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4959 HRES HB 186 - HB 198

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ARCTIC SLOPE REGIONAL)
 CORPORATION, an Alaska)
 corporation; CHEVRON U.S.A.)
 INC., a Pennsylvania)
 corporation; STANDARD ALASKA)
 PRODUCTION COMPANY, a Delaware)
 corporation,)

Plaintiffs,)

vs.)

STATE OF ALASKA, DEPARTMENT)
 OF NATURAL RESOURCES; and)
 ALASKA OIL AND GAS)
 CONSERVATION COMMISSION,)

Defendants.)

Case No. 3AN-88- 4357 CI

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

In this action, plaintiffs seek a judgment declaring that AS 31.05.035 is unconstitutional insofar as it requires the plaintiffs to disclose confidential oil and gas well information obtained from private lands to either the Department of Natural Resources or the public. Plaintiffs also seek preliminary and permanent injunctive relief prohibiting the Department of Natural Resources from obtaining access to certain confidential oil and gas well information.

I. PARTIES AND JURISDICTION

1.1 Arctic Slope Regional Corporation ("ASRC") is a Native Regional Corporation established pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629a, and organized under the Alaska Business Corporation Act, AS 10.05. ASRC's shareholders are the Inupiat Eskimos of the Arctic Slope. ASRC has its principal place of business in the State of Alaska. ASRC has paid its biennial corporation tax last due and has filed its biennial report for the last reporting period, and is qualified in all respects to maintain this action.

1.2 Chevron U.S.A. Inc. ("Chevron") is a Pennsylvania corporation with its principal place of business in the State of California. Chevron has paid its biennial corporation tax last due and has filed its biennial report for the last reporting period, and is qualified in all respects to maintain this action.

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1.3 Standard Alaska Production Company ("Standard") is a Delaware corporation with its principal place of business in the State of Alaska. Standard has paid its biennial corporation tax last due and has filed its biennial report for the last reporting period, and is qualified in all respects to maintain this action.

1.4 State of Alaska, Department of Natural Resources ("DNR"), is an agency of the State of Alaska.

1.5 The Alaska Oil and Gas Conservation Commission ("Conservation Commission") is an agency of the State of Alaska.

1.6 This court has jurisdiction over this matter pursuant to AS 22.10.020 and AS 09.40.230.

II. CONFIDENTIAL OIL AND GAS WELL DATA

2.1 On or about April 24, 1986, Chevron completed the drilling of an oil and gas well ("KIC well") on private land located in the North Slope Borough. The land is owned by ASRC and leased to Chevron and Standard. The location of the well is described as:

1409 feet from the south line, 1861 feet from the east line, Section 1, Township 3 North, Range 36 East, Umiat Meridian. State of Alaska.

2.2 Chevron and Standard are the "owners" of the KIC well as that term is used in AS 31.05.035 and defined in AS 31.05.170(9). Chevron is the operator of the KIC well.

2.3 Pursuant to AS 31.05.035(b) and 30 AAC 25.071, Chevron filed certain confidential reports and

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information concerning the KIC well ("KIC well data") with the Conservation Commission.

2.4 At such time as the Chevron and Standard lease terminates, ASRC will become the "owner" of the KIC well. At that time, ASRC will also have the right to use the KIC well data for its own proprietary purpose.

2.5 The sole legitimate purpose for which the KIC well data may be used by the State of Alaska is the prevention of waste and conservation of oil and gas.

2.6 The process of drilling the KIC well and producing the KIC well data cost the plaintiffs in excess of fifty million dollars and required over three years of planning, drilling and analysis.

2.7 The KIC well data have substantial economic value to the plaintiffs. The KIC well data allow the plaintiffs to evaluate ASRC's land for potential oil and gas development. In addition, the KIC well data provide the plaintiffs with critical information for the evaluation of land surrounding the KIC well.

2.8 So long as it is held confidential, the KIC well data provide the plaintiffs with a significant competitive advantage with respect to their competitors.

2.9 The KIC well data will continue to have substantial economic value to the plaintiffs for the indefinite future, so long as it continues to be held confidential by the Conservation Commission.

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III. STATUTORY AND REGULATORY CONFIDENTIALITY PROVISIONS

3.1 AS 31.05.035(c) directs the Conservation Commission to hold confidential oil and gas well information filed with it for 24 months following the 30-day filing period after completion of the well.

3.2 The KIC well data have been held confidential by the Conservation Commission. Unless the confidential period is extended as described below, the Conservation Commission will release the data to the public at 8:00 A.M., on Tuesday, May 24, 1988.

3.3 AS 31.05.035(c) also provides in pertinent part:

If the commissioner of natural resources finds that the required reports and information contain significant information relating to the valuation of unleased land in the same vicinity, the commissioner shall keep the reports and information confidential for a reasonable time after the disposition of all affected unleased land, unless the owner of the well gives written permission to release the reports and information at an earlier date.

3.4 DNR has implemented AS 31.05.035(c) by promulgating 11 AAC 83.153. The regulation states, in pertinent part:

If the commissioner finds that reports or information required under AS 31.05.035(a) contain significant information relating to the valuation of unleased land within a three-mile radius of the well from which these reports or information were obtained, the commissioner will, upon the written request of the owner of the well, keep the reports or information confidential for a

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reasonable time not to exceed 90 days after disposal of the unleased land, unless the owner of the well gives written permission to release the reports and information at an earlier date.

3.5 The KIC well is located less than one half mile from unleased land. Approximately three-fourths of all land located within a three-mile radius of the KIC well is unleased state or federal land.

3.6 Accordingly, the KIC well data contain significant information relating to the valuation of unleased land.

3.7 In order to obtain extended confidentiality, DNR requires that Chevron file a written request with DNR.

3.8 DNR does not currently have the authority to examine the KIC well data.

3.9 DNR asserts that it may examine the KIC well data filed with the Conservation Commission at the time Chevron files a request for extended confidentiality pursuant to AS 31.05.035(c) and 11 AAC 83.153 in order to make the finding set out in the statute ("AS 31.05.035(c) finding").

IV. STATE USE OF CONFIDENTIAL INFORMATION

4.1 Employees of DNR have asserted, in public media, in submissions to the Alaska legislature, and in conversations with Chevron employees, that DNR is inclined to use, and will use, the KIC well data for the following purposes, among others: (a) Estimating the value of land owned by the state for oil and gas development; (b) Setting sale terms for oil and gas lease sales of state lands pursuant to AS

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38.05.180; (c) Establishing minimum bids for tracts offered in state oil and gas lease sales; (d) Evaluating public offshore lands, the ownership of which is in dispute between the United States and the State of Alaska; (e) Promoting the state's position with respect to the oil and gas development of the Arctic National Wildlife Refuge (ANWR); and (f) Promoting the state's position with respect to the land leases negotiated between the United States Department of the Interior and certain Native corporations.

4.2 The KIC well data will be reviewed by DNR employees whose responsibilities include evaluation and leasing of state lands. DNR's valuation of state lands will be affected by information obtained from reviewing the KIC well data.

4.3 DNR asserts that it is impossible to structure DNR's review of the KIC well data so as to preclude access to that information by employees whose responsibilities include evaluation and leasing of state lands.

4.4 The information DNR will obtain from reviewing the KIC well data will have economic value to DNR in its capacity as proprietor of state land, in that it will enhance DNR's ability to evaluate state land.

V. COUNT ONE - UNCONSTITUTIONAL TAKING OF PROPERTY

5.1 Plaintiffs incorporate the prior allegations.

5.2 Mandatory disclosure to the public by DNR of well data obtained from private lands in connection with an

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application for extended confidentiality, does not substantially advance any legitimate state interest.

5.3 Mandatory disclosure to the public or to DNR of the KIC well data therefore violates state and federal constitutional prohibitions against taking or damaging private property for public use without just compensation.

VI. COUNT TWO - VIOLATION OF DUE PROCESS OF LAW

6.1 Plaintiffs incorporate the prior allegations.

6.2 Mandatory disclosure to the public or to DNR of the KIC well data bears no reasonable or rational relationship to the furtherance of a proper legislative purpose.

6.3 Mandatory disclosure to the public or to DNR of the KIC well data therefore violates state and federal constitutional prohibitions against deprivation of property without due process of law.

VII. COUNT THREE - POLICE POWERS

7.1 Plaintiffs incorporate the prior allegations.

7.2 Mandatory disclosure to the public or to DNR of the KIC well data has no connection with the promotion of the public health, safety, or general welfare.

7.3 Mandatory disclosure to the public or to DNR of the KIC well data is therefore in excess of the police powers of the State of Alaska.

VIII. COUNT FOUR - VIOLATION OF INHERENT RIGHTS

8.1 Plaintiffs incorporate the prior allegations.

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8.2 Mandatory disclosure to the public or to DNR of the KIC well data deprives plaintiffs of the enjoyment of the rewards of their own industry.

8.3 Mandatory disclosure to the public or to DNR of the KIC well data therefore violates the inherent rights of the plaintiffs.

IX. COUNT FIVE - UNAUTHORIZED USE OF CONFIDENTIAL INFORMATION

9.1 Plaintiffs incorporate the prior allegations.

9.2 In the alternative, if the court rules that AS 31.05.035(c) is constitutional, neither that statute, nor any other statute, authorizes the state, DNR, or any of their respective employees or agencies, to use information submitted pursuant to AS 31.05.035 to enhance the state's own proprietary interest, or for any purpose other than the limited purpose of making the AS 31.05.035(c) finding.

9.3 Plaintiffs will suffer irreparable harm if DNR is allowed to review the KIC well data under circumstances that permit access to this information by employees whose responsibilities include evaluation and leasing of state lands.

X. COUNT SIX - TAKING PRIVATE PROPERTY FOR PUBLIC USE

10.1 Plaintiffs incorporate the prior allegations.

10.2 Any use of the KIC well data by the state, DNR, or any of their respective employees or agencies for purposes other than making the AS 31.05.035(c) finding constitutes a "taking" or "appropriation" of plaintiffs' private property for public use without just compensation.

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XI. COUNT SEVEN - DECLARATORY RELIEF

11.1 Plaintiffs incorporate the prior allegations.

11.2 AS 22.10.020(g) authorizes the superior court to declare the rights and legal relations of an interested party in case of an actual controversy.

11.3 Actual controversies exist with respect to (a) the constitutionality of AS 21.05.035(c) as applied to private lands, and (b) assuming AS 31.05.035(c) is constitutional, DNR's authority to use the KIC well data for purposes other than making the AS 31.05.035(c) finding.

11.4 Plaintiffs are entitled to a judgment declaring AS 31.05.035(c) unconstitutional on its face or as applied to the facts of this case.

11.5 In the alternative, plaintiffs are entitled to a judgment declaring that DNR may not use the KIC well data for any purpose other than making the AS 31.05.035(c) finding.

XII. COUNT EIGHT - INJUNCTIVE RELIEF

12.1 Plaintiffs incorporate the prior allegations.

12.2 11 AAC 83.153(a) requires Chevron to file a written request with DNR in sufficient time prior to May 14, 1988, to allow DNR to confirm that the KIC well data contains significant information relating the valuation of unleased land within a three-mile radius of the well.

12.3 Plaintiffs will suffer irreparable harm if the KIC well data is disclosed to the public or DNR.

12.4 Pursuant to AS 09.40.030 and CIVIL RULE 65, plaintiffs are entitled to a preliminary and a permanent

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injunction, directing the Conservation Commission to hold the data confidential without any review of the data by DNR.

12.5 In the alternative, plaintiffs are entitled to a preliminary and permanent injunction directing DNR to review the KIC well data for the sole purpose of making the AS 31.05.035(c) finding under such procedures as the court deems necessary and appropriate to insure the data will not be used for any other purpose.

WHEREFORE having stated its complaint, plaintiffs pray for the following relief:

1. A judgment declaring that AS 31.05.035 is unconstitutional insofar as it requires the plaintiffs and/or the Conservation Commission to disclose the KIC well data to DNR or the public;

2. A judgment declaring that the Conservation Commission must continue to maintain the confidentiality of the KIC well data;

3. In the alternative, a judgment declaring that DNR and its employees and agencies are without authority to use the KIC well data for any purpose other than making the AS 31.05.035(c) finding;

4. A preliminary injunction directing the Alaska Oil and Gas Conservation Commission to maintain the KIC well data as confidential pending the resolution of this litigation;

5. In the alternative, a preliminary injunction directing DNR to review the KIC well data for the sole purpose of making the AS 31.05.035(c) finding, under such procedures as

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the court deems necessary and appropriate to insure the data will not be used for any other purpose;

6. A permanent injunction directing the Alaska Oil and Gas Conservation Commission to maintain the KIC well data as confidential;

7. In the alternative, a permanent injunction forbidding DNR to disclose the KIC well data prior to the time set forth in AS 31.05.035(c), and forbidding DNR to use the KIC well data for any purpose other than making the AS 31.05.035(c) finding.

8. Costs and attorney fees incurred in the prosecution of this matter; and

9. Such other relief as the court may deem equitable and just under the circumstances.

DATED at Anchorage, Alaska this 21st day of April, 1988.

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STANDARD ALASKA PRODUCTION COMPANY

STATEMENT ON HB 186 - March 17, 1988

HB 186, in Section 2, seeks to (i) amend AS 31.05.035(c) to limit its application to all exploratory wells, and (ii) exclude wells drilled on private lands from the benefits of extended confidentiality, while providing these benefits to wells drilled on State lands. Standard believes no legitimate public interest is served by this discriminatory treatment of wells drilled on private lands.

In Alaska's unique frontier environment, years may elapse between the drilling of an exploratory well and the disposition of unleased acreage nearby. Almost any well yields significant information about nearby lands, both State and private, and has considerable commercial value. Alaska exploratory wells are extremely expensive. The capital investment required to drill a well is simply not justified unless the information obtained thereby is maintained in a confidential status until nearby lands are leased. Therefore, Standard believes the proposed language on lines 2 and 3 on page 2 of HB 186 should be eliminated.

Standard has consistently objected to the removal of provisions providing protection for exploratory wells, delineation wells or development wells which are deepened to new horizons. However, Standard has no objection to the immediate release of information from wells drilled strictly in a development setting. Accordingly, Standard would support provisions relieving the Alaska Oil and Gas Conservation Commission from this administrative burden.

Standard believes the encouragement of the drilling of exploratory wells on all lands is in the overall best interest of the State and is the key to continued development of the oil and gas industry in Alaska. Unless provisions are made for protection of information obtained from this activity, no incentive will exist to engage in exploration in areas where development could require decades.

**TESTIMONY OFFERED ON MARCH 17, 1988
BEFORE THE ALASKA HOUSE OF REPRESENTATIVES
RESOURCES COMMITTEE
REGARDING HOUSE BILL 186**

by J. R. Carson

Thank you, Mr. Chairman. My name is John Carson. I am the Chief Geologist for Chevron U.S.A.'s Western Region. I have been a petroleum geologist for 32 years and have spent nearly two-thirds of that time working on Alaska exploration. I speak today on behalf of Chevron. I appreciate the opportunity to testify on this matter of importance to both the State and the petroleum industry. My remarks will be brief. I will be glad to answer questions.

Chevron opposes Section 2 of House Bill (HB) 186 which amends AS 31.05.035(c). The issue is extended confidentiality of well data. HB 186 proposes restricting eligibility for extended confidentiality to exploratory wells only and to further restrict eligibility to only those wells drilled on state lands.

As we stated in testimony during last year's session with reference to HB 41, Chevron believes the current law is fair, well-intended, and in the best interest of the State as well as the industry. I will not repeat that total testimony here today, but will sum it up by saying we feel that the opportunity to apply for extended confidentiality encourages operators to expend risk capital in the search for oil and gas; they can count on their sensitive data being held from other operators while waiting for a sale to be scheduled and held. Further, the surrounding landowners will receive higher sale bids and leasing bonuses if the data are held confidential. The benefit to all will be increased drilling over a long period of time which should lead to discovery of more reserves. For your further information, we have attached a copy of Chevron's testimony on HB 41 offered last April.

Chevron's objections to Sec. 2 of HB 186 are twofold: first, the limitation of extended confidentiality to exploratory wells, and second, the elimination of extended confidentiality provision for wells drilled on lands other than those owned by the State.

Chevron has no objection to routine development wells being excluded from eligibility; however, problems arise when delineation or development wells drilled below the producing zones are not afforded confidential status. Such wells may not fall in the State's definition of exploratory wells. Often, the data from these wells is highly critical. Provisions should be made to cover these wells as well as stratigraphic tests which are drilled solely to gain information about the rocks in the subsurface.

In discussing the limitation of extended confidentiality to wells drilled on state lands, I would like to make three points: 1) oil knows no political boundaries, 2) the AOGCC's obligation is to protect all landowners, and 3) the makeup of landownership in Alaska, which confirms the need for the current law.

Oil and gas accumulations and their accompanying rock formations have no coincidence with or regard for political boundaries. Consequently, enacting legislation that discriminates as to ownership is futile. Oil is where you find it and accumulations are rarely on one landowner's domain. Prudhoe Bay is a notable exception.

The AOGCC is empowered to subject its policing authority to all lands of the state regardless of ownership (Sec. 1 of HB 186 clarifies this authority). This authority should carry with it an obligation to protect, as well as police, all of the

landowners of the state. Surely, the federal government and private landowners, whether they be Alaska natives or individuals, deserve the same protection as the State. If HB 186 is enacted, operators would tend to drill on state lands to the detriment of the private landowner and the federal government.

An argument for relaxation of extended confidentiality is that the law was enacted for a special situation — the Beaufort Sea Sale of 1979 — and is no longer needed. We believe the policy considerations which gave rise to the law remain wholly applicable today. There are too many variables in the Alaska political scene to assure sales coming off as scheduled. In addition, the 6,640-mile long coast line of Alaska has the same multiple landownership at every mile that was responsible for sale delays in the Beaufort in 1979. The 1979 sale may have been unique in that the two government agencies were able to work out a joint sale. Typically state and federal agencies hold sales at different times in the same area while private landowners lease when the demand exists. This complication of various leasing dates is the reason that extended confidentiality eligibility on all lands is so important.

HB 186 acknowledges that extended confidentiality for exploratory well data is appropriate, but unfairly limits its effect to wells drilled on state lands.

As presently drafted, HB 186 would apply to well data presently on file with the State. We have previously expressed our grave concern with this type of retroactive legislation. The present version of HB 41 recognizes these concerns. That bill has been amended to prevent retroactive consideration. A similar amendment should be made to HB 186.

In summary, AS 31.05.035(c) currently provides protection for all parties concerned; the state, the landowners, and the operators. Continuation of this law unchanged will, in the long run, encourage drilling for oil and gas and, hopefully, in finding new reserves which will offset foreign oil dependency and strengthen Alaska's economy.

Thank you. I will be glad to answer any questions you may have.

ATTACHMENT

TO J. R. CARSON'S STATEMENT

OF MARCH 17, 1988

ATTACHMENT

TESTIMONY OFFERED ON APRIL 28, 1987
BEFORE THE ALASKA HOUSE OF REPRESENTATIVES
FINANCE COMMITTEE REGARDING HB 41 AND
HB COMMITTEE SUBSTITUTE 41

By J. R. Carson

Thank you, Mr. Chairman. My name is John Carson. I am the Chief Geologist for Chevron U.S.A.'s Western Region. I have been a petroleum geologist for 31 years and have spent nearly two-thirds of that time involved with Alaska's exploration problems. I speak today on behalf of Chevron. Chevron appreciates the opportunity to testify on this matter of importance to both the State and the petroleum industry. My remarks will be brief and I will be glad to answer any questions you may have.

Chevron opposed HB Committee Substitute 41 because we feel that the State and the industry's best interests are served under the existing law. The State's best economic interests are served when increased leasing and exploratory drilling are promoted. Given the multiple lessors, harsh climate, long lead times, and uncertain economic conditions, a prudent operator will not drill an exploratory well next to open acreage unless he has some certainty that the open acreage will be sold prior to his well data being released.

Therefore, Chevron contends that exploratory drilling will decline if HB 41 is enacted. Previous testimony has generated much discussion on this topic and, I must admit, it is not an easily proven point from either side. However, I plan to present evidence that I hope will show why we contend that drilling will decrease.

First, historically there is a strong correlation between impending lease sales and exploratory drilling. In the eighteen months prior to the State of Alaska Prudhoe

Bay Sale in September 1969, a total of 17 exploratory wells were drilled on leased parcels adjacent to unleased parcels scheduled for the 1969 sale. Although these operators were hoping to find oil, they were obviously attempting to gain information that would allow them to construct realistic bids on the adjoining parcels.

From 1974 through 1979, no State lease sales were held due to various factors including complications of the Alaska Native Claims Settlement Act. From 1974 through 1976, very few exploratory wells were drilled. In 1976, in anticipation of the joint State-Federal Beaufort Sea Sale scheduled for 1978, exploratory activity picked up. In 1978, when it became apparent that this sale would have to be delayed, the State enacted the current law which allowed operators to apply for extended confidentiality on wells drilled in the vicinity of unleased lands.

The message here, I believe, is clear. Operators are looking beyond the drilling of an exploratory well in an attempt to gain information near unleased parcels.

This leads to my second line of evidence which is a personal one. I have been involved in numerous lease sales in my career, and in every one a major strategic element was the consideration of drilling a well or wells at a location that would gain information for an upcoming sale. In previous discussions on HB 41, there have been statements made to the effect that operators only drill wells to find oil and gas. That is true up to a point. We do not normally drill these offsetting wells without an economically feasible venture, but the strategy involves finding the combination of the best prospect located in the optimum position to gain information on adjacent unleased lands. It is a standard part of our lease sale preparation as I'm certain it is of any aggressive exploratory company. The

aggressive explorer must look to the future. The early release of well data punishes the aggressive explorer.

A second item that I feel needs clarification is the contention that the current law stifles competition by denying a broad common data base to any company that may want to explore in Alaska. Of the more than 100 exploratory wells drilled in Alaska since the enactment of the extended confidentiality in 1978, only 50 have received extensions of confidentiality beyond the normal two-year period. Currently, only 17 wells are in extended confidentiality. Of those 33 wells removed from the list, the average period of extended confidentiality was 2.3 years. A broad common data base does indeed exist.

The companies that are aggressive explorers and have the expertise, capital and commitment to explore Alaska have been here doing so since statehood and are exploring now. Other companies who have not been involved in drilling in Alaska already have a wealth of information available; all but 17 wells are available to them free of cost, courtesy of those who have taken the risks and expended the capital. This bill will not motivate drillers to take exploratory risks. It should be pointed out that the release of over 100 wells drilled on the NPRA has not increased competition and not encouraged any more companies to explore the area other than those who have operated on the North Slope historically.

A third point that I would like to speak to concerns a suggestion that firms which drill exploratory wells in frontier areas do not actually provide free information to other firms, even under a two-year disclosure rule, because the firm doing the drilling is able to recoup most of its costs from other firms through the process of cost equalization. But cost equalization will occur only if the lease owned by the

exploratory firm is later included with other leases in a potential producing unit. In the period since 1978, 77 percent (or 111) of the 144 exploratory wells drilled in Alaska have not been included in a potential producing unit. Furthermore, of the eight potential producing areas where the other 33 wells are located, most have not yet been developed and, as a result, these wells may never have their costs shared. What is most important to note in this regard is that if an exploratory well is incapable of production — and this is true of most exploratory wells — there is generally no cost equalization.

Another contention of HB 41 proponents is that the release of well data to the public will allow safer and more efficient drilling practices. The Alaska Oil and Gas Conservation Commission (AOGCC) already obtains the drilling data from every well drilled. It is aware if there are known drilling hazards in certain formations and it ensures safe drilling practices, because all drilling operations must be permitted by them. The AOGCC currently reviews and approves all drilling plans prior to the drilling of each well in Alaska, without having to divulge well data to the public. Making all well data public will not make drilling operations any safer or more efficient than they already are.

Now I would like to discuss two of the provisions of Committee Substitute for HB 41. First is the provision that the AOGCC shall provide access to all of the confidential well data to the Department of Natural Resources. Chevron strongly objects to this provision. We are, frankly, concerned with security. There are large turnovers with DNR which industry has no control over. Often these former employees end up in industry. We believe this to be an unacceptable risk. Within our own company, we operate on a need-to-know basis. There are wells which Chevron has drilled in Western Region that I am not privy to because I don't need

to know in order to perform my function as Chief Geologist. As previously mentioned, the AOGCC is charged with insuring safe and efficient drilling practices. They need to know, DNR does not. We are particularly concerned about the release of this data from wells on private lands.

A second provision of the Committee Substitute involves continuing the present law as status quo until July 1991. Chevron's reaction to this is that this is an arbitrary date and, like any arbitrary date or time period, overlooks the fact that critical exploratory wells will continue to be drilled in Alaska as long as there is open acreage and a probability that this open acreage will be sold. For your consideration, I present the scenario that few or no critical wells requiring confidentiality may be drilled until after 1991. Although I hope this is not the case, I believe anyone who follows the oil industry in general, and Alaska oil in particular, could consider this possibility.

Chevron hopes that the committee will not change the current law and leave open the possibility that all critical offsetting wells to be drilled in Alaska may receive extended confidentiality.

Thank you. I will be happy to answer any questions.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 16, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the Alaska Oil and Gas Conservation Commission (commission). This bill offers revisions to improve the state's proposed underground injection control (UIC) program for injection wells related to the recovery and production of oil and natural gas (Class II wells). It also reinstates statutory authority for affiliation with the Interstate Oil Compact Commission, conforms certain sections of AS 31.05 to the revised criminal code, and amends the provisions of AS 31.05 relating to the confidentiality of oil and gas well data.

In 1984, CSHB 680 (L&C) was enacted (ch. 91, SLA 1984). It authorized the commission to "take all actions necessary to allow the state to acquire primary enforcement responsibility under 42 U.S.C. 300h-4 (Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300f-300j), for the control of underground injection related to the recovery and production of oil and natural gas." AS 31.05.030(h). Under this authority, the commission prepared an application for a state UIC program for Class II wells, which has been submitted to the U.S. Environmental Protection Agency (EPA) for approval.

In their review, EPA staff identified certain provisions in AS 31.05 which could be amended to improve the state's proposed program. The amendments are being proposed under the terms of a memorandum of agreement between the commission and EPA, Region 10.

Amendment of the criminal provisions of AS 31.05 is recommended by the criminal division of the Department of Law. When the comprehensive rewrite of AS 11 and AS 12 was undertaken in 1981 and 1982, it was determined to be too great a task to attempt amendment of the state's other criminal provisions, scattered throughout the Alaska statutes, at the same time. As this bill amends AS 31.05 for other reasons, I believe it appropriate to take advantage of this

opportunity to "clean up" the criminal provisions of AS 31.05 as well, in order to make them consistent with AS 11 and AS 12, as revised.

Amendment of the confidentiality provisions of AS 31.05.035(c) is recommended by the Alaska Oil and Gas Conservation Commission. The proposed changes are described in detail below.

The amendments to AS 31.05 in the bill are as follows:

Section 1. AS 31.05.027 is amended to eliminate state statutory limitations on the commission's jurisdiction over land of the United States.

Federal law requires that state UIC programs apply to underground injection occurring on property leased or owned by the United States. 42 U.S.C. 300h(b)(1)(D) and 300j-6. However, AS 31.05.027 presently provides in part:

The authority of the commission. . . applies to land of the United States or to land subject to the jurisdiction of the United States only to the extent that control and supervision of conservation of oil and gas and prevention of waste by the United States on its land fails to carry out the intent and purposes of AS 31.05.005 -- 31.05.170, and otherwise applies to federal land so far as an officer of the United States having jurisdiction, or an authorized representative, shall approve any of the provisions of AS 31.05.005 -- 31.05.170 or orders of the commission which affect land.

The jurisdictional limitations of AS 31.05.027 first appeared as territorial legislation enacted in 1955, when Alaska's relationship to the federal government was far more subservient than after Alaska's acceptance into the Union. As a state, Alaska's potential jurisdiction over oil and gas activities on federal land is limited only by constitutional restrictions on the exercise of state police powers. See Myers, The Law of Pooling and Unitization, sec. 11.04 (2d Ed. 1984). AS 31.05.027 asserts less jurisdiction than is now constitutionally permissible, and would be amended by this bill to remove this potential impediment to the commission's regulation of oil and gas activities on federal land.

Section 2: AS 31.05.035(c) is amended to restrict its application to exploratory wells and to limit the period of confidentiality for reports and information from wells on private and federal land to two years.

The existing language of AS 31.05.035(c) requires that certain reports and information from oil and gas wells be kept confidential for two years after submission to the Alaska Oil and Gas Conservation Commission, and for a longer period if authorized by the commissioner of natural resources. The primary purpose of this subsection was to protect the confidentiality of exploratory well data gathered in preparation for the Beaufort Sea joint lease sale. As that sale had been postponed a number of times, oil companies interested in bidding at the sale indicated their need for a legislative provision ensuring the confidentiality of their data until the sale was held. The commission believes that no purpose is served by applying the extended confidentiality provisions of this subsection to development wells. Furthermore, the retention of confidential data from development wells, which consists in large part of core samples, uses up a substantial amount of storage space, which is in short supply and costly. It is anticipated that oil companies will not oppose this change.

AS 31.05.035(c) authorizes extended confidential treatment beyond the initial statutory period of two years for reports and information from oil and gas wells based on a determination of the commissioner of natural resources. Under AS 38.05, the authority of the commissioner is restricted to state land. Presently there is confusion as to whether the commissioner may view confidential data from wells on private and federal land for the limited purpose of making an extended confidentiality determination under AS 31.05, notwithstanding the commissioner's inability to have access to those data under AS 38.05. Amendment of the subsection would clarify that the commissioner's determination under this provision is limited to state land. The amendment would also eliminate the possibility of extended confidential treatment for well data from private and federal land. This latter amendment was proposed by the Alaska Oil and Gas Conservation Commission based on its belief that extended confidential treatment beyond the automatic statutory two year period for reports and information from those wells serves no useful purpose.

Section 3. AS 31.05.070(a) is amended to eliminate the "transactional" immunity provided as a result of a person being compelled to testify or produce documents before the commission or a court, and to make its provisions consistent with the revised criminal code.

As it now reads, AS 31.05.070(a) affords a person transactional immunity if compelled to appear as a witness under that statute. This provision could preclude effective enforcement of the state's UIC requirements if it were to be applied to compel testimony of a witness, and consequently foreclosed subsequent prosecution of that witness for violating a requirement of the state's UIC program. The provision is also inconsistent with the immunity provision of AS 12.50.101. The amendments eliminate the immunity provision. Under new language added to AS 31.05.070(a), a witness who asserts his or her privilege against self-incrimination may be granted immunity and compelled to testify under AS 12.50.101. The immunity will be immunity from the use of his or her testimony and any evidence derived from it. Language that disallows self-incrimination as a ground for excusing attendance, testimony, or production of books and records, is also deleted. That language is potentially unconstitutional, and is unnecessary.

AS 31.05.070(a) also provides that a compelled witness is not exempt from prosecution and punishment for perjury committed while testifying. This provision would also be repealed because it duplicates provisions of the criminal code.

Section 4. New AS 31.05.141 would be placed in a "miscellaneous provisions" article in AS 31.05, to reinstate express authority to affiliate with the Interstate Oil Compact Commission (IOCC). The new statute is patterned after Vt. Stat. Ann., tit. 29, sec. 565 (1983). Section 15, ch. 40, SLA 1955, which created the Oil and Gas Conservation Commission, authorized affiliation with the IOCC. After statehood, sec. 15 became AS 31.05.130 and 31.05.140. Section 2, ch. 247, SLA 1970, repealed AS 31.05.130 and 31.05.140, purging AS 31.05 of that authorization. Of note is the fact that the state is still a dues-paying member of the IOCC.

Sections 5 and 6. AS 31.05.150(a) and (b) are amended to eliminate the "wilful" standard from consideration in the imposition and recovery of civil penalties; to increase the civil penalties that may be imposed; to make sec. 150's

provisions consistent with the provisions of the revised criminal code; and to establish criminal liability for violations of the commission's regulations and orders.

AS 31.05.150(a) currently imposes civil penalties for wilful violations of AS 31.05 or regulations or orders of the commission. However, there is no indication of the type of wilfulness required.

Use of the term "wilfully" in criminal statutes has traditionally required a showing of bad intent. Although evidence of bad intent is generally not required to impose civil penalties, amendment of the statute to eliminate the term would remove any doubt as to the ability of the state to impose civil penalties in the absence of evidence of bad intent.

The amendments would increase the amount of civil penalties imposable under AS 31.05.150(a) from "not more than \$1,000" to "no more than \$5,000 per day for each day of violation." The \$1,000 amount, which was first established in 1955, is now inadequate to deter violations. The increased penalty would more effectively accomplish that.

The bill would amend AS 31.05.150(b), which imposes criminal liability for falsifying records and committing similar offenses, to make the description of those offenses consistent with AS 11.46.630(a)(1) -- (4). The class A misdemeanor penalty classification raises the possible maximum term of imprisonment to one year but the amount of the fine is unaffected.

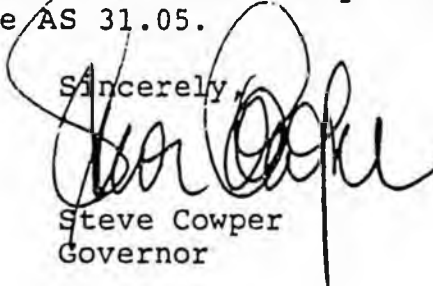
Section 7. AS 31.05.150 is amended by adding a new subsection (f), imposing criminal liability on a person who knowingly violates a regulation or order of the commission.

Section 8. This section identifies a somewhat unusual adoption of a court rule. It takes a cautious approach, to assure compliance with art. IV, sec. 15, of the Alaska Constitution, regarding legislative change of a court rule. Although Rule 732 of the Uniform Rules of Criminal Procedure (promulgated by the National Conference of Commissioners on Uniform State Laws in 1974) does not appear in the publication of Alaska Court Rules, it was adopted by the Alaska Supreme Court, under its constitutional rule-making authority, in State v. Serdahely, 635 P.2d 1182 (Alaska 1981). A Superior Court judge has held that a legislative change of the substance of that rule requires the same procedures as for a legislative change of any other court rule.

Thus, sec. 8 of this bill cites the court rule and describes the change, as required by Rule 39(e), Uniform Rules of the Alaska State Legislature. Also, in compliance with that legislative rule, the title of the bill mentions the court-rule change. If this bill passes but the section making that change does not receive a two-thirds vote in favor of it, and the amended statute is challenged in court, the Alaska Supreme Court will, of course, have the final word on whether those procedures were necessary.

I urge your prompt action on this measure to strengthen the state's UIC program, to reinstate authority to affiliate with the IOCC, and to update AS 31.05.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over the word "Sincerely,".

Steve Cowper
Governor

ATTACHMENT

TO J. R. CARSON'S STATEMENT

OF MARCH 17, 1988

ATTACHMENT

TESTIMONY OFFERED ON APRIL 28, 1987
BEFORE THE ALASKA HOUSE OF REPRESENTATIVES
FINANCE COMMITTEE REGARDING HB 41 AND
HB COMMITTEE SUBSTITUTE 41

By J. R. Carson

Thank you, Mr. Chairman. My name is John Carson. I am the Chief Geologist for Chevron U.S.A.'s Western Region. I have been a petroleum geologist for 31 years and have spent nearly two-thirds of that time involved with Alaska's exploration problems. I speak today on behalf of Chevron. Chevron appreciates the opportunity to testify on this matter of importance to both the State and the petroleum industry. My remarks will be brief and I will be glad to answer any questions you may have.

Chevron opposed HB Committee Substitute 41 because we feel that the State and the industry's best interests are served under the existing law. The State's best economic interests are served when increased leasing and exploratory drilling are promoted. Given the multiple lessors, harsh climate, long lead times, and uncertain economic conditions, a prudent operator will not drill an exploratory well next to open acreage unless he has some certainty that the open acreage will be sold prior to his well data being released.

Therefore, Chevron contends that exploratory drilling will decline if HB 41 is enacted. Previous testimony has generated much discussion on this topic and, I must admit, it is not an easily proven point from either side. However, I plan to present evidence that I hope will show why we contend that drilling will decrease.

First, historically there is a strong correlation between impending lease sales and exploratory drilling. In the eighteen months prior to the State of Alaska Prudhoe

Bay Sale in September 1969, a total of 17 exploratory wells were drilled on leased parcels adjacent to unleased parcels scheduled for the 1969 sale. Although these operators were hoping to find oil, they were obviously attempting to gain information that would allow them to construct realistic bids on the adjoining parcels.

From 1974 through 1979, no State lease sales were held due to various factors including complications of the Alaska Native Claims Settlement Act. From 1974 through 1976, very few exploratory wells were drilled. In 1976, in anticipation of the joint State-Federal Beaufort Sea Sale scheduled for 1978, exploratory activity picked up. In 1978, when it became apparent that this sale would have to be delayed, the State enacted the current law which allowed operators to apply for extended confidentiality on wells drilled in the vicinity of unleased lands.

The message here, I believe, is clear. Operators are looking beyond the drilling of an exploratory well in an attempt to gain information near unleased parcels.

This leads to my second line of evidence which is a personal one. I have been involved in numerous lease sales in my career, and in every one a major strategic element was the consideration of drilling a well or wells at a location that would gain information for an upcoming sale. In previous discussions on HB 41, there have been statements made to the effect that operators only drill wells to find oil and gas. That is true up to a point. We do not normally drill these offsetting wells without an economically feasible venture, but the strategy involves finding the combination of the best prospect located in the optimum position to gain information on adjacent unleased lands. It is a standard part of our lease sale preparation as I'm certain it is of any aggressive exploratory company. The

aggressive explorer must look to the future. The early release of well data punishes the aggressive explorer.

A second item that I feel needs clarification is the contention that the current law stifles competition by denying a broad common data base to any company that may want to explore in Alaska. Of the more than 100 exploratory wells drilled in Alaska since the enactment of the extended confidentiality in 1978, only 50 have received extensions of confidentiality beyond the normal two-year period. Currently, only 17 wells are in extended confidentiality. Of those 33 wells removed from the list, the average period of extended confidentiality was 2.3 years. A broad common data base does indeed exist.

The companies that are aggressive explorers and have the expertise, capital and commitment to explore Alaska have been here doing so since statehood and are exploring now. Other companies who have not been involved in drilling in Alaska already have a wealth of information available; all but 17 wells are available to them free of cost, courtesy of those who have taken the risks and expended the capital. This bill will not motivate drillers to take exploratory risks. It should be pointed out that the release of over 100 wells drilled on the NPRA has not increased competition and not encouraged any more companies to explore the area other than those who have operated on the North Slope historically.

A third point that I would like to speak to concerns a suggestion that firms which drill exploratory wells in frontier areas do not actually provide free information to other firms, even under a two-year disclosure rule, because the firm doing the drilling is able to recoup most of its costs from other firms through the process of cost equalization. But cost equalization will occur only if the lease owned by the

exploratory firm is later included with other leases in a potential producing unit. In the period since 1978, 77 percent (or 111) of the 144 exploratory wells drilled in Alaska have not been included in a potential producing unit. Furthermore, of the eight potential producing areas where the other 33 wells are located, most have not yet been developed and, as a result, these wells may never have their costs shared. What is most important to note in this regard is that if an exploratory well is incapable of production -- and this is true of most exploratory wells -- there is generally no cost equalization.

Another contention of HB 41 proponents is that the release of well data to the public will allow safer and more efficient drilling practices. The Alaska Oil and Gas Conservation Commission (AOGCC) already obtains the drilling data from every well drilled. It is aware if there are known drilling hazards in certain formations and it ensures safe drilling practices, because all drilling operations must be permitted by them. The AOGCC currently reviews and approves all drilling plans prior to the drilling of each well in Alaska, without having to divulge well data to the public. Making all well data public will not make drilling operations any safer or more efficient than they already are.

Now I would like to discuss two of the provisions of Committee Substitute for HB 41. First is the provision that the AOGCC shall provide access to all of the confidential well data to the Department of Natural Resources. Chevron strongly objects to this provision. We are, frankly, concerned with security. There are large turnovers with DNR which industry has no control over. Often these former employees end up in industry. We believe this to be an unacceptable risk. Within our own company, we operate on a need-to-know basis. There are wells which Chevron has drilled in Western Region that I am not privy to because I don't need

to know in order to perform my function as Chief Geologist. As previously mentioned, the AOGCC is charged with insuring safe and efficient drilling practices. They need to know, DNR does not. We are particularly concerned about the release of this data from wells on private lands.

A second provision of the Committee Substitute involves continuing the present law as status quo until July 1991. Chevron's reaction to this is that this is an arbitrary date and, like any arbitrary date or time period, overlooks the fact that critical exploratory wells will continue to be drilled in Alaska as long as there is open acreage and a probability that this open acreage will be sold. For your consideration, I present the scenario that few or no critical wells requiring confidentiality may be drilled until after 1991. Although I hope this is not the case, I believe anyone who follows the oil industry in general, and Alaska oil in particular, could consider this possibility.

Chevron hopes that the committee will not change the current law and leave open the possibility that all critical offsetting wells to be drilled in Alaska may receive extended confidentiality.

Thank you. I will be happy to answer any questions.

HB

193

Alaska State Legislature

REPRESENTATIVE
MIKE W. MILLER
P.O. Box 55094
North Pole, Alaska 99705
(907) 488-2687

District 18
North Pole
Badger Road
Eielson
Moose Creek
Saicha



White in Juneau
Pouch V
Juneau, Alaska 99811
(907) 465-4976

House of Representatives

MEMORANDUM

TO: Representative Sam Cotten

FROM: Representative Mike Miller

RE: House Bill 193, "An Act relating to the sale of inherited parcels."

DATE: 4/7/87

House Bill 193 is before the Resources Committee today for your consideration. This bill is designed to address a problem that has developed from the remote parcel disposal statutes that were repealed in 1984.

Former AS 38.05.077 and 38.05.078 allowed individuals to stake the boundaries of a remote parcel on state land and enter into a five year renewable lease for use of the property. Prior to the expiration of the lease and following a survey of the property, these individuals were granted the right to purchase the parcel at its fair market value at the time of lease.

In order to avoid land speculation, AS 38.05.077 clearly determined that "A remote parcel lease may not be assigned, conveyed or otherwise transferred, but rights under the lease may devolve by testate or intestate succession." Likewise, AS 38.05.078 stated "a contract of sale for land in a remote parcel shall contain the following conditions: 1) the land may not be sold, leased, or otherwise conveyed before 10 years after the date the contract of sale is signed by the purchaser, but title to the land may devolve by testate or intestate succession."

These statutory restrictions do not take into consideration that a person receiving such a lease or property right, through testate or intestate succession, may not have the desire or means to fulfill the terms of the lease or contract of sale and therefore, would lose their inheritance.

Passage of HB 193 would alleviate this problem by allowing an individual who has received a remote parcel lease or contract of sale, through testate or intestate succession, to sell their interest in the parcel. The State would retain its protection against land speculation since the right to make such a sale would only be triggered by the death of the individual holding the property rights.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLCUGHBY AVE.
JUNEAU, ALASKA 99801-1798
PHONE: (907) 455-2400

March 25, 1987

The Honorable Adelheid Herrmann
The Honorable Sam Cotten
Co-Chairs, House Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatives Herrmann and Cotten:

Subject: HB 193, an act relating to the sale of inherited remote parcels.

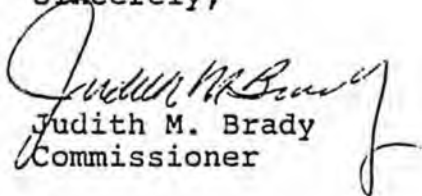
Position: The Department of Natural Resources supports the proposed changes in AS 38.09.100, lessees of remote parcels.

Background: The original drafters of AS 38.09.100, the statute that sets up leasing of remote parcels, did not allow remote parcel leases to be assigned in order to reduce the possibilities for speculation. HB 193 would allow the assignment of a remote parcel lease only in the event of the death of the lessee. The incidents to which this change would apply are few, because the remote parcel program was discontinued in 1983.

Recommendation: The Department of Natural Resources supports the proposed changes in AS 38.09.100.

If you would like additional information or have any questions, please contact my office.

Sincerely,


Judith M. Brady
Commissioner

Committee Members
Bill Sponsors
George Sullivan
Rod Swope

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 193
Publish Date : _____

REQUEST: _____
Revision Date: _____
Title: An act relating to the sale of inherited remote parcels
Sponsor: Miller
Requestor: House Resources

Agency Affected: Natural Resources
BRU: Land and Water Management
Components : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The Department of Natural Resources anticipates no additional staff time or expenditures associated with this legislation.

Prepared by: Paula Burgess Phone: 465-3400
Division: Land and Water Management Date: 3/25/87

Approved by Commissioner: *W. J. Miller* Date: 3/25/87
Agency: Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

HOUSE COMMITTEE REPORT

4/8

(9)

Date referred: 3/18/87

FURTHER REFERRALS: Judiciary

DATE: 4-8-87

The Resources Committee has considered HB 193

"An Act relating to the sale of inherited remote parcels."

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

Sen Gt

Walter Herrmann

Heinrich Sprungel

W. Davidson

John L...

SIGNING OTHER RECOMMENDATIONS:

Sen Gt

Chairman's signature

Alaska State Legislature

REPRESENTATIVE
MIKE W. MILLER
P.O. Box 55094
North Pole, Alaska 99705
(907) 488-2687

District 18
North Pole
Badger Road
Eielson
Moose Creek
Salcha



White in Juneau
Pouch V
Juneau, Alaska 99811
(907) 465-4976

House of Representatives

MEMORANDUM

TO: Representative Sam Coffen

FROM: Representative Mike Miller

RE: House Bill 193, "An Act relating to the sale of inherited parcels."

DATE: 4/7/87

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In order to avoid land speculation, AS 38.05.077 clearly determined that "A remote parcel lease may not be assigned, conveyed or otherwise transferred, but rights under the lease may devolve by testate or intestate succession." Likewise, AS 38.05.078 stated "a contract of sale for land in a remote parcel shall containing the following conditions: 1) the land may not be sold, leased, or otherwise conveyed before 10 years after the date the contract of sale is signed by the purchaser, but title to the land may devolve by testate or intestate succession."

These statutory restrictions do not take into consideration that a person receiving such a lease or property right, through testate or intestate succession, may not have the desire or means to fulfill the terms of the lease or contract of sale and therefore, would lose their inheritance.

Passage of HB 193 would alleviate this problem by allowing an individual who has received a remote parcel lease or contract of sale, through testate or intestate succession, to sell their interest in the parcel. The State would retain its protection against land speculation since the right to make such a sale would only be triggered by the death of the individual holding the property rights.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLCOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 455-2400

March 25, 1987

The Honorable Adelheid Herrmann
The Honorable Sam Cotten
Co-Chairs, House Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatives Herrmann and Cotten:

Subject: HB 193, an act relating to the sale of inherited remote parcels.

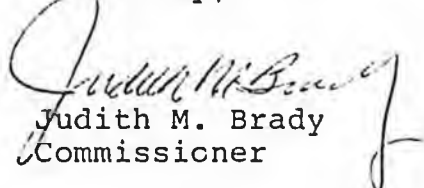
Position: The Department of Natural Resources supports the proposed changes in AS 38.09.100, lessees of remote parcels.

Background: The original drafters of AS 38.09.100, the statute that sets up leasing of remote parcels, did not allow remote parcel leases to be assigned in order to reduce the possibilities for speculation. HB 193 would allow the assignment of a remote parcel lease only in the event of the death of the lessee. The incidents to which this change would apply are few, because the remote parcel program was discontinued in 1983.

Recommendation: The Department of Natural Resources supports the proposed changes in AS 38.09.100.

If you would like additional information or have any questions, please contact my office.

Sincerely,


Judith M. Brady
Commissioner

Committee Members
Bill Sponsors
George Sullivan
Rod Swope

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: HB 193
Publish Date: _____

Revision Date: _____
Title: An act relating to the sale of inherited remote parcels
Sponsor: Miller
Requestor: House Resources

Agency Affected: Natural Resources
BRU: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
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SUPPLIES						
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TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The Department of Natural Resources anticipates no additional staff time or expenditures associated with this legislation.

Prepared by: Paula Burgess
Division: Land and Water Management

Phone: 465-3400
Date: 3/25/87

Approved by Commissioner: *Judith M. Brant*
Agency: Natural Resources

Date: 3/25/87

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)
 - Senate Secretary

HB

198

TO: Alaska Land Use Council
THROUGH: Staff Committee
FROM: Trespass Work Group
SUBJECT: Recommendations on Trespass
DATE: September 11, 1985

In January 1985, the Council adopted a work item addressing unauthorized use and trespass on both public and private lands. A work group including the following agencies was established:

- Alaska Federation of Natives (Lead Agency)
- State of Alaska, Department of Natural Resources
- State of Alaska, Department of Fish and Game
- State of Alaska, Department of Law, District Attorney's Office (ad hoc)
- State of Alaska, Department of Public Safety (ad hoc)
- U.S. Dept. of Interior, Bureau of Land Management
- U.S. Dept. of Agriculture, Forest Service
- U.S. Dept. of Interior, Fish and Wildlife Service
- U.S. Dept. of Interior, National Park Service
- U.S. Dept. of Interior, Bureau of Indian Affairs (ad hoc)

Under the leadership of the Alaska Federation of Natives, the group has developed a comprehensive set of recommendations on the subject. The primary focus of attention has been to identify ways to foster cooperation among landowners and recommend actions which may be taken by public agencies and private landowners to prevent and alleviate the growing problems of trespass and unauthorized use especially inadvertent use which constitutes the majority of the problems now occurring.

The Work Group spent several months identifying ways to foster cooperation among landowners in terms of preventing and abating trespass and unauthorized use on public and private land.

The underlying direction of the work group's recommendations is a good neighbor approach which encourages public and private land owners to cooperate to prevent trespass on adjoining land. The recommendations of the group are not intended to conflict with or contradict the responsibility of each landowner to enforce applicable laws and regulations on his own land to prevent trespass or unauthorized use.

The work group paid considerable attention to the question of who should be responsible for implementing each recommendation. In a number of cases the entity that would be most appropriate to implement the recommendation is identified in the report. It must be recognized, however, that the affected owner, public or private, has the primary responsibility for initiating actions to prevent trespass and working with neighboring landowners to develop a solution.

Some of these recommendations will require additional funding. These recommendations should be referred to by agencies as they prepare their respective budgets so that they may requisition funds needed to fulfill their responsibilities associated with trespass enforcement and abatement.

Members of the Trespass Work Group:

Mike Keimige

Chairman
Alaska Federation of Natives

Don Inken for

Carl M. Kanagawa

State of Alaska
Dept. of Fish & Game

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RECOMMENDATIONS

WORK ITEM #1 - Recommend specific activities that offer public education intended to prevent unauthorized use of private and public lands.

A. User Information Maps¹ and Brochures Illustrating Land Ownership

Through better knowledge of the state's land ownership pattern, a significant amount of the inadvertent trespass activity could be prevented. In order to remedy this problem, easy to understand maps and brochures depicting land ownership should be prepared and made readily available to users of state, federal and other public land. These maps or brochures should be prepared for those areas which receive high public use and should show, in as much detail as possible, the land status for the area. Once completed, these maps should be made available to the public through public agencies, public information facilities, appropriate retail outlets and Native corporation offices. It is recommended that agencies preparing maps and brochures follow the steps outlined below.

1. Identification of areas subject to high use and trespass - Sites and easements which are subject to high public use should be identified by the landowner. It is recommended that agencies notify and solicit this information from regional corporations and other major landowners² prior to preparing user information maps. Such priority areas would most likely include the railbelt and roadbelt, the Bristol Bay area, specific parts of southeast Alaska, well used river corridors, major recreation areas, and transportation corridors. By identifying areas subject to trespass in these priority areas, it is possible to determine where land ownership maps are most needed. Due to funding priorities it will be necessary to focus first on those areas subject to high use and frequent trespass problems.
2. Preparation of maps - It is recommended that public agencies and Native corporations give due consideration to trespass abatement by establishing priorities for preparation of user information maps. It is recommended, prior to an agency's completion of these maps that major landowners review the map, when practical or reasonably necessary, to ensure that the land ownership information is accurately depicted.

¹General User Information Maps - These maps are of a general nature and should show land ownership boundaries and land status information. These maps are generally available for distribution to the public and are meant to inform the user about general topics concerning Alaska including land use, sources for additional information, or availability of areas for recreational use.

²Major landowners-Since the passage of ANCSA, large tracts of both state and federal land have been transferred to private landowners. These landowners include the Alaska Native regional corporations, village corporations, or other parties receiving tracts of land. Other major landowners include state and federal agencies such as the Bureau of Land Management and the State of Alaska, Department of Natural Resources.

- a. Easement Atlas - The existing easement atlas project being carried out by the State of Alaska, Department of Natural Resources (DNR) is an example of a mapping program which meets the need of providing accurate land ownership maps. Under this project, DNR is preparing map atlases for the Bristol Bay and Copper River Basin areas. These atlases are made up of maps at 1:63,360 scale. They show the location of all valid public easements and rights-of-way, as well as the land status for those areas. If these atlases prove to be beneficial, they should be prepared for other areas of the state subject to high public use.
 - b. Native Corporation Maps - It is recommended that Native corporations also prepare maps of their land status which could be posted in regional centers, agency offices, Native corporation offices, hunting and fishing lodges, etc.
3. Distribution of Maps - It is recommended that the distribution of user information maps, whether free or at a nominal cost, be expanded. Whenever practical, appropriate land ownership maps should be made available and distributed to the following: aircharter businesses, guides, hunters, fishermen, campers and others who use public land. As they are completed, the DNR easement atlases should be distributed through state and federal agency offices.

B. Language for Public Documents Regarding Trespass and Unauthorized Use

It is recommended that appropriate language regarding the use of private land appear on all public documents (i.e., brochures, maps or informational leaflets) on land use, recreation, hunting and fishing, as well as any other documents which are appropriate. An example of wording that might be useful for this purpose is set forth below:

"Both small and large tracts of privately owned land are located within and adjacent to the boundaries of publicly owned land throughout the state. This private land is not open to public use or travel without permission from the landowner, unless public easements have been reserved or there is a valid existing public right-of-way. Navigable rivers passing through private land are available for use up to the ordinary high water mark. Tidelands are also available for public use up to the mean high tide mark.

Invasion of community and camp privacy is a concern of many rural residents. Be sensitive to local concerns. Trapping cabins and tent camps are essential to the livelihood of many rural residents. They should not be used except in case of real emergency. They may appear abandoned, especially in late summer when the brush is tall. The owners will return though and will need everything they left for the coming winter. The early trappers and wilderness travelers established an honorable tradition of respecting camps and cabins - a tradition that continues today.

Users should check with the _____ (insert appropriate land management agency) to determine the location of public land and public easements across private land. For information regarding the use of private land contact the landowner. Use or travel across private land or an unauthorized use of a public easement could be considered criminal trespass."

C. General Public Education Program on Trespass

A general public education program focusing on trespass is recommended and necessary. It should emphasize Alaska land ownership patterns, the need to prevent trespass and unauthorized use and respect private and public land. This public education program should be directed at both local residents and visitors. Outlined below are several suggestions for educating the public about trespass and unauthorized use.

1. Public Service Announcements - Public service announcements for radio and television should be developed and presented to the Alaska public by concerned parties. These announcements should inform the public about land ownership patterns and land use policies within Alaska. Such announcements could be developed on a state-wide basis or for particular use areas, such as wildlife refuges, parks or regional geographic areas. The Alaska Land Use Council will encourage interagency efforts to develop general statewide public service announcements. It is expected that both public agencies and Native organizations will participate in preparing and presenting public service announcements for specific areas or uses.

Whenever possible, these announcements should be aired on programs dealing with hunting, fishing, recreation, etc. The announcements should emphasize that it is an individual's responsibility to become familiar with the land ownership patterns and trespass policies and laws for specific areas in Alaska. To the extent possible, an announcement should include an explanation of the allowable activities and uses for the different categories of public and private land in a particular area. It should also describe the means by which the public may become familiar with land ownership patterns, trespass laws and policies.

2. Visitor Centers and Other Public Information Centers - When appropriate, available information on land ownership and land use and trespass policies should be integrated into visitor center materials, as well as other public information outlets or programs. It is recommended that the visitor centers have maps, easement atlases, Native land policies and land ownership brochures available. This information should be provided to the visitor centers by the appropriate entity and it should include a list of contacts for additional information concerning the use of public and private land. Visitor center and public information personnel should be able to inform the public about the location of large tracts of private land near or adjacent to public land.
3. Native Corporation Brochures and Actions - It is recommended that the Alaska Federation of Natives prepare an informational brochure describing Native land ownership in the state and the need to respect this privately owned land. Those Native corporations and public agencies which have serious trespass problems should consider setting up booths at sports fairs and other public events to explain their land management policies and practices.
4. Publications - Whenever possible, descriptions of existing land management policies and appropriate maps showing land ownership patterns should be included in magazines, tourist brochures, publications such as the Alaska Milepost, etc. Recently, Northwest Publishing has offered to include this information in their Milepost publications. Public and private landowners are encouraged to provide this information to these periodicals.

5. Central Depository For Land Use Policies and DNR Easement Atlases - A central depository should be established for information on land use policies and copies of the DNR easement atlases. Land owners are responsible for ensuring that the information on file is current. It is recommended that this information be updated on a regular basis. Possible locations for this purpose include visitor centers or the Department of Interior Resource Library. Such a depository will provide both landowners and the general public with a central location to acquire information about land use policies and public easement information. Official land status information will continue to be available at existing land records offices.
6. School Education Program - It is recommended that a land information program be developed for use in public schools throughout the state. This program could include audio - visual aids and other educational materials on the history of the various land acts and programs which have affected land ownership and land use in Alaska; specifically this should include the Alaska Native Claims Settlement Act, the Alaska National Interest Lands Conservation Act, and the Alaska Statehood Act. The program could also include information on current land management policies, including trespass, throughout Alaska. It is recommended that the University of Alaska and Department of Education be requested to produce the program.

D. Land Use Policies

It is recommended that Native corporations establish policies for the use of their land. These policies should be made available for reference at the central depository and visitor information centers.

E. Cooperation

It is recommended that neighboring public and private landowners work together to provide the general public with land use policies and permit information concerning public and private land. Private landowners should provide information of this nature to public agencies managing adjacent land. Once this information has been provided, public agencies should make the information available to the general public through their offices. Agency personnel will not be expected to interpret the Native land policy information or to issue permits. It is recommended that public agencies make similar information available to the Native corporations in order that they may distribute the information to the public.

F. Landowner Education Program

It is recommended that guidelines and/or educational programs be developed to provide private landowners with information regarding management and protection of privately owned land from trespass and unauthorized use. The education program should focus on landowner rights, duties and liabilities with regard to detaining trespassers, methods for pursuing criminal and civil action, reporting procedures for trespass activities, land management options, and permitting systems for commercial and non-commercial uses. This program may include the use of: videos, public service announcements, brochures, etc. It should be a cooperative effort between private landowners and public agencies. It is recommended that the Alaska Federation of Natives, Alaska Native Foundation and other regional profit and non-profit Native corporations explore and implement this program.

WORK ITEM #2 - Discuss known and suspected problems of unauthorized use and explore ways land and resource managers may be able to assist each other, as permitted by applicable laws, in implementing their respective responsibilities for enforcement and management to prevent unauthorized use. Among other things the group should identify problems and solutions associated with unauthorized access and travel across public land, permitting systems and other trespass prevention measures.

A. Cooperation & Trespass Prevention Measures

Agencies and private land owners are encouraged to cooperate and develop informal, and where appropriate formal agreements, which will encourage landowners to report to the appropriate landowner instances of unauthorized use and trespass on adjacent land. In the limited instances where formal agreements are advisable, the agreements should not be burdened with liability clauses regarding failure to report trespass incidents. The agreement should generally specify the types of activities which will constitute unauthorized use or trespass for the purpose of reporting such actions. It is recommended that landowners be responsible for informing their neighbors about their land management policies and priorities. It will be necessary for private landowners to provide such policies to agencies so they will know when to inform a land owner of a possible incident of trespass or unauthorized use. Generally, it is recommended that land managers concentrate on reporting trespass actions which cause resource damage, could lead to lasting resource damage, are a taking of timber or a mineral resource, represent continued unauthorized commercial use, or are activities which might lead to adverse possession.

1. Land Bank Agreements - Land Bank agreements may be used as a vehicle between public and Native land owners to report suspected trespass incidents. Unless otherwise specified, such agreements should not impose a liability upon the reporting agency.
2. Land Exchanges/Boundary Adjustments - In some high use areas, land exchanges or minor boundary adjustments may remedy trespass problems. It is recommended that a program be implemented whereby Native corporations could request public land management agencies to make land exchanges, boundary adjustments and/or acquire public easements to remedy or ameliorate chronic trespass problems.

B. Program Development

Agency heads, Native corporation officers and other appropriate policy representatives should provide direction on the development of programs and policies to prevent and deal with trespass problems.

1. Identification and on-site management of site and trail easements - It is recommended that land owners and public agencies cooperatively identify easements subject to high public use. Programs should be implemented by the appropriate manager which ensure that these sites and trails receive priority in terms of posting and management. Providing appropriate facilities such as outhouses and litter barrels, as well as providing trail maintenance and clean-up programs, should be considered in those areas receiving high use. The Dillingham effort could be used as a model for this program. In this case, the BLM provided signs regarding public use of an ANCSA §17(b) easement, and in turn, the village corporation posted the signs along the easements on their land.

Public agencies and Native corporations should investigate the use of funding sources, such as DOT/PF's local roads and trails program monies, to help finance the identification and placement of signs along high use areas and public easements. The agency with primary management responsibility should develop standardized signs to identify authorized uses of easements and high use public areas.

2. Land Use Planning - Land use planning efforts for public and private land should take into consideration the impact of various activities which might cause trespass problems. Land use plans should identify heavily used areas which are open to public use.
3. Native Owned Land - It is suggested that Native corporations consider identifying areas on Native owned lands which may be open to public use for specific purposes. If opened, this land could be made available on a permit basis or non-permit basis. The Native corporations should also identify those areas which require the greatest protection against trespass and unauthorized use. They should then establish priorities for trespass abatement and for protecting specific areas against trespass and unauthorized use.

C. Law Enforcement

It is the perception of the Native community that trespass laws are not being adequately enforced, nor are trespass complaints being investigated in a timely manner. It is recommended that the Department of Public Safety investigate various mechanisms to improve upon the enforcement of trespass laws.

WORK ITEM #3 - Identify activities that may lead to trespass and unauthorized use on adjacent land and recommend possible ameliorating actions.

A. Coordination of Planning and Development Efforts

It is recommended that adjacent landowners coordinate with one another when developing activities that would attract the public since certain facilities or activities tend to have a magnetic quality which attracts or encourages the public use. Landowners should strive to implement their programs in a way to minimize activities or development which create unwanted trespass problems for adjacent landowners.

B. Uses Along Public Waters, Tidelands and Submerged Lands

It is recommended that agencies and private landowners work together to minimize trespass and unauthorized use problems which might occur on private uplands because of activities which are permitted along public waters, tidelands and submerged lands.

Legislative Action

After considerable discussion, the work group felt that recommending specific changes in state law was inappropriate as part of its recommended actions for trespass abatement. The work group, however, recognized that existing laws may not provide for effective control of trespass on public and private land; therefore legislative action may be needed.

Although land use activities have largely remained unchanged in Alaska since the passage of ANCSA and ANILCA, land ownership and management patterns have changed dramatically. Areas previously open for virtually unregulated public use are no longer available for that same purpose.

Existing state trespass laws evolved when private land ownership was generally confined to small blocks of land, usually 160 acres or less in size. The reality now is that in addition to the usual small blocks of private land, Native village and regional corporations own large blocks of land, thousands and even millions of acres in size. Boundaries between public and privately owned land are usually poorly defined, difficult to distinguish on the ground, and may extend for literally hundreds of miles.

Changing land ownership patterns require, at the minimum, a thorough review of current laws with respect to posting requirements and penalties currently applicable to trespass violations, as well as a review of state law authorizing adverse possession to determine whether it still serves a useful purpose in Alaska property law. Additional attention should be directed to the unauthorized taking of resources, such as sand, gravel and timber, from private land since current civil and/or criminal laws and penalties for such unauthorized use may be inadequate.

The work group also agreed that liability laws should be examined and amended, if necessary, to limit the liability on the part of the land owner or manager for public use of their land. Limitations on liability might encourage private landowners to permit public use of their land.

The work group recognizes the importance of the legislative recommendations set forth by Jim Messick in the Department of Public Safety report, Trespass and Unauthorized Use of Native Lands in Alaska. The report may well serve as a starting point for a thorough review of all state laws which currently apply to trespass on private land.

In light of the massive changes in land ownership patterns, AFN and private landowners should undertake a critical review of all state laws dealing with trespass, unauthorized use of privately owned land and resources, and private landowner liabilities. The goal of such a review should be to recommend legislative action, if deemed necessary, to achieve two objectives: 1) require practical and reasonable measures for protecting private land and associated resources from trespass; and 2) reduce, as much as possible, the risk that land owners take if they allow recreational use of their land by the general public.

Re: Sponsor Substitute for HB 660 "An Act regulating the use of land."

Section by Section Analysis

This legislation is designed to provide landowners with better regulations regarding the use and management of privately owned lands.

Section 1

Section 1 adds a new chapter to Title 5 which addresses recreational use of private land. The purpose of this amendment is to encourage private landowners to open their lands to recreational use by the public. In exchange for opening private lands to public use, landowners would be protected from liability claims by recreational users.

Under the proposed statute, except as otherwise provided in the Act, a landowner will owe no duty of care to keep the land safe for entry or use by others for recreational purposes.¹ Nor will a landowner be required to warn persons using the land of a dangerous condition, use, structure or activity on the land, so long as the use is recreational in character. Furthermore, under the Act, an owner who directly or indirectly invites a person to use his property for recreational purposes doesn't extend any assurance of safety, confer legal status as a licensee or invitee, or assume responsibility for any injury to users caused by other recreational users. The Act, thereby, places invitees, licensees, and trespassers on the same footing if they are recreational users. Should an individual file suit against a landowner, it eliminates the need for an inquiry into the owner's consent or lack thereof.

The Act does, however, limit a landowner's liability in two specific cases. First of all, it does not limit a landowner's liability for a willful or malicious failure to guard against a dangerous condition, structure, or activity. This duty is analogous to the minimal standard of care owed to trespassers at common law.² In addition, the immunity of the statute does not apply to the landowner who charges for the recreational use of his land, excluding from this exception lease fees paid by the state and a municipal government or business. This exception preserves the common-law duty of the landowner when he has an economic interest in the presence of another.³

However, the Act does not relieve an individual using the land for recreation from an obligation to exercise care in relation to his use of the land and activities on the land. Recreational users will be liable for any damage to the property they cause during use of the property. The Act applies to an owner of land leased to the state, unless otherwise provided in writing.

The over-all effect of the Act, in summary, is to relieve an owner of land of any duty of care to persons using it for recreational purposes, unless he charges for use of the land, or his acts are willful or malicious. The implementation of the Act should encourage private landowners to open their land to the public for recreational use.

Presently, forty-three states, excluding Alaska, Nevada, Arizona, Rhode Island, Missouri and Mississippi have adopted laws which limit the liability of landowners whose lands are used by the public for recreational purposes such as hunting, fishing and sightseeing.⁴ States have adopted these statutes to encourage landowners to open their lands to the public for recreational use. In exchange for opening their land, the private landowner's liability is then limited. These recreational use statutes represent a reverse in the trend toward extending land owner liability. These laws are based upon a special public policy directed toward a limited classification of users.⁵ These statutes usually represent a tradeoff whereby the landowner is relieved of certain tort liabilities when he gratuitously allows the public to use his land for recreational purposes.⁶ Statutes of this kind, including those not based on

the Model Act, have been held constitutional against equal protection challenges as rationally related to the valid state purpose of opening private lands for use by the public.⁷

Until the adoption of recreational use statutes, the tort liability of owners and occupiers of land has traditionally been based on common law doctrines. The courts have typically adhered to common law rules which recognize that a landowner owes a certain duty of care towards those entering upon his property as an entrant or invitee.⁸ However, in most instances, it has been recognized that a landowner owes trespassers or licensees the duty to merely refrain from willfully or wantonly injuring them, with the least duty of care being owed to a trespasser.⁹

The model recreational use act and subsequent recreational use acts have dramatically altered the common law principles regarding liability. Under these acts, except when there is consideration, owners may remain silent and allow even known hazards to persist without incurring liability for resultant injuries to recreational users, regardless of the users' classification under common law. The law shifts the burden of liability for injuries from the landowner to the recreational user.¹⁰ Although this principle may seem contrary to common law, the courts have upheld the various recreational use laws because the public benefit of encouraging free use of the land far outweighs the increased cost of injuries to negligent recreationalists.¹¹

Recreational use statutes have been enacted to increase the amount of land available for public recreation activities. In order to accomplish this, the legislatures created a "quid pro quo," whereby a landowner receives immunity from lawsuits due to his negligence in return for opening his land to the public. Alabama's preamble expresses the intent in creating these statutes by stating:

"It is hereby declared that there is a need for outdoor recreational areas in this state which are open for public use and enjoyment; that the use and maintenance of these areas will provide beauty and openness for the benefit of the public and also assist in preserving the health, safety and welfare of the population; that it is in the public interest to encourage owners of land to make such areas available to the public by limiting such owner's liability towards persons entering therein for such purposes; (emphasis added) that such limitations in liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas."¹²

Without certain legal protection against liability claims, it is unreasonable to expect a private landowner to open his land to public use. This is especially true in Alaska where much of the land is isolated, in a natural state and so remote it cannot be carefully policed by the landowner.

There is concern that the proposed legislation removes a landowner from total legal responsibility to a person entering onto his land for recreational uses. This, however, is not the case because Section (d) states, "This section does not limit the liability of an owner of land for a wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." (emphasis added). Twenty-two other statutes contain the same exclusion,¹³ and most others have similar provisions.¹⁴

Although AS 09.45.795 provides liability protection against injuries received on unimproved land, the recreational use act amendment takes the law a step further. The liability protection a landowner receives would now extend to any private land so long as it is open to public recreational use and the landowner receives no valuable consideration for use of the land. This language would, therefore, remove some of the burden now placed on a landowner

to warn persons entering upon his land of any hidden dangers of which he is aware, Moloso v. State, 644 P.2d 205 (Alaska 1982), or possibly including the likelihood of being eaten by an unruly bear or other ferocious beast, Carlson v. State, 598 P.2d 969 (Alaska 1979).

The amendment as proposed is not contrary to case law which supports the premise that recreational use statutes should be applicable to rural areas where land is in its natural, undeveloped state¹⁵ or the statutes are only applicable to land not susceptible to policing.¹⁶ A landowner in an urban setting cannot use the Recreational Use Act as a defense should someone be injured in his backyard.

Section 05.40.010(c) is a clarification of what can be considered compensation for the purpose of this act. Although other recreational use acts leave the meaning of compensation ambiguous by using language such as for a "charge" or "consideration"¹⁷ it is important to remove any ambiguities regarding the definition of "compensation" for the purposes of this act. A landowner should not have to be responsible for the actions of a lessee. In this situation, the lessee, not the landowner, will be the party liable for any damages resulting from an injury or wrongful death of a user of the leased premises.

The language in AS 05.40.020 is standard language included in the recreational use acts.¹⁸ It is necessary to protect a landowner's ownership rights in the land. Without such language, it is possible that over a period of time the public would acquire a prescriptive easement to use a particular piece of land for recreational purposes in perpetuity. This language prevents such an action from occurring.

Section 2.

Section 2 amends AS 09.45.730 by adding a new subsection which recognizes the right to go onto another person's land to conduct geophysical exploration is a valuable interest which should be protected by the law. The mineral explorer who goes onto another person's land to gather geotechnical data or take mineral resources without permission from the landowner is a geophysical trespasser.¹⁹ This type of trespass activity is becoming more common in Alaska. It is believed that a law such as this will help deter any illegal resource exploration or taking of mineral resources.

The courts have recognized a landowner's right of recovery against a geophysical explorer who enters upon land without authority and conducts a geophysical survey.²⁰ Damages have been awarded to a landowner for geophysical trespass based on actual surface damages,²¹ on loss of the exploration right,²² and on loss of the leasing value.²³

An adequate remedy is required to compensate the landowner for the loss of prospective advantage suffered in a particular case. When the interference results in a pecuniary loss, the landowner should be allowed legal redress if (1) the explorer intentionally proceeds with a geophysical survey of the plaintiff's land without authorization, and (2) an actual exploration of the property is conducted.

In the case of a geophysical trespass, physical harm to the property is only of minor consequence. Physical damages can be avoided by the use of modern surveying methods that cause little or no physical damage to the land. The greatest concern of landowners is not damage to land, but their loss of prospective economic advantages. A landowner's major losses are those resulting from the misappropriation of information regarding the mineral estate. A landowner is deprived of a valuable exploration right, and if the survey tends to demonstrate that the land is valueless for mineral development, a landowner may be denied the opportunity to lease or sell his rights to the mineral estate.²⁴

Usually when the public knows a surreptitious survey has taken place, speculative value of the land is affected whether or not information concerning the results is made public. For example, if the explorer takes no action after the survey has been conducted, unfavorable data will be presumed, causing the same effect as drilling a dry hole.²⁵ In Humble Oil & Refining Co. v Kishi, the landmark case on destruction of speculative value,²⁶ the court held that a trespasser who entered and drilled a dry hole was liable to the property owner for the destruction of the speculative value of the land. Whether the destruction of speculative value is caused by the drilling of a dry hole or by a geophysical survey, the landowner has been harmed.²⁷ Conversely, should the survey yield positive results which tend to demonstrate that certain land has a high propensity to produce a mineral resource, nondisclosure problems may arise in future negotiations between the explorer and landowner.

The following types of damages²⁸ have been suggested, dependent upon the particular facts and circumstances and the bona fide intent of the defendant: (1) the value of the right to enter on the land for the survey; (2) the loss of speculative value by reason of unfavorable publicity resulting from the survey; (3) the value to the trespasser of the information the operator obtained by the geophysical trespass; and (4) a form of punitive damages when the trespass is in bad faith. It has been held that a landowner may be awarded at least nominal damages for unauthorized geophysical exploration; however he is not limited to such a small remedy.²⁹ Other cases have conclusively established that compensatory damages are available to redress any injuries that were proximately caused by unauthorized geophysical exploration.³⁰ In addition, one Court has stipulated that punitive damages are available for flagrant disregard of the rights of the mineral owner.³¹

Given the sensitive nature of mineral rights, the landowner should also be protected against a negligently conducted survey.³² For example, a negligent survey would encompass misappropriation of information occurring as a result of boundary errors or operational negligence. In situations where unauthorized exploration has occurred, a landowner loses a valuable exploration right.³³ If the existence of the survey becomes known, or if unfavorable contents of the survey are released, the landowner is harmed since he may suffer the loss of all prospective advantage arising from the mineral estate.

A landowner can also be harmed should an unauthorized survey yield information that suggests that a property has high mineral potential. Although mineral estate information is confidential and of a proprietary nature, it may be used to the detriment of the landowner and the benefit of the misappropriator. When an exploration company and landowner go to negotiate exploration/development contracts, the exploration company is under no duty to disclose the findings of its illegal survey or the fact that a survey has been conducted. In this situation, the exploration company has an unfair advantage in the negotiation process because of information gathered surreptitiously. Based on the data gathered, a company may or may not decide to enter into an exploration/development contract.³⁴

Adverse economic consequences invariably flow from unauthorized exploratory activities. When the geophysical explorer proceeds with a survey, the landowner receives no compensation for the surveys conducted. Meanwhile, the explorer has acquired valuable private information without being required to compensate the landowner. If favorable for mineral production, and if secrecy of the survey is maintained, the information will lead to an unequal bargaining position since the exploration company is under no duty to disclose the existence of the survey or its contents. Furthermore, information that is compiled from a geophysical survey is often inaccessible to the landowner because the survey cost is prohibitive. Conversely, if the information released is unfavorable and tends to show the land is worthless for mineral development, a landowner could suffer the loss of speculative or lease value.

The surreptitious geophysical survey is the type of improper conduct to be guarded against by the "interference"³⁵ tort. Intentionally proceeding with a geophysical survey without proper

authorization from the landowner is the type of improper, unfair, and unethical trade practice against which the interference tort should protect. E.I. DuPont de Nemours & Co. v. Christopher, 431 F.2-d, 1012 (1970) stated that "extraction of confidential information concerning the mineral estate by use of air reconnaissance devices would be an improper method of appropriation."

The landowner's right to contract for the sale of the opportunity to explore the land is a prospective advantage, as is the landowner's right to enter into subsequent oil and gas leases. When an operator chooses to act without proper authorization, the landowner is injured. The surreptitious survey interferes with the landowner's ability to contract for the sale or lease of the exploration rights. Once the survey has been conducted, the landowner will have lost the value of those exploration rights.³⁶ Moreover, that loss may be compounded by publication or business disclosures that may deprive a land owner of the speculative or lease value of the land, or result in an unequal bargaining position and lost profits for the landowner.

When an exploration company conducts a survey of a landowner's property, the existence of the survey should amount to prima facie evidence of a prospective advantage since the operator was sufficiently interested in the property to expend the time, effort, and money to conduct the survey. The landowner's lost profits might be measured by any of the following methods: (1) the value of the right to enter on land for the survey. (2) the loss of speculative or lease value, or (3) the difference between the price paid and the actual fair market value. The ultimate goal is to make the landowner whole for the deprivation occasioned by the actions of the exploration company.³⁷ If the exploration company's conduct is sufficiently culpable, punitive damages should be awarded.

When the interference results from negligently conducted exploration activities, the landowner can be afforded legal redress under the negligence aspect of the tort. Negligent interference with prospective advantage is recognized in California³⁸ and like the intentional counterpart, provides legal redress to make the landowner whole for the injuries inflicted by a surreptitious geophysical survey.

Section 3

Section 3 amends AS 09.45.795 so that the landowners are protected against liability suits resulting from injuries caused by isolated and unknown improvements which may be on an individual's land. The proposed change in the law will provide landowners with reasonable protection against an "attractive nuisance" or "negligence" lawsuit involving an improvement for which a landowner had no actual knowledge and could not reasonably be expected to have had knowledge of its existence.

Due to the vast amount of private land in Alaska and the remote location of much of the land, it is quite possible that there are improvements on the land for which the landowners have no actual knowledge. Although the AS 09.45.795 provides liability protection against injuries received on unimproved and apparently unused land, no protection is provided for those situations involving unknown improvements, such as mine shafts, out-of-way gravel pits, old military facilities, abandoned cabins or old roads, trails and airstrips.

The duty of care owed by an owner or possessor of land to those on the land has traditionally depended upon a rather rigid scheme of classification of the persons on the land as trespassers, licensees or invitees, with the greatest duty of care owed to invitees. The Restatement of Torts, Second outlines the following duties of care a landowner owes to an entrant on the land:

§ 342. Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused by his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

In these situations, the court typically examine the nature of the improvement,³⁹ the cost of removing the improvement,⁴⁰ the landowner's likeliness and actual knowledge of its existence and the extent to which the improvement can be considered an attractive nuisance.⁴¹

Section 4

Section 4 adds a new section to AS 09.45.795 which states that a landowner is not liable to a trespasser in violation of AS 11.46.320 for damages for an injury received or wrongful death which occurs on a landowner's land whether it is improved or unimproved.

Under the present law, it is possible for a trespasser to sue a landowner for injuries received while trespassing on the other person's land. However, under the law of torts, the lowest duty is owed to a trespasser, who is defined by §329 of the Restatement of Torts, Second, as "...a person who enters or remains upon land in possession of another without a privilege to do so created by the possessor's consent or otherwise."

In the past, other courts have held that a landowner owes a minimum care to a trespasser.⁴² Since there is almost no case law in Alaska dealing with trespass and injury to the trespasser, it is important that Alaska's statutes be revised to protect landowners from liability suits involving trespassers.

Section 5

Section 5 amends AS 11.46.320 by adding a new section which outlines several forms of trespass which shall be considered criminal in nature, and therefore, subject to criminal prosecution. The penalty for the trespass actions will continue to be a Class A misdemeanor as stated in AS 11.46.320.

Presently, the revised Criminal Code provides that "a person, who without intent to commit a crime on the land, enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is privileged to do so, (emphasis added) unless; 1) notice against trespass is personally communicated to that person by the owner of the land or some authorized person; or 2) notice against trespass is given by posting in a reasonably conspicuous manner under the circumstances."

As the statute is now written, it encourages and permits casual trespass, rather than preventing it. The existing statute is worded in such a manner that it does not discourage casual trespass on private land. Rather, it sanctions this type of activity so long as an individual is not intending to commit a crime and the lands are unused and unfenced, or the individual using the land has not been advised by the land owner that the land is indeed private land.

It is difficult for private landowners to get state officials to aggressively prosecute those cases involving various types of trespass on private lands. The Criminal Code is ineffective when dealing with trespass predominantly because the State Troopers, by and large, do not view trespass as a major crime. This attitude is in significant contrast to the Lower 48 where states have made it a crime to hunt or fish on private land if an individual does not have permission from the landowner beforehand.⁴³ In its present form, the statute is very vague as to what constitutes criminal trespass, and therefore, does not provide landowners with adequate protection against trespassers. The Alaska Statutes are subject to interpretation and place the burden of proof that a trespass has occurred on the landowner. The proposed changes in the statute removes the ambiguity now found in AS 11.46.320(a) and (b). This language leaves no doubt as to what actions shall be considered criminal trespass, and therefore subject to prosecution as such.

As it now stands, the statute may be interpreted in a manner which will permit a person to enter on private land to go hunting, fishing, camping, prospecting, etc., so long as the person is not intending to commit a crime and the lands are unused, unfenced, and no one advises the user to the contrary. The statute reflects the philosophy that if a landowner wants to exclude intruders, the land owner should be solely responsible for taking steps to do so. The entire burden of protecting one's land is thereby placed on the landowner. The philosophy is very contrary to the laws of other states.⁴⁴ Comparatively, Alaska's trespass laws are much more lenient and do very little to protect a landowner against trespass.

Closely associated with the problem of the leniency of the state's laws is an attitude which is common to law enforcement agencies and the District Attorney's office wherein trespass is regarded as a low priority issue. Trespass activities are not viewed as major crimes which require immediate legal action, consequently little is done to enforce the state's trespass laws, even when requested to do so by a landowner experiencing trespass problems. As long as this attitude prevails, landowners will continue to have to carry the responsibility themselves of deterring trespassers and enforcing trespass laws. To ease the burden on the landowner more stringent trespass laws are needed.

The amendment to AS 11.46.320 clearly differentiates between acts which are fundamentally civil in nature and those which are more criminal in character. Furthermore, it recognizes that criminal prosecution is not necessary for all trespass offenses. In some situations, such as cases involving geophysical or timber trespass, the civil courts and/or privately negotiated agreements may be used in lieu of criminal prosecution to resolve the trespass problem when the situation warrants such action. It is important to note, however, that a civil action is usually not a very satisfactory remedy to a trespass problem because it is expensive for an individual to prosecute a civil case. A landowner would be required to hire attorneys to file the action and there is no certainty of recovering more than nominal amounts for damages done during the trespass. Unless the enormous evidentiary burden now placed on the landowner is removed, the majority of the trespass actions now occurring will remain unabated and difficult to prosecute.

The intent of this amendment to AS 11.46.320 is to deal with severe instances of trespass. The amendment recognizes that not every trespass action is criminal in nature. The amendment recognizes that the inadvertency of a typical trespass by an individual who, without consent from the landowner, mistakenly crosses or camps on unfenced and unposted

private land in an area dominated by wilderness and interspersed with public land is usually such a minimal intrusion upon the land of another that it should not be considered a criminal act. However, the amendment does recognize that landowners have certain rights must be protected, especially if an individual knowingly enters private land, and reasonable notice has been given not to enter or remain on the property.⁴⁵ This type of action will now be considered a criminal trespass. The proposed statutory language for revising the Criminal Code holds a trespasser accountable for his trespass actions. A trespasser who ignores the rights of a landowner to limit the use of his land should be subject to prosecution because he blatantly and patently ignored the landowner's request not to use or enter onto the land. Such willfulness shows a total disregard for the rights of others and should not be tolerated by the law.⁴⁶

Section 6

Section 6 amends AS 11.46.350(b) by allowing that "notice" be given through the use of alternative forms of posting.⁴⁷ Furthermore, by deleting the language "and apparently unused" the statute recognizes that there are vast tracts of unimproved land that may be used by the landowner which should also be protected against trespass.

Section 7

Section 7 adds a new section to AS 11.46.350 which provides specific requirements for posting private land. The purpose of this language is to remove the ambiguity associated with the present statutory requirement that land be posted "in a reasonably conspicuous manner." The law as it is now written leaves everything to interpretation. A landowner's interpretation of the minimum posting requirement may result in the landowner not posting his lands sufficiently to satisfy law enforcement officers or prosecutors. For example, under a strict interpretation of the law, if a float plane lands on a lake or river inside a private landowner's property boundaries, the land would not be considered to be posted "in a reasonably conspicuous manner," if signs were posted only on the property's exterior boundaries. To be considered adequately posted, signs would have to be posted along the shores of all interior lakes and rivers. This interpretation of the law is extremely burdensome for owners of large tracts of land because of the vastness, remoteness and inaccessibility of many of these lands.

The statute has been modified so that it is reasonable and will permit the private landowner to comply with the posting requirement with reasonable facility. Under the present law, those private landowners who have not adequately posted their lands against trespass are unable to prosecute trespassers even if there is a flagrant and purposeful instance of trespass and unauthorized use. The addition of alternative posting options reflect the uniqueness of Alaska's land ownership patterns (vast tracts of undeveloped private land) and makes the posting of private land much less burdensome for the landowner. This amendment will provide protection to the private landowner against casual trespass and will also allow for prosecution of severe cases of trespass. Since state law requires that land be posted before there can be enforcement of the trespass laws, it is essential that the statutes stipulate in no uncertain terms what constitutes the posting of land.⁴⁸ The proposed language of Section 7 recognizes the unique character of land ownership patterns in Alaska. Specifically Section 11.46.350(d)(2) provides guidelines for posting land that is isolated and inaccessible by road.⁴⁹ Under the current law, it is possible that a court would interpret the law to mean that a landowner has to post signs along all outer property boundaries, river banks and lake shores. For land owners with large tracts of land, this would mean posting literally hundreds and thousands of signs. This is a very expensive and burdensome requirement for landowners. In fact, in many areas of the state, it would be difficult for landowners to post signs simply because there are no trees on which to attach "no trespassing" signs. As it is now written, the state's posting requirement is unrealistic when applied to large tracts of land, and in many instances cannot be implemented economically or

practically by the landowner. The new language provides for an alternative form of posting which can be used more readily by landowners.

Finally the new language in AS 11.46.350(e) provides for criminal penalties for the removal or destruction of trespassing signs and fences enclosing private land. "No trespassing" signs are constant targets for vandalism. Although landowners still have a continual obligation to police their lands to ensure that his lands remain posted, this provision will at least provide landowners with some recourse against individuals who intentionally remove and destroy "No Trespassing" signs or fences surrounding their property.⁵⁰

Footnotes

- 1 See e.g. *Texas O. & E. Ry v. McCarroll*, 80 Okla. 282, 284-45, 195P. 139, 141 (1920) trespassers); *Foster*, 426 P.2d at 360 (licensees). Once a trespasser is discovered, however, the owner must exercise ordinary care to avoid injuring him. *Texas O. & E. Ry*, 80 Okla. at 285, 195 P. at 141-42. Further, a landowner must warn licensees and discovered trespassers of concealed, dangerous conditions of which the owner has knowledge. W. Prosser, Law of Torts, §§ 58, 60, at 357-85 (4th ed. 1971).
- 2 In Oklahoma, the invitor must use ordinary care to maintain his premises in reasonably safe condition. *Wise v. Roger Givens, Inc.* 618 P.2d 951, 952 (Okla 1980); *Rogers v. Hennessee*. 602 P.2d. 1033, 1034 (Okla. 1979). This duty is applicable only to defects or conditions not readily observable by the invitee. *Sutherland*, 595 P.2d at 783.
- 3 An invitee is a person expressly or impliedly invited on the land for a business purpose; the owner and the invitee have a mutual interest in the invitee's presence. W. Prosser; supra. note 1 §60, at 385.
- 4 ALA. Code §35-15-20 (Supp. 1982); ARK STAT, ANN. §§50-1101 to -1107 (1971); CAL. CIV. CODE §346 (West 1982); COLO. REV. STAT. §§33-41-101 to -105 (1973); CONN. GEN. STAT. ANN §§52-557f to -557k (West Supp. 1982); DEL. CODE ANN, tit. 7. §§5901-5907 (Supp. 1970); FLA. STAT. ANN. §375.251 (West 1974 & Supp. 1982); GA. CODE ANN. §§105-403 to -409 (1968 & Supp. 1982); HAWAII REV. STAT. §§520-1 to -8(1976); IDAHO CODE §36-1604 (Supp. 1982); ILL. ANN. STAT. ch. 70, §§31-37 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. § 14-2-6-3 (Burns 1982); IOWA CODE ANN. §§IIC.1-7 (West Supp. 1982-1983); KAN. STAT. ANN. §§58-3201 to -3207 (1976); KY. REV. STAT. ANN. §150.645 (Baldwin 1981); LA. REV. STAT. ANN. §9:2791 (West 1965); ME. REV. STAT. ANN, tit. 14, §159-A (1980 & Supp. 1982-1983); MD. NAT. RES. CODE ANN. §§5-1101 to -1108 (1974 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 21, §17C (West 1981); MICH. COMP. LAWS ANN. §300.201 (West Supp. 1982-1983); MINN. STAT. ANN §§87.01 -.03 (West 1977); MONT. CODE ANN. §§70-16-301 to -302 (1981); NEB. REV. STAT. §§37-1001 to -1008 (1978); N.H. REV. STAT. ANN. §212:34 (Supp. 1979), N.J. STAT. ANN. §2A:42 A-2 to -5 (West Supp. 1982-1983); N.M. STAT. ANN §17-4-7 (1978); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978 & Supp.) 1981-1982); N.D. CENT. CODE §§53-08-01 to -06 (1982); OHIO REV. CODE ANN. §§ 1533.18-181 (Page 1978 & Supp. 1982); OKLA. STAT. ANN, tit 76, §10-16 (West 1976); OR. REV. STAT. §§ 105.655-680 (1981); PA. STAT. ANN. tit, 68, §§ 477.1-8 (Purdon Supp. 1982-1983); S.C. CODE ANN. §§27-3-10 to -70 (Law Co-op, 1976); S.D. (CODIFIED LAWS ANN. §20-9-5 (1979); TENN. CODE ANN. §§51-801 to -805 (1977); TEX. REV. CIV. STAT. ANN, art 1b (Vernon Supp. 1982); VT. STAT. ANN. tit, 10, §5212 (1973); VA. CODE §29-1302 (Supp. 1982) WASH. REV. CODE ANN. §§4 24.200 -210 (Supp. 1982); W. VA CODE §§ 19-25-1 to -5 (1977); WIS. STAT. §29.68 (1979); WYO. STAT. §§34-389.1-6 (Supp. 1975). Two states enacted recreational use statutes but later repealed them. See N.C. Secs. Laws 830.§1 (repealed 1980); 1965 Utah Laws 115 (repealed 1971).
- 5 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, XXIV SUGGESTED STATE LEGISLATION 150-152 (1975). The policy preamble states - Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreational resources available...in those instances where private

owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

- 6 "The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes by limiting their liability towards persons entering therein for such purposes, and in the case of permissive use, by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such land for recreational purposes." §105.660 Oregon Statutes-Property Rights and Transactions.
- 7 *Parish v. Lloyd*, 82 Cal. App.3d 785, 147 Cal. Rptr. 431, 432 (1978) and *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App.3d 737, 140 Cal. Rptr. 905, 910-911 (1977), upholding Cal., Civ. Code §846 (West Supp. 1979); and *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786, 792 (1975), upholding Mich. Comp. Laws Ann. §300.201 (Supp. 1979). Limiting the liability of landowners opening their property to the public for recreation does not violate equal protection. *Simpon v. U.S.* (C.A. 1981) 652 f.2d 831.
- 8 Restatement of Torts, Second §341A, 343 (1965). See also *Morton v. Lee*, 75 Wn.2d 393, 400 S n.2, 450 P.2d 957, 961-67 S n.2 (1969). *Buthnick v. J & M, Inc.*, 186 Wash. 658, 661, 59 p.2d 750, 751 (1936).
- 9 W. Prosser, L-w of Torts, §58, 60 (4th ed. 1971).
- 10 State of Oregon. §105.665 Duties and liabilities of owner of land used by public for recreation.

Except as otherwise provided in ORS 105.675: (1) an owner of land owes no duty of care to keep land safe for entry or use by others for any recreational purpose or to give warning of a dangerous condition, use, structure of activity on the land to persons entering thereon for any such purpose. (2) an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

- (a) Extend any assurance that the premises are safe for any purpose;
- (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; or
- (c) Assume responsibility for or incur liability for any injury to person or persons or property caused by an act of omission of that person.

- 11 See Note 7.
- 12 Alabama Code §35-15-20 (Supp. 1982) (emphasis added)
- 13 See Cal. Civ. Code §846 (West 1982); Conn. Gen. Stat. Ann. §52-557h(1) (West Supp. 1983); Del. Code Ann. tit. 7, §5906(1) (1984); Ga. Code Ann. §105-408(a)(Supp. 1982); Hawaii Rev. Stat. §520-5(J) (1976) (slightly dissimilar); Act of Aug. 2, 1965, §6(a), Ill. Ann. Stat. ch 70, §36(a) (Smith-Hurd Supp. 1983-1984); Iowa Code Ann. §11C.6(1) (West Supp. 1983-1984); Kan. Stat. Ann. § 58-3206(a)(1983); Ky. Rev. Stat. Ann. §150.645 (Bobbs-Merrill 1980) ("willful and malicious"); Me. Rev. Stat. Ann, tit, 14 § 159-A(4)(A) (1980); Md. Nat. Res. Code Ann. § 5-1106 (1983); Neb. Rev. Stat. §37-1005(1) (1978); Nev. Rev. Stat. §42.510(3)(a) (1981); N.W. Rev. Stat. Ann. §212.34 III(a) (Supp. 1983); N.J. Stat. Ann. § 2A.42A-4(a) (West Supp. 1983-1984); N.Y. Gen. Oblig. L-w

§9-103(2)(a) (McKinney Supp. 1983-1984); N...D. Cent. Code §53-08-05(1)(1982); 68 PA. Cons. Stat. Ann. §477-6(1)(Purdon Supp. 1983-1984); Tenn. Code Ann. §§ 11-10-103(1)(Supp. 1983)("dangerous or hazardous"). 70-7-104(1)(1983); Va. Code §29-130.2(d) (Supp. 1983); W.Va. Code § 19-25-4(1)84) ("dangerous or hazardous"), Wis. Stat. Ann. §29.68(3) (West Supp. 1983-1984).

- 14 See Ala. Code §35-15-24(a) (Supp. 1982)(quoted infra note 134); Ark. Stat. Ann. §50-1106(a)(Supp. 1983)("malicious but not mere negligent failure to guard or warn against an ultra-hazardous condition, structure, personal property, use or activity usually known to...be dangerous"); Colo. Rev. Stat. §33-41-104(a)(1973)("willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm"), Fla. Stat. Ann. §375.251(4)(West 1974)("deliberate, willful or malicious injury to persons or property"); Ind. Code Ann. §14-2-6-3(Burns Supp. 1983)("malicious or illegal acts") La. Rev. Stat. Ann. §9.279(B)(West 1965)("deliberate and willful or malicious injury to persons or property"); Mass. Gen. Laws Ann. ch 21, §17C(West 1981)("willful, wanton or reckless conduct") Mich. Comp. Laws Ann. §300-201 (West 1984) ("gross negligence or willful and wanton misconduct") Minn. Stat. Ann. §87.025(a)(West 1983)("conduct which...entitles a trespasser to maintain an action"); Miss. Code Ann. §89-2-5 (Supp. 1983) ("deliberate, willful or malicious injury"); Mont. Code Ann. §70-16-302(1983)("willful or wanton misconduct), Or. Rev. Stat. §105.655(1981)("reckless failure to guard"); S.C. Code Ann. §27-3-60(a)(Law Coop 1976)("grossly negligent, willful or malicious failure to guard or warn") S.D. Codified Laws Ann. §20-9-5 (1979) ("gross negligence or willful and wanton misconduct"); Tex. Rev. Civ. Stat. Ann, art 1b(2)(Vernon 1969)("willful or malicious injury to persons or property"); Vt. Stat. Ann. tit 10 §5212(b)(1973)("no greater duty except as to acts of active negligence than is owed a trespasser); Wash. Rev. Code Ann. §4.24.210 (Supp. 1983-1984)("injuries... by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted").

Only two recreational use statutes contain no such exception. See Idaho Code §35-1604 (Supp. 1983); Ohio Rev. Code Ann. §1533.18-.181 (Baldwin 1980).

- 15 *Quesenberry v. Milwaukee County*, 106 Wis. 2d 685 317 N.W.2d 468, 472 (1982) (activities expressed in statute are usually "done on land in its natural undeveloped state."
- 16 *Kucher v. Pierce County*, 24 Wash. App. 281, 600 P.2d at 688, 1979. The court discussed three factors for determining the scope of applicability of the immunity statute; these include: "(1) the amount of land owned by the defendant; (2) the arrangement of this land and its improvements and (3) the relative proximity of the land to a population center.
- 17 Ark. Stat. Ann. §50-1106(b)(1971); Tex. Rev. Civ. Stat. Ann. art. 1b §4(2) (Vernon 1969 & Supp. 1982)
- 18 Ore. Stat. §105.677(1) "An owner of land who either directly or indirectly invites or permits any person to use his land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of his land for any recreational purpose without his consent. (2) The fact that an owner of land allows the public to recreationally use his land without posting or fencing or otherwise restricting use of his land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public to continued use of the land.

- 19 8 H. Williams and C. Meyers, Manual of Oil and Gas Terms, 319 (5th ed. 1982), defines the term "geophysical trespass as "the wrongful entry on land for the purposes of making a geophysical survey on the land."
- 20 See Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957)(the right to explore is a valuable property right that can be legally protected); Franklin v. Arkansas Fuel Oil Co., 218 La 987, 51 So. 2d 600 (1951) (the right to explore is a valuable property right which belongs exclusively to the owner of the land and if it is wrongfully exercised, it is a proper element to be considered in awarding damages); Layne Louisiana Co. v. Superior Oil Co., 209 La, 1014, 26 So. 2d 20 (1946) (the right to conduct geophysical exploration is a valuable property right and disregard of that right entitles the landowner to recover compensatory damages); Angeloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1940) (the right to permit entry upon land to conduct physical exploration is a valuable property right and belongs exclusively to the owner); Wilson & Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951) (the right to enter upon lands for the purpose of making geophysical surveys is a valuable property right which belongs exclusively to the landowner, and an unauthorized invasion renders the invader liable for damages to the owner).
- 21 See Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934) (plaintiff entitled to recover full indemnity for his loss in quasi-contract); Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946)(actual damages awarded for loss of cattle, drilling of seventeen shot holes and damages to fences, trees, private road, crops and the surface terrain of the land); General Geophysical Co. v. Brock, 205 Miss. 189, 38 So. 2d 703 (1949)(actual damages awarded for destruction of a water well); Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951)(good faith trespasser is liable only for actual damages).
- 22 See Franklin v. Arkansas Fuel Oil Co. 218 La. 987, 51 So. 2d 600 (1951) (exploration right is a proper element to be considered in the award of damages); Holcombe v. Superior Oil Co., 213 La. 684, 35 So. 2d 457 (1948)(compensatory damages available for appropriation of the exploration right), Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946) (exclusive right to explore for minerals entitles landowner to recover compensatory damages for disregard of the right); Angeloz v. Humble Oil & Ref. Co. 196 La. 604, 199 So. 656 (1940) the right to explore is a valuable property right and may be considered in assessing damages).
- 23 See Williams & Meyers, Adverse Possession and Trespass in the Law of Oil and Gas, 29 Rocky Mt. L. Rev. 1, 48-50 (1956). Williams and Meyers cite Angeloz v. Humble Oil & Ref. Co. 196 La. 604, 199 So. 656 (1940)(dissemination of unfavorable information by geophysical trespasser entitled landowner to damages for resulting depreciation of lease value) as authority for recovery of damages for loss of speculative value. The rationale advanced for allowing recovery for loss of leasing rights due to a decrease in speculative value is that if the general public is aware that a survey has been made with no subsequent attempt to execute a lease on the land, the speculative lease value of the land is affected even in the absence of a publication of the survey rights. The wrongful geophysical survey and subsequent failure to lease has the same effect on speculative value as drilling a dry hold. See e.g. Humble Oil & Refining Co. v. Kishi, 276 S.W. 190 (Tex. Comm'n App. 1925)(damages awarded for loss of lease value caused by drilling a dry hole).
- 24 R. Hemingway, Oil and Gas §4.1(1971) (discussion of progress of deprivations occasioned by use of modern geophysical methods). See also Kennedy v. General Geophysical Co., 213 S.W.2d 707, 710 (Tex. 1948).

- 25 H. Williams and Meyers. Oil and Gas. §130 (1981).
- 26 Humble Oil & Refinery Co. v. Kishi, Tex. Comm. App. 276 W.S. 190 and 191.
- 27 "So far as the speculative value of the land is concerned, the combination of events has virtually the same effect as the drilling of a dry hole in the Kishi case, Williams and Meyers. Oil & Gas Laws, §230 (1981).
- 28 Williams & Meyers, supra note 18, at §230.
- 29 See Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934) where it was held that general damages are available to mineral owners for unauthorized geophysical exploration.
- 30 See generally Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934); Franklin v. Arkansas Fuel Oil Co. 218 La. 987, 51 So. 2d 600 (1951); Geophysical Serv. Inc. v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958); Kennedy v. General Geophysical Co. 213 S.W.2d 707 (Tex. Civ. App. 1948).
- 31 See Geophysical Serv. Inc. v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958).
- 32 "Large sums of money are annually paid landowners for the mere right to go onto their land and make geophysical and seismographic tests." Layne Louisiana Co. v. Superior Oil Co., 216 So. 2d 20, 22 (La. 1946). Rice, "Wrongful Geophysical Exploration," 44 Montana Law Review 53, 66 (1983).
- 33 See Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957) where the Fifth Circuit held that the right to conduct geophysical operations is either held by the lessee or mineral owner exclusively and one who geophysically explores with the consent of the surface owner is liable to the owner of mineral rights for trespass of his interest.

The Court noted:

This conclusion appears reasonable if it is considered that in many instances an unexplored mineral right has only a speculative value upon which investigation may prove to be either far in excess of or considerably less than the real value of the deposits it represents. It is both public knowledge in general and it appears from this record in particular that the right to explore for minerals has a considerable monetary value and it thus follows that it must generally be vested exclusively in either the mineral or the surface owner (or at most jointly in both) since if each had the independent right to explore or to permit exploration the right of neither would in fact be protected. Since mineral rights are in the first instance almost always purchased as speculations and are often resold as such a number of times it would be a peculiar rule that would permit the owner of an entirely different estate, the surface, to reduce or sell the right to reduce a certainty, and thereby change the whole basis of the valuation of information about property belonging to another that can only be obtained by investigations carried out at the site of the mineral estate. (emphasis added)

- 34 430 So. 2d 301 n2. "The right to geophysically explore land for oil and gas and other minerals is a valuable right of the landowner since the average landowner lacks the means or funds to gather geophysical or seismographical information, and such information, if disseminated can impair the landowner's ability to deal advantageously with his valuable mineral rights."
- 35 The landowner's right to dispose or lease property is a prospective advantage that the law has protected by the "interference" tort. Cooper v. Steen, 318 S.W.2d, 757 (Tex. Civ. App. 1958); Solberg v. Sunburst Oil and Gas Co., 246 P. 168 (1926).

- 36 See note 24.
- 37 It is a fundamental and cardinal principle of the law of damages that the injured party shall have compensation for the injury sustained. The injured party is entitled to recover full indemnity for his loss, and to be placed as nearly as may be in the condition which he would have occupied had he not suffered the injury complained of. No measure of damages which does not afford just compensation for the loss sustained can stand the fundamental test. Shell Petroleum v. Scully, 71 F.2d 772, 775 (5th Cir. 1934).
- 38 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. (1979).
- 39 E.g., Garner v. Pacific Coast Coal Co., 3 Wn. 2d 143, 100 P.2d 32 (1940) is an example of the Washington Supreme Court's approach. In that case two girls were traveling a well beaten path across the defendant's property from a nearby creek. The land had a natural appearance, but, as the defendant knew, immediately beneath the topsoil were incendiary remains of a man-made coal slag which had been created many years earlier. The girls were burned when the topsoil gave way and they fell several feet into a bed of hot cinders. The court denied recovery, even though it found that the defendant knew of the inflammable nature of the undersoil and of the public's frequent use of the path. The court reasoned that because there was no specific knowledge of the precise underground location within the slag where coals might be burning or of the presence of these two particular girls, the defendant was not liable for failure to warn. More compelling, however, may have been the fact that the danger of spontaneous combustion from smoldering coals was one which the court believed could take place up to 50 years after formation of a coal slag. Furthermore, the land in question was an undeveloped tract of several thousand acres; even the slag itself was more than two acres in size. To require repairs or even warning signs over such an area for so many years would have involved a considerable burden.
- 40 In many circumstances, the costs will not always be easily susceptible to monetary calculation. The expense of adequate warning signs or repairs to the property may not be excessive, but the extent of the loss to the occupier and the general public in recreational, scenic, utilitarian or aesthetic value as a result of such warnings or repairs could be considerable. Cf. Smith v. United States, 383 F. Supp. 1076, 1080 (D. Wyo. 1974) (recreational value of Yellowstone Park would be diminished by posting or repairing all hazards). As Prosser stated in the context of child trespassers, "(t)he utility to the possessor of maintaining the condition must be slight as compared with the risk to children involved," W. Prosser, *supra* note 2, §59, at 375.
- 41 In theory, one required element for application of the doctrine is that the alluring condition be such that its dangers could not be appreciated by a child. See Mathis v. Swanson, 68 Wn. 2d 424, 413 P.2d 662 (1966). However, the courts embrace the assumption that hazardous conditions which occur in nature always should be appreciated, even by a child barely out of infancy. See e.g. Meyer v. General Electric Co. 46 Wn. 2d 251, 280, P.2d 257 (1955).
- 42 Exempting property owner from tort liability to motorcyclists who are trespassers or nonpaying licensees did not violate equal protection. Parish v. Lloyd (1978) 147 Cal. Rptr. 431, 82 C.A.2d 785.

Landowners could not be held liable for injuries sustained by motorcyclist while riding uphill on a path or trail across properties where motorcyclists admitted that he had entered properties for recreation, that neither landowner had expressly invited him to enter, that he had paid no money or other consideration for his use of properties, and that failure of landowner to take precautionary or warning measures was neither willful nor malicious. English v. Marin Municipal Water Dist. (1977) 136 Ca. Rptr. 224 66 C.A.3d 725.

43 State of Wisconsin Criminal Code §943.13.
Criminal trespass to land

- (1) Whoever does any of the following is guilty of a Class C misdemeanor:
- (a) Enters any enclosed or cultivated land of another with intent to catch or kill any birds, animals, or fish on the land or gather any products of the soil without the express or implied consent of the owner or occupant to engage in any of those activities.
 - (b) Enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises.
 - (c) Hunts, shoots, fishes or gathers any product of the soil on the premises of another, or enters said premises with intent to do any of the foregoing after having been notified by the owner or occupant not to do so.
 - (d) Enters any enclosed or cultivated land of another with a vehicle of any kind without the express or implied consent of the owner or occupant.

44 State of Idaho. §18-7008. Trespass - Acts

Every person who willfully commits any trespass, by either:

1. Cutting down, destroying or injuring any kind of wood or timber belonging to another, standing or growing upon the lands of another; or
2. Carrying away any kind of wood or timber lying on such lands; or
3. Maliciously injuring or severing from the freehold of another, anything attached thereto, or the produce thereof; or
4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, stone; or
5. Digging, taking, or carrying away from any land in any of the cities of the state, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil or stone; or
6. Willfully opening, tearing down, or otherwise destroying any fence on the inclosed land of another, or opening any gate, bar, or fence of another and willfully leaving it open, or using the corral or corrals of another without the permission of the owner; or
7. Willfully covering up or encumbering in any manner, the land or city lot of another, without written permission from the owner or custodian thereof; or
8. Every person, except under land'ord-tenant relationship, who, being first notified in writing, or verbally by the owner or authorized agent of the owner of real property, to immediately depart from the same and who refuses so to depart after being so notified; or
9. Entering without permission of the owner or owner's agent, upon the real property of another person which real property is posted with "No Trespassing" signs or

other notices of like meaning, spaced at intervals of not less than one (1) sign or notice per six hundred sixty (660) feet along such real property; provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs or notices are posted at such points of access(;) is guilty of a misdemeanor.

45 Hubbard v. Commonwealth, 207 Va. 673, 152 S.E.2d 250 (1967). Entering property of Dan River Mills where signs forbidding such entry was a violation of the Code of Virginia §18.2-119 which allows for criminal prosecution of an individual who enters or remains upon land, buildings or premises of another after having been forbidden to do so.

46 State of Virginia, §18.2-119. Trespass
After having been forbidden to do so; penalties

If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be guilty of a Class 1 misdemeanor. This section shall not be construed to affect in any way the provisions of §§ 18.2-132 through 18.2-136 and §29-170 of this Code. (Code 1950, §18.1-173; 1960, c. 358; 1975; cc. 14, 15; 1982, c. 169.)

Section is constitutional. - There is nothing in this section when properly applied which infringes upon any privilege or right guaranteed by the federal Constitution Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369 (1948).

47 State of California §554.1 Method of posting

Any property described in Section 554 may be posted against trespassing and loitering in the following manner:

- (a) If it is not enclosed within a fence and if it is of an area not exceeding one (1) acre and has no lineal dimension exceeding one (1) mile, by posting signs at each corner of the area and at each entrance.
- (b) If it is not enclosed within a fence, and if it is of an area exceeding one (1) acre, or contains any lineal dimension exceeding one (1) mile, by posting signs along or near the exterior boundaries of the area at intervals of not more than 600 feet, and also at each corner, and, if such property has a definite entrance or entrances, at each such entrance.
- (c) If it is enclosed within a fence and if it is of an area not exceeding one (1) acre, and has no lineal dimension exceeding one (1) mile, by posting signs at each corner of such fence and at each entrance.
- (d) If it is enclosed within a fence and if it is of an area exceeding one (1) acre, or has any lineal dimension exceeding one (1) mile, by posting signs on, or along the line of, such fence at intervals of not more than 600 feet, and also at each corner and at each entrance.
- (e) If it consists of poles or towers or appurtenant structure for the suspension of wires or other conductors for conveying electricity or telegraphic or telephonic messages or of towers or derricks for the production of oil or gas, by affixing a

sign upon one or more sides of such poles, towers, or derricks, but such posting shall render only the pole, tower, derrick, or appurtenant structure posted property.

(Added by Stats. 1953, c.32, p.638 §10.)

48 State of New Mexico §30-14-6.

- A. The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post noticed parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access in conspicuous places, and if the property is not fenced, such notices shall be posted every five hundred feet along the exterior boundaries of such land.
- B. The notices posted shall prohibit all persons from trespassing or entering upon the property, without permission of the owner, lessee, person in lawful possession or his agent. The notices shall:
- (1) be printed legibly in English;
 - (2) be at least one hundred forty-four square inches in size;
 - (3) contain the name and address of the person under whose authority the property is posted or the name and address of the person who is authorized to grant permission to enter the property;
 - (4) be placed at each roadway or apparent way of access onto the property, in addition to the posting of the boundaries; and
 - (5) where applicable, state any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," or "no fishing," "no digging" or any other specific prohibition.

49 State of Idaho §18-7011. Criminal Trespass -

Definition and punishment. -1.....
Where the geographical configuration of the real property is such that entry can reasonably be made at only certain points of access, such property is posted sufficiently for all purposes of this section if said signs or notices are posted at such points of access.

50 Code of Virginia §18.2-135.

"Destruction of posted signs; - "Any person who "shall mutilate, destroy or take down any "posted", "no huting" or similar sign or poster on the lands or waters of another...without the consent of the landowner or his agent, shall be deemed guilty of a Class 3 misdemeanor..."

Colorado Criminal Code §18-4-510, Defacing Posted Notice. Any person who knowingly mars, destroys or removes any posted notice authorized by law commits a Class 1 petty offense.

HOUSE COMMITTEE REPORT

(9)

Date referred: 4/17/87
~~3/20/87~~

FURTHER REFERRALS: Judiciary

DATE: _____

The Resources Committee has considered § HB 198

"An Act relating to the permissive and nonpermissive use of land."

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

Adelheid Herrman

Lynn Huff

SIGNING OTHER RECOMMENDATIONS:

Heinrich Spruijs No Rec

Dick Smith No Rec

James Weaver No Rec

Jan Carter No Rec

Jan Carter

Chair's signature



Official Business

COMMITTEE:

Resources

DATE: *April 28, 1987*

SIGN-IN

Subject of meeting:

HB 289

HB 198

NAME

ADDRESS

PHONE

REPRESENTING

DO YOU WANT TO TESTIFY?

<i>Lawrence Kimball</i>	<i>411 W. 4th Avenue Anch. 99501</i>	<i>274-3611</i>	<i>AFN</i>	<i>Yes</i> ^{<i>HB198</i>}
<i>Elizabeth de Blanc</i>	<i>516 Denali, Anch 99501</i>	<i>279-5516</i>	<i>Calista, Corp</i>	<i>Yes</i> ^{<i>HB198</i>}
<i>DOUG GRIFFIN</i>		<i>4750</i>	<i>DCRA</i>	<i>No</i>
<i>Roland Staudus</i>	<i>ADF & G</i>	<i>8100</i>	<i>ADF & G</i>	<i>HB198</i>
<i>Jan O'Hara</i>	<i>204 N Franklin St. Suite 3 JNU</i>		<i>AK. Environmental Policy</i>	<i>HB 198</i>
<i>Bert Greist</i>		<i>4750</i>	<i>DCRA</i>	<i>Yes</i>

STATE OF ALASKA



LYMAN F. HOFFMAN
REPRESENTATIVE

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4530, 465-4453

HOUSE OF REPRESENTATIVES

DISTRICT 25

AKIACHIAK
AKIAK
ATMAUTLUAK
BETHEL
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GODNEWS BAY
KASIGLUK
KIPNUK
KONGIGANAK
KWETHLUK
KWIGILINGOK
MEFORYUK
NAPAKIAK
NAPASKIAK
NEWTOK
NIGHTMUTE
NUNAPICHUK
OSCARVILLE
PLATINUM
QUINHAGAK
TOKSOOK BAY
TUNTUTLIAK
TUNUNAK

M E M O R A N D U M

TO: Representative Adelheid Herrmann, Co-Chair
Representative Sam Cotten, Co-Chair
House Resources Committee

FROM: Representative Lyman F. Hoffman *Lyman*

DATE: April 23, 1987

RE: SSHB 198

Please find enclosed for SSHB 198, the following supporting documents.

- 1) Copy of SSHB 198.
- 2) Sectional analysis.
- 3) Alaska Land Use Council Recommendations.
- 4) Guest opinion by Janie Leask.

Also available upon request,

- 1) Trespass/Easement Problems on Native Owned Lands
By Elizabeth M. LeBlanc
Calista Corporation - Land & Natural Resources Dept.
- 2) Trespass/Easement Problems on Native Corporation Lands
by Alaska Federation of Natives Land Committee

Thank you.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: SSHB 198
Publish Date: _____

Revision Date: April 24, 1987
Title: "An Act relating to permissive
and nonpermissive use of land."
Sponsor: Repr. Hoffman (by request)
Requestor: Repr. Hoffman

Agency Affected: Department of Law
BRU: Prosecution
Components: Third Judicial District,
Fourth Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		72.6	74.8	77.0	79.3	81.7
TRAVEL		14.4	14.8	15.2	15.7	16.2
CONTRACTUAL		8.4	8.7	9.0	9.3	9.6
SUPPLIES		9.0	6.2	6.4	6.6	6.8
EQUIPMENT		3.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		107.4	104.5	107.6	110.9	114.3

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		107.4	104.5	107.6	110.9	114.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME		2	2	2	2	2
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Date: April 24, 1987
Richard I. Pegues / FOR /
Approved by Commissioner: Grace Berg Schaible, Atty. Gen. Date: April 24, 1987
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SSHB 198

Revisions made by the sponsor substitute changed certain of the bill's definitions, but the substitute did not make any substantive changes to the original version of the bill. Consequently, the fiscal impact on the Department of Law, noted in the department's analysis of April 6, 1987, remains the same. Because the bill would still criminalize a wide range of conduct, which has traditionally been tolerated by Alaska landowners, the bill's potential for causing a substantial increase in trespass prosecutions has not changed. Severe budget reductions, both in FY 87 and FY 88, prevent the department from attempting to assume this additional caseload with its reduced workforce. If the bill becomes law, and fiscal note funds are not approved, the department's ability to enforce the law would be very limited.

CONTINUATION of FISCAL NOTE ANALYSIS

SSHB 198

For Bill/Resolution No. _____

	ATTY III Bethel (PPT)	ATTY III Fairbanks (PPT)	Total
Personal Services	36.9	35.7	72.6
Travel	7.2	7.2	14.4
Contractual	4.2	4.2	8.4
Supplies	4.5	4.5	9.0
Equipment	<u>1.5</u>	<u>1.5</u>	<u>3.0</u>
TOTAL	54.3	53.1	107.4

Costs beyond FY88 include a 3 percent annual inflation factor, less one-time costs.

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PPT	Staff Months 12	Location Fairbanks		Election District 19/20/21
Type of Expenditure		Justification		
		This part-time attorney position will be needed to handle the increased number of trespass cases growing out of the adoption of SSHB 198. Non-permissive uses of privately owned land that would be criminalized, and that heretofore have been tolerated by land owners, have the potential for causing a large increase in these cases. Current and projected budget cuts are forcing the department to decline entire classes of misdemeanor cases. Additions at this new class of case require this new position. Allocation to the Attorney III level is appropriate for attorneys who handle first degree misdemeanors.		
Amount				
1	2	3		
Salary	28,128			
Benefits	7,597			
Premium Pay				
Other				
Total Personal Services		35,725		
Travel		7,200		
Contractual		4,200		
Commodities		4,500		
Equipment		1,500		
Other				
Total Cost		53,125		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	53,125		
I-A Receipts	1006			
CIP Receipts	1061			
Other				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Fourth Judicial District

Page 1 of 2
 Revised Date _____

FY 88

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PPT	Staff Months 12	Location Bethel		Election District 25
Type of Expenditure		Amount		
1	2	3		
Salary	29,076			
Benefits	7,800			
Premium Pay				
Other				
Total Personal Services		36,876		
Travel		7,200		
Contractual		4,200		
Commodities		4,500		
Equipment		1,500		
Other				
Total Cost		54,276		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	54,276		
I-A Receipts	1006			
CIP Receipts	1061			
Other				
Justification				
This part-time attorney position will be needed to handle the increased number of trespass cases growing out of the adoption of SSIB 198. Non-permissive uses of privately owned land that would be criminalized, and that heretofore have been tolerated by land owners, have the potential for causing a large increase in these cases. Current and projected budget cuts are forcing the department to decline entire classes of misdemeanor cases. Additions at this new class of case require this new position. Allocation to the Attorney III level is appropriate for attorneys who handle first degree misdemeanors.				

Request For
New Position

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 2 of 2
 Revised Date

FY 88

TRESPASS AND EASEMENT MANAGEMENT PROBLEMS ON NATIVE OWNED LANDS

Elizabeth M. LeBlanc
Calista Corporation - Land & Natural Resources Dept.
503 East Sixth Avenue
Anchorage, Alaska 99501

ABSTRACT

Ever since Alaska Native corporations began to receive title to their lands, they have been faced with the ever increasing problem of trespass. The types of trespass and frequency of incidents varies from region to region. This paper will familiarize individuals with the trespass problem since it provides an overview of the trespass problem and identifies forms of trespass which affect the ability of government agencies to provide adequate protection against trespass.

INTRODUCTION

December 18, 1971 is a significant date for the Native community in Alaska. This date marks the signing of the historic Alaska Native Claims Settlement Act (ANCSA). When Congress passed ANCSA, it provided for the transfer of 44 million acres of land throughout Alaska to Native owned corporations. ANCSA created several landlords, each of whom was concerned with the disposition of their land and the activities upon it. During the past 15 years the state has been undergoing a complex and often times confusing process of land transfers conveying federal ownership of land to state and private interests. The changing patterns of land ownership, although major, seem pale in the face of the many complex legal issues resulting from the changing land status (e.g. navigability determinations, legal challenges involving grandfather rights, over-selections, trespass enforcement, easements, etc.)

As a result of the various land transfers, there is a great deal of confusion in Alaska as to land status and the rights attached to land ownership. Land that was available for public use one year is not available the next year. The situation has led to an increasing problem of trespass on private land by the general public. The public often fails to realize that the land conveyed to the Native corporations is private land, and does not realize that even though these lands are seemingly unused, undeveloped, and largely unfenced and unmarked, entry onto the land could constitute trespass.

Land conveyed to Native corporations is private property and as such enjoys all the rights and protection due an individual owner. Unfortunately, protecting Native owned land from unauthorized use and entry by the public is becoming a serious problem for the Native corporations and has varying consequences. As with any private landowner, the Native corporations are experiencing an infringement on their ownership rights. The protection once afforded to these lands through their remote location and inaccessibility is rapidly diminishing as Alaska's non-Native rural population grows, as easement reservations provide increased access to remote areas, and as competition for the land and its resources intensifies.

There are two principal categories of unauthorized use.

1. Casual use whereby an individual strays from adjacent public land or easements. This type of use generally occurs without a permit or license, while an individual is hunting, fishing, hiking, camping, etc. These forms of

trespass are usually inadvertent, but over a period of time may adversely impact subsistence or Native lifestyles. Although these activities do not create immediate problems, there is the possibility that they will significantly impact land management policies or create a possessory right, if ignored.

2. Unauthorized use whereby an individual damages the land or removes resources found on the land thereby affecting the economic base of a Native corporation. Such activities may include cutting timber, illegal exploration for minerals or removal of sand and gravel.

The trespass problem is difficult to handle because Native land holdings are often remote and cover vast undeveloped areas which are not always easily accessible by the land owner or its managers. Some of the trespass problems are endemic to any large tract of undeveloped land; others have been precipitated by the massive change in the State's land status that has occurred in recent years and is still occurring. The trespass problem, however, is not confined to land owned solely by Native corporations, nor is the problem limited to remote areas of the state. Other private landowners, in particular, those in the Kenai Peninsula and the Matanuska-Susitna Borough are also experiencing trespass problems due to rapid growth and increased recreational use.

TYPES OF TRESPASS

Native corporations are experiencing several forms of trespass on their lands. Most instances of trespass are inadvertent, but many times the trespass is intentional and causes significant harm to the landowner.

Trespass Resulting From Misuse of Public Easements

In the State of Alaska there are many types of easements, including trails of varying widths, public rights-of-way, site easements for vehicle parking, temporary camping, and loading and unloading of supplies, utility easements, railroad rights-of-way, section line easements and easements for communication systems, oil and gas activities, etc.

Although there are many types of easements, the misuse of ANCSA 17(b) easements is of particular concern to Native landowners since these easements were reserved only on Native corporation land. ANCSA 17(b) easements now encumber vast amounts of Native corporation land and go largely unmanaged. Under Section 17(b) of ANCSA, the Secretary of Interior was authorized to reserve public easements across land selected by Native corporations pursuant to ANCSA. The purpose of these easements is to provide public access to publicly owned land and major waterways. These easements were to be reserved so that their impact on the Native culture, lifestyle and subsistence resources was minimized. ANCSA 17(b) easements are for a specific use, location and size and they may be used only for a specific purpose which is described in a corporation's interim conveyance documents. For example, many 17(b) easements are limited to winter use and, therefore, cannot be used at other times of the year. Section 17(b) of ANCSA does not give the public the right to use Native lands for recreational purposes; it only provides access to public recreational areas. All too often, the public misunderstands the purpose of the 17(b) easement or that the use of the easement is regulated by law, thereby failing to realize that the land underlying the easement is private property and should be respected as such.

A key factor contributing to the trespass problem is the absence of a program for managing and protecting 17(b) easements against misuse. The various federal and state agencies have been unable to implement regulations for easement management because each agency is faced with vastly different objectives. Although federal

agencies within the Department of Interior are permitted, within established guidelines, to adopt their own procedures for 17(b) easement management, state and other federal agencies are not bound by these guidelines. Consequently, federal and state agencies are reluctant to manage public use of the 17(b) easements, citing lack of legal authority and funding.

Under existing policies and practices there is no way for the public to know when or if they are trespassing on private land. In most areas, there are no indicators of private ownership (i.e., signs or fences) which identify the location of 17(b) easements or property boundaries for private owned land. Furthermore, there is no single agency or source (i.e., map, brochure, guidebook, etc.) to which the public may go for information about land ownership and land status, including the location of private land, permissible activities on easements, and laws concerning trespass and public use of undeveloped land.

Perhaps the most bothersome and complex trespass problem is the misuse or non-use of 17(b) easements. In most instances, the public is not aware that the easements exist, so noncompliance is a common occurrence. It is very easy for individuals to stray beyond the boundaries of the easements because there are no signs or markings on the ground delineating easement location. This results in a high incidence of trespass, much of which is inadvertent or unintentional. However, the most troublesome problem is that the public uses the easement for purposes other than what was designated in the interim conveyance document. For example, 25 ft. winter trails are used as summer haul roads or one acre site easements are used for long-term camping. These situations are difficult to monitor because the Native landowner, usually a village corporation, is not aware of the procedures pertaining to the management of 17(b) easements, nor does the corporation know the exact location of the easement on its land.

The location of a 17(b) easement is obviously an important factor in easement management and trespass enforcement. Since the easements are on private land, the state of Alaska's trespass laws are in effect. This creates a difficult situation because the state's criminal law on trespass cannot be held to apply in most instances of trespass occurring off 17(b) easements. The law excludes from criminal trespass any entry upon unimproved land where there is no marker, sign or fence indicating a prohibition against such intrusion.* As the statute is now written, it encourages and permits casual trespass on private land, rather than preventing it. The law currently sanctions this type of activity so long as an individual is not intending to commit a crime and the land is unused and unfenced, or the individual using the land has not been advised by the land owner that the land is indeed private land. It should be remembered that many casual trespassers carry guns for bear protection or hunting. It is not an enviable position for a village land manager, who has no law enforcement training or authority to approach these individuals to inform them that they are trespassing.

Trespass off a Navigable Waterbody

Problems of trespass occurring off of navigable waterbodies are similar to those associated with trespass off 17(b) easements. The problem, however, has been compounded because there are disagreements about where the boundary of the uplands is located along navigable waterbodies. Typically, uplands are defined as that land above the mean high water mark; the state, however, tends to view the demarcation more liberally. In any event, the trespass problem usually involves people boating up a river or flying in by float plane and then using the uplands along the shoreline of the navigable waterbody for recreational purposes such as camping, fishing, hunting, firewood gathering or other incidental activities.

* AS 11.46.350

It is nearly impossible to prosecute these types of trespass because state law currently requires the land to be posted before a law enforcement officer can take action on a trespass violation. Under the law, such a minimal intrusion upon the land is not a criminal offense unless reasonable notice is provided. However, it is difficult for the village corporations to comply with the law and provide adequate notice along rivers or lakes since many are inholdings on Native corporation land. In most cases, posting signs forbidding trespass cannot be done without great expense or difficulty to the large landowner.

Recreational Trespass

A large number of trespass actions may be described as "recreational trespass." This type of trespass usually involves a one-time situation where individuals stray onto Native corporation lands from adjacent public lands or 17(b) easements and then camp overnight, go hiking, fishing, hunting, trapping, gather firewood or do a wide array of similar activities. Many of these trespass occurrences seem to be inadvertent and appear to occur because the public does not have adequate information about the use of 17(b) easements or land ownership patterns.

Due to the vast amount of private land in Alaska and the remote location of much of the land, it is quite possible that there are improvements on the land for which a landowner has no actual knowledge. Although AS 09.45.795 provides liability protection against injuries received by trespassers on unimproved and apparently unused land, no liability protection is provided to the landowner for those situations involving unknown improvements, such as mine shafts, gravel pits, old abandoned cabins, and old roads, trails and airstrips. Under the present law, it is quite possible for a trespasser to sue a landowner for injuries received while trespassing on private land if any of these improvements are present in these situations. The courts typically examine the nature of the improvement, the cost of removing the improvement, the landowner's likeliness and actual knowledge of the improvement's existence, and the extent to which the improvement can be considered an attractive nuisance. In those cases involving a trespass action, the courts in other states have held that a landowner owes a minimum of care to a trespasser.* Since Alaska has almost no case law dealing with trespass or wrongful death or injury of a trespasser, it is possible that a private landowner could be held liable in a personal injury suit involving a trespasser on unimproved lands.

The size of the land area, duration, impact and intent, all to one degree or another determine how severe a trespass activity may be. Not all trespass actions are equally severe, nor are they all harmless activities. It is important to note there is a significant difference between an individual hiking across the land and a "D-8 cat" crossing the land. A bulldozer crossing the tundra only one time can cause severe surface degradation, whereas a camper may cause no permanent damage. However, the potential for damages by the camper from fire and litter are ever present regardless of the type, extent and frequency of the unauthorized use. Furthermore, there is the ever present possibility that historical sites and cemeteries may be damaged or looted by the casual trespasser. This situation is most common on Native land.

Unauthorized Use of Land and Natural Resources

Unauthorized use of land and natural resources usually results in a loss of revenue to the Native corporation. In some cases, physical damage to the land itself may occur. Over a long period of time, removal of valuable resources through gravel extraction, gold mining, cutting of timber, or even extensive fishing and hunting can significantly impact the economic viability of a Native corporation and its

* LeBlanc, E.M., "Section-by-Section Analysis - HB 660," April, 1986, unpublished report to the State of Alaska Legislature.

individual shareholders. The hunting and fishing issue is particularly sensitive in those areas dependent on subsistence activities or dependent on commercial fishing along rivers.

Although most of these trespass activities result only in a loss of revenue, they can create a possessory right if ignored. Fishermen, trappers, miners, etc., have built structures of varying types on Native owned lands. Some of these people moved onto the land prior to the passage of ANCSA in 1971, but did not file the proper paperwork to establish their residence or activity. In the absence of these records, they appear to have no "valid existing right" under ANCSA and hence, may be trespassing unless they have occupancy rights under Section 14(c) of ANCSA. Others who moved onto the lands after ANCSA are in a similar, but less defensible position. In addition, historical roads and trails which were not reserved by 17(b) easements are present on Native corporation land. Continued use of these rights-of-way by the public could lead to the creation of a prescriptive easement across the corporation's land. Should this type of trespass go unchallenged, it may lead to an eventual claim of adverse possession against a Native corporation's lands or the creation of an additional easement which will result in an actual loss of land.

Geological and Geophysical Trespass

In recent years, Native corporations have discovered that illegal geologic exploration activities have been occurring on their land. In these situations, mineral exploration companies have gone onto or flown over regional and village corporation land to conduct geologic exploration activities without the permission of the subsurface owner. In the Lower 48, these activities are a recognized form of trespass and are considered to be a tort known as wrongful appropriation of the right to explore for a resource.* The courts have recognized a landowner's right of recovery against a geophysical explorer who enters upon land without authority and conducts a geophysical survey. Damages have been awarded to a landowner for geophysical trespass based on actual surface damages, on loss of the exploration rights, and on loss of the leasing value.*

In the case of a geophysical trespass, physical harm to the property is usually only of minor consequence because modern surveying methods cause little or no physical damage to the land. Consequently, the greatest concern of a landowner is not damage to land, but the loss of prospective economic advantages. A landowner's major losses occur when information regarding the mineral estate is misappropriated. The landowner is then deprived of a valuable exploration right, and if the survey tends to demonstrate that the land is valueless for mineral development, a landowner may be denied the opportunity to lease or sell his rights to the mineral estate, thereby denying the landowner any profits and placing him in an unequal bargaining position.

PROBLEMS RELATIVE TO ENFORCEMENT AND PROSECUTION OF TRESPASS

Trespass in its many aspects is a problem that impacts all private landowners in Alaska, whether they be a Native corporation or a homesteader. It is a problem which must be addressed on a statewide basis in order to resolve the fundamental issues of law and public responsibility.

Jurisdiction for Trespass Enforcement

While the division of responsibility between the state and federal government relative to trespass seems clear, actual determination of responsibility is usually complicated because of the changing land status. There is no disagreement that

* LeBlanc, E.M., "Section-by-Section Analysis - HB 660," April 1986, Unpublished Report to State of Alaska Legislature.