design and application, report writing and coordination of education course reviews and updates. Included field work in well testing, safety equipment inspection and workover operations.

HONORARY & PROFESSIONAL ACTIVITIES:

Licensed Petroleum Engineer--State of Alaska since August 16, 1979 EP4772.

Member, Society of Petroleum Engineers (SPE)

1988 - Present: Continuing Education Chairman

June 1990: Elected Treasurer for one year term

Member, Chugach Electric Association, Member Advisory Council (MAC)

Served one year as Vice-Chairman and one year as Chairman

REFERENCES: See attached

MEMORANDUM

State of Alaska

TO: Kevin Bruce, Special Assistant
Office of the Governor

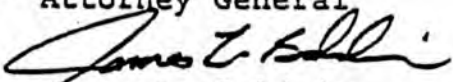
DATE: February 3, 1983

FILE NO: 366-391-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Withdrawal of
appointment


By: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You have asked if Governor Sheffield may refuse to forward to the legislature the name of a person appointed by the former governor to an office in the executive branch of state government.

We have attached a copy of our earlier memorandum of advice of December 10, 1979. In that memorandum we advised the governor that he may remove a person before confirmation by withdrawing the nomination, or if the name has not been forwarded to the legislature, by informing the person that he or she is no longer under consideration. We reaffirm that advice. However, you should consider the fact that no authority is cited for our earlier advice and that no Alaska case exists to guide us concerning the resolution of this issue.

If our reasoning expressed in the earlier memorandum is rejected by a court, and the appointment is not considered to be a nomination, then an appointee whose name is summarily withdrawn may have a cause of action for denial of a property right without due process of law. See Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

JLB/pjg

Enc.

Vicki A. Clayman
Office of the Governor

DATE: December 10, 1979

FILE NO: J-66-334-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Reappointments to
boards or commissions

By:

Rodger W. Pegues
Assistant Attorney General

You have asked whether, prior to the expiration of his own term, the Governor can make reappointments of members of boards or commissions whose terms expire thereafter. You also ask whether, if that is the case, the new Governor can revoke the reappointment and appoint someone else.

We believe that the answer to both questions is yes.

When a term for an office is set by law, the term continues until its conclusion, regardless of the actual tenure of any person who may hold the office from time to time. Thus, when an incumbent leaves office prior to the expiration of his term, his successor is appointed for the remainder of that term, and the successor must be reappointed if he is to hold the position beyond the end of that term. Accordingly, no matter what an incumbent may do, his term continues until its prescribed end.

Nothing, however, precludes the Governor, as appointing authority, from anticipating the end of terms of office and making present appointments to fill the offices as those terms expire in the near future. Indeed, he is required to do this during each session of the legislature with respect to offices which have terms which will expire before July 2, and to submit the names of his appointees to the legislature for confirmation. AS 39.05.080(1). Hence, the Governor, even though he may be leaving office in early December, may make appointments for terms which begin the following January.

If the appointments are subject to confirmation, they are not complete until the legislature confirms them. Prior to confirmation, the new Governor may withdraw the nomination. And indeed, he need not even submit it and can merely revoke the nomination outright. If the appointments are not subject to nomination, they take effect when the appointee qualifies and takes office. That cannot happen until the new term for the office begins. Until that time,

Ms. Vicki A. Clayman
December 10, 1979
Page #2

the appointment can, as a general rule, be revoked.

It is probably because each new Governor has the power to countermand any appointive actions taken by each outgoing Governor which remain pending that the latter have not established a history of making midnight appointments to terms of office which begin after they leave office. Where, as in the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense. But where they remain pending, they will have been futile unless the incoming chief executive approves of them as well.

RWP/pjg

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 12, 1991

SUBJECT: Appointment of Oil and Gas Conservation Commission
Member (W.O. 17LS-1159)

TO: Representative Bill Hudson
Attn: Andy Spear

FROM: Jerry Luckhaupt *GPL LMB*
Legislative Counsel

QUESTIONS PRESENTED:

I. Is the appointment of Russell Douglass to the Oil and Gas Conservation Commission by Governor Cowper, prior to Governor Cowper leaving office, valid and binding on Governor Hickel?

ANSWER: Yes. See discussion I.

II. Can the legislature confirm Mr. Douglass' appointment absent any communication from Governor Hickel requesting Mr. Douglass' confirmation?

ANSWER: Yes. See discussion II.

III. What happens if the legislature does not act to confirm Mr. Douglass' appointment on its own or if the governor continues to fail to refuse to send Mr. Douglass' name down to the legislature for confirmation?

ANSWER: Mr. Douglass' appointment will be rejected by operation of law, AS 39.05.080(3), on the last day of the current legislative session. Governor Hickel will be free to appoint another person to Mr. Douglass' seat. See discussion III.

IV. Can Governor Hickel remove Mr. Douglas from his position on the Oil and Gas Conservation Commission and on what grounds?

ANSWER: Yes. For "cause" as provided in AS 31.05.007(d). See discussion IV.

FACTUAL BACKGROUND

The facts as I understand them are that a vacancy existed on the Oil and Gas Conservation Commission.^{1/} Governor Cowper in a letter to Mr. Douglass dated November 29, 1990, appointed Mr. Douglass to the vacant seat.^{2/} Mr. Douglass executed an oath of office, as required by art. XII, § 5 of the Alaska Constitution and AS 39.05.040, on December 4, 1990. Mr. Douglass remains in his position as a member of the Oil and Gas Conservation Commission and continues to be paid accordingly.^{3/} To date, Governor Hickel has not presented Mr. Douglass' name to the legislature for confirmation.

DISCUSSION

I

In answer to your first question, it appears that Mr. Douglass' appointment is valid and binding on Governor Hickel. AS 31.05.007(b) provides:

(b) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

This section requires the governor at the time a vacancy exists to fill that vacancy by appointment, subject to the legislature's authority to confirm or fail to confirm the

^{1/} Sufficient information has not been provided to me so that I can determine if that vacancy was as a result of a resignation or by expiration of term. It appears that the vacancy was caused by resignation as the appointment by Governor Cowper was for a term ending December 31, 1994. Since Oil and Gas Conservation Commission members are appointed for six-year terms, AS 31.05.007, it appears that Mr. Douglass' appointment was for the balance of a full term. Regardless, the information that has been provided to me by your staff is that at the time of Mr. Douglass' appointment no one was currently occupying that particular seat on the Oil and Gas Conservation Commission and no one was receiving a salary for that position.

^{2/} Information supplied by your staff seems to indicate that the appointment occurred on November 26, 1990. The letter of appointment from Governor Cowper does not support this earlier date.

^{3/} The members of the Oil and Gas Conservation Commission are essentially full-time employees and receive an annual salary and are in the exempt service. AS 31.05.015.

appointee at a later time. This section is consistent with art. III, § 26 of the Alaska Constitution which states:

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.^{4/}

AS 39.05.080(4) further implements these sections. It provides:

(4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

Based upon these provisions and the facts as presented, clearly there was a vacancy in the membership of the Oil and Gas Conservation Commission. Governor Cowper pursuant to statutory and constitutional directive appointed Mr. Douglass to fill that then existing vacancy. Mr. Douglass executed his oath of office, took office, and remains in the office to this day. Mr. Douglass' appointment appears to be entirely valid.

But is this appointment binding on Governor Hickel or may Governor Hickel withdraw Mr. Douglass' appointment because he has not been confirmed by the legislature? I believe that Mr. Douglass' appointment is binding on Governor Hickel and that Mr. Douglass may not be removed from office absent the legislature's failure to confirm him or the finding by Governor Hickel of sufficient "cause" as described in AS 31.05.007(d).

Support for this conclusion is found in the plain language of the Constitution and in the court decisions. The Constitution recites in art. III, sec. 26 that the members of those boards or commissions shall be "appointed" by the governor. To determine the meaning of "appointed" we can look to other provisions of the Constitution for assistance. Article II, sec. 5 of the Constitution refers to the terms "nominated,"

^{4/} It appears from an examination of their powers and duties that the Oil and Gas Conservation Commission is a regulatory, if not a quasi-judicial, commission as stated in art. III, § 26 so as to require that those appointed by the governor to a position on the commission are subject to confirmation by the legislature. In fact, AS 31.05.005(a) recites that the commission is an "independent quasi-judicial agency of the state. . . ."

"elected," or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an 'office or position of profit.'" Begich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated."

That nominated and appointed are not synonymous terms in this state is further supported by the proceedings of the framers of our constitution. Art. III, § 26 of our constitution, as originally proposed in Committee Proposal No. 10a, by the Executive Branch Committee of the Alaska Constitutional Convention stated:

Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be **nominated and appointed** by the governor, with the advice and consent of the senate. . . .

This "nomination" language and reasoning was specifically rejected by the framers of our constitution as it was finally enacted.

The distinction between "nominated" and "appointed" is significant. In the federal system, the president "nominates" persons to the senate for confirmation. A federal "nominee" does not take office pending confirmation. In that situation:

There is no 'appointment' within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

Munson v. Territory of Alaska, 16 Alaska 580 (1956). But, an "appointee" takes office and is vested with all the duties, powers, and responsibilities of the office subject only to the legislature's authority to fail to confirm the appointment. When a person is "appointed" and takes office and exercises the powers of the office, the governor has performed the "last act" necessary to vest the person with the powers of the office. The governor may not later withdraw or revoke the appointment except that he may remove the appointee as provided by law.

In Division of Elections v. Johnstone, 669 P.2d 537, 539-540 (Alaska 1983) the supreme court held that the term appointment as used in the Constitution means "to designate for office." The court also found that the appointment of a superior court judge was effective on the completion of the "last act" of the appointing authority, in that case, the letter of appointment issued to the judge by the governor.

The court cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. In McChesney, the Kentucky Supreme Court was confronted with a situation where the governor, having the authority to appoint

members of a board subject to confirmation by the Senate, appointed in the interim (between sessions of the legislature), McChesney who entered upon and performed the functions of the office. Several months later, before the legislature had again convened, the governor removed McChesney without cause and appointed another person. McChesney sued to retain his office. The court held that the governor's purported removal of McChesney was illegal. The court stated that the governor by naming and appointing McChesney had exhausted his power to appoint and performed the "last act" necessary to vest McChesney with his office, subject only to the state senate's authority to confirm or fail to confirm and to the governor's authority to remove McChesney for cause as provided by law. The court further contrasted the situation where an officer is "appointed" subject to confirmation by the legislature (as exists in Alaska by art. III, sec. 26 of the Constitution) with the situation where an officer is "nominated" subject to confirmation (as exists for federal appointments) and said:

Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall . . . What, then, constitutes an appointment insofar as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. [Citation.] It is completed when the appointing authority has performed the acts incumbent upon him to accomplish the purpose. [Citations.] The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power. [Emphasis supplied].

McChesney, supra, at 587.

The court concluded by stating: "Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld." See also Barrett v. Duff, 114 Kan. 244, 217 P. 918 (1923).

The rule discussed in McChesney v. Sampson has been variously stated by courts and commentators to be the "majority rule," the "general rule," and to be "universally held." See e.g., Barrett v. Duff, supra; State v. Essling, 128 N.W. 2d 307, 311 (Minn. 1964) ("well settled"); State v. Brewster, supra; 89 ALR 135 ("general rule").

McChesney and the rule discussed in it are based upon Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 159-60, 2 L.Ed 60, 68-69 (1803) in which Justice Marshall stated:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.

While the principle of a strong executive is embraced by our Constitution and recognized by our courts, Bradner v. Hammond, 553 P.2d 1, 3, n.3 (Alaska 1976), that principle does not mandate a different conclusion than that reached by the United States Supreme Court, the McChesney court and their progeny. To state that a subsequent governor has the authority to recall the appointments of a previous governor, absent constitutional or statutory authority, would render appointments to office personal to the particular governor and his term. This is contrary to our Constitution which establishes an office of governor and provides for succession to that office. Under our constitution there is a governor and a governor there will always be, though the individuals occupying the office may come and go. See e.g., People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924); Barrett v. Duff, supra; State v. Brewster, 84 S.E.2d 231, 246 (W. Va. 1954); Tappy v. State, 82 So.2d 161, 169 (1955).

The fact that Mr. Douglass executed his oath of office one day after Governor Cowper left office does not appear to be particularly significant. When Governor Cowper appointed Mr. Douglass, that is, named him to the office in the letter of appointment, there was a present vacancy on the Oil and Gas Commission. Under the rationale of the Alaska Supreme Court in Johnstone, supra, Mr. Douglass was appointed at that time, while Governor Cowper was still in office, with all the powers, duties, and responsibilities of the Governor of Alaska. If Governor Cowper had attempted to appoint Mr. Douglass to a position where a vacancy did not then exist,

but for which a vacancy was anticipated in the future (for example, a seat on a commission that was currently occupied but the occupant's term was due to expire, say January 1, 1991), then I would conclude that a purported appointment by Governor Cowper to take effect in the future, after Governor Cowper had left office, would not be binding upon the subsequent administration.^{5/} Such is not the situation here.

This distinction was recognized in an Alaska Attorney General's opinion issued from Rodger Pegues to Vicki Clayman on December 10, 1979. (Copy attached). In that opinion the attorney general opined that appointments by an outgoing governor to take effect beyond the governor's term are not binding upon and may be withdrawn by the new administration. That opinion, though, recognizes that if "the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense." Presumably, if they make sense, then they are also effective and binding upon the new administration. If there is a present vacancy in office and when the governor performs that "last act," in this case the letter of appointment, then the appointment is effective and binding upon the new administration, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the new governor to remove the appointee "as provided by law."

Finally, support for this conclusion is found in the settlement of a lawsuit brought by a former member of the Alaska Commercial Fisheries Entry Commission, Michael Whitehead against the state. Mr. Whitehead was appointed to a position on the commission on October 16, 1982, by then Governor Hammond. Governor Sheffield took office in December, 1992, and on February 28, 1983, Governor Sheffield appointed another person to fill the position occupied by Mr. Whitehead. AS 16.43.030(a) provided that the members of the commission could only be removed for cause. Governor Sheffield contended that he had the authority to withdraw Mr. Whitehead's appointment as Mr. Whitehead had not as yet been confirmed by the legislature.^{6/} Mr. Whitehead then sued to retain his position on the commission. The state settled the lawsuit by paying Mr. Whitehead his salary and benefits as a member of the commission up to June 16, 1982, and an additional \$75,000.

The similarities between the Whitehead case and the present case are numerous. The settlement by the state seems to support a conclusion that a subsequent administration may not withdraw or revoke the valid, effective appointments of a

^{5/} A purported "appointment" to take effect at some date in the future is in actuality a "nomination" because the "appointee" is not then, at the time of "appointment," vested with all the duties, powers, and responsibilities of the office.

^{6/} It was apparently the state's position that Mr. Whitehead was a "nominee" and that the "last act" necessary to make his appointment effective was confirmation by the legislature.

previous administration where the appointee has taken office and is exercising the powers, duties, and responsibilities of the office.

Be advised that the Alaska Attorney General in an opinion from James L. Baldwin to Kevin Bruce, dated February 3, 1983 (copy attached) advised the Sheffield administration that the governor had the authority to withdraw an appointment made by a previous governor. The opinion does not cite any authority for this position other than the Pegues opinion discussed earlier.

II

You have asked what the authority of the legislature is to hold confirmation proceedings for an appointee of the governor when the governor fails or refuses to transmit the name of the appointee, or notice of the appointment, to the legislature for confirmation.

Initially, in considering your question we must look to the constitution to determine the appointment power of the governor and the authority of the legislature to confirm or reject those appointments. Article III, sec. 25, of the Alaska Constitution provides:

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

And art. III, sec. 26 provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

These provisions provide that the governor has the authority to appoint the "head of each principal department" of the state and the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-

judicial agency." These appointees are all subject to the legislature's constitutional authority to confirm or reject them.^{2/}

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency," though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. . . .

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has

^{2/}Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is actually a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, supra, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor

could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers

in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926.

Virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground.

Therefore, I conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

III

For your third question you ask what happens if the legislature does not act on Mr. Douglass' appointment on its own and if Governor Hickel continues to fail or refuse to transmit Mr. Douglass' name to the legislature for confirmation? The result of these inactions would be the failure of the legislature to confirm Mr. Douglass' appointment to the Oil and Gas Conservation Commission as required by art. III, § 26 of the Alaska Constitution. Such an act would be tantamount to a rejection under

AS 39.05.080(3) on the day the session adjourns.^{8/} Munson v. Territory of Alaska, discussed earlier in answer to question 1, reaches a similar conclusion.

Although, AS 39.05.080(3) does anticipate an orderly procedure for confirmation or rejection of all appointments by providing that all appointments will be presented to the legislature, (and if not confirmed they are rejected by operation of law), it does not anticipate the situation where an appointment has been made and a request for confirmation is not communicated to the legislature. But, just as the legislature may take notice of an appointment for the purpose of confirming an appointee, as discussed in answer to your second question earlier, so too, is the legislature charged with notice when it fails to confirm a gubernatorial appointee even without communication from the governor. Shawver, supra; Bell v. Sampson, supra. Therefore, if the legislature does not act to confirm Mr. Douglass with or without a communication from the governor, Mr. Douglass' appointment will have been rejected by the legislature on the day the legislature adjourns this session. At that time, there will be a vacancy on the Oil and Gas Conservation Commission and Governor Hickel will be free to appoint someone else to the seat.^{9/}

IV

The final question you posed was can the governor remove Mr. Douglass from his position on the Oil and Gas Conservation Commission and, if so, on what grounds?

AS 31.05.007(d) provides:

(d) The governor may remove a commissioner from office for cause including but not limited to incompetence, neglect of duty or misconduct in office. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

^{8/} AS 39.05.080(3) provides in part: "Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns."

^{9/} This new appointment will, of course, be subject to confirmation at the next regular session of the legislature.

From this section it appears that the members of the Oil and Gas Conservation Commission do not serve at the pleasure (or will) of the governor, but serve their entire term subject to removal by the governor for cause pursuant to the procedure provided in the statute.^{10/} "Cause" is not defined in AS 31.05, although, the listing in AS 31.05.007(d) of things included in "cause" is instructive of what "cause" is. The listing includes within the term "cause," "incompetence, neglect of duty or misconduct in office. . . ."

The only definition of "cause" that I could find in the Alaska Statutes was one pertaining to the removal of the commissioner of education "for cause." AS 14.05.-145(f). It provides that in that section "cause" means:

- (1) incompetency which is the inability or the unintentional failure to perform the duties of the commissioner;
- (2) immorality which is the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or
- (3) malfeasance or misfeasance in office which includes, but is not limited to, the failure of the commissioner to comply with the rules or regulations adopted by the board.

Black's Law Dictionary defines "for cause" as:

With respect to removal from office 'for cause,' means for reasons which law and public policy recognize as sufficient warrant for removal and such cause is 'legal cause' and not merely a cause which the appointing power in the exercise of discretion may deem sufficient. . . . They do not mean removal by arbitrary or capricious action but there must be some cause affecting and concerning ability and fitness of official to perform duty imposed on him. The cause must be one in which the law and sound public policy will recognize as a cause for official no longer occupying his office.

Clearly, then the governor may only remove Mr. Douglass for a "cause," which appears to be directly related to Mr. Douglass' performance and exercise of the

^{10/} Subject, of course, to the legislature's power to fail to confirm them, thereby effecting their removal from office.

Representative Bill Hudson
April 12, 1991
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duties, powers, and responsibilities of his office and his ability and fitness to perform those functions.

If you have further questions, please contact me at your convenience.

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Enclosures

Alaska State Legislature



Sen. Lloyd Jones, *Chair*
Sen. Sam Cotten, *Vice-Chair*
Sen. Dick Eliason, *Member*
Sen. Steve Frank, *Member*
Sen. Rick Holford, *Member*
Sen. Curt Menard, *Member*
Sen. Fred Zharoff, *Member*

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907 465-4907
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Senate Resources Committee

MEMORANDUM

May 2, 1991

TO: Senate Resources Committee Members

FROM: Senator Lloyd Jones, Chair 

SUBJECT: CONFIRMATION OF RUSSELL DOUGLAS -
Alaska Oil and Gas Conservation Commission

The appointment of Russell Douglas as one of three commissioners to the Alaska Oil and Gas Conservation Commission has been referred to both the Senate Resources Committee and the Senate Special Committee on Oil and Gas.

It would be my intent to forego Senate Resources Committee hearings on Mr. Douglas. I am enclosing a copy of his resume for your information.

If there is no objection to this procedure, I would ask the members to sign a form indicating that the committee has reviewed the resume for Mr. Douglas and have no stated objections to his confirmation.

I would appreciate it if you would let me know your feelings on this by Monday, May 6,

Thank you.

BOARDS & COMMISSIONS

Russell A. Douglass
6750 Teshlar Drive
Anchorage, Alaska 99507
Hm. (907) 346-5696
Bus. (907) 279-1433

FEB 14 1991

EDUCATION: B.S. in Petroleum Engineering, May 1973
Colorado School of Mines - Golden, Colorado

Graduate Courses, University of Alaska Anchorage
Spring 1981: Well Testing Analysis
Fall 1981: Waterflood/Secondary Recovery Technology
Fall 1978: Arctic Engineering

EXPERIENCE:

August 1984 - Present: Senior Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. In addition to responsibilities of the Reservoir Engineering position, prepare reports for the Commission concerning oil and gas reservoir performance in the State. Prepare draft conservation orders and administrative decisions relating to oil and gas operations in the state. Supervise two statistical technicians on the Commission staff.

July 1982 - August 1984: Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Same responsibilities as Acting Reservoir Engineer.

December 1980 - July 1982: Acting Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Responsible for updating 3-D reservoir model of the Prudhoe Bay Sadlerochit Reservoir. Gather and analyze well logs, well tests, fluid data and core data for ultimate input into 3-D simulator and overall reservoir surveillance. Preparation of reports and recommendations to Commission concerning model and reservoir performance (GOC movement, well test analysis, log analysis and well performance). Initiate studies of new fields and discoveries in Alaska.

August 1976 - November 1980: Petroleum Engineer for the Oil & Gas Conservation Commission. Responsible for reviewing oil and gas exploration and production operations taking place in the State of Alaska with particular attention to safety aspects, prevention of physical waste and protection of correlative rights. Make recommendations to Commission on problems and situations arising as a result of oil and gas operations in Alaska. Witness well tests and crude oil measurements to insure proper production accounting in the State's interest. Estimate reserves of oil and gas, reservoir potential and evaluate recovery methods and their efficiency. Furnish technical advice on problems associated with but not limited to well spacing, equipment, safety, pollution, unitization and secondary recovery methods.

May 1973 - June 1976: Petroleum Engineer with H.K. van Poolen and Associates Inc. Responsible for general petroleum engineering such as log interpretation, reservoir fluid analysis, well test design and analysis, well stimulation design and application, report writing and coordination of education course reviews and updates. Included field work in well testing, safety equipment inspection and workover operations.

HONORARY & PROFESSIONAL ACTIVITIES:

Licensed Petroleum Engineer--State of Alaska since August 16, 1979 EP4772.

Member, Society of Petroleum Engineers (SPE)

1988 - Present: Continuing Education Chairman

June 1990: Elected Treasurer for one year term

Member, Chugach Electric Association, Member Advisory Council (MAC)

Served one year as Vice-Chairman and one year as Chairman

REFERENCES: See attached