ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6068 HOUSE RESOURCES

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Chronology for Lease Sale 50, Camden Bay

October 1981	DNR proposes to add Sale 50 to leasing schedule; call for comments issued.
January 1982	Sale 50 added to Five Year Oil and Gas Leasing Program.
July 26, 1985	Call for general information.
January 27, 1986	Request for socioeconomic and environmental information.
August 21, 1986	Call for comments, 1987 Five Year Oil and Gas Leasing Program
November 20, 1986	Preliminary Analysis of the Director and Preliminary ACMP Consistency Determination; request for comments; public notice as required under AS 38.05.945(a)(3).
March 1987	Public meetings held in Kaktovik and Anchorage.
April 30, 1987	Final Finding and Decision of the Director and ACMP Consistency Determination; public notice required under AS 38.05.945(a)(4).
June 1, 1987	Groups represented by Trustees for Alaska (TfA) file motion with DNR to reconsider its Sale 50 decision and postpone Sale 50 pending DNR's reconsideration decision.
June 4, 1987	DNR notifies the groups it will not postpone Sale 50 pending reconsideration.
June 22, 1987	TfA file their reconsideration brief.
June 24, 1987	TfA file action for declaratory and injunctive relief challenging Sale 50.
June 25, 1987	DNR responds to reconsideration brief and reaffirms conclusion that holding Sale 50 is in the best interests of the state.
June 29, 1987	Judge Hunt holds a hearing and then denies the groups injunction request.
June 29-30, 1987	Bids accepted for Sale 50; sale held; 35 tracts sold for a total bonus bid of $6.6 million.
June 2, 1988	Judge Bosshard issues a lengthy decision upholding Sale 50 in every respect.
July 5, 1988	TfA files appeal to Alaska Supreme Court.
September 28, 1989	Supreme Court hears oral arguments on Sale 50.
March 16, 1990	Alaska Supreme Court issues decision on Sale 50 remanding the Best Interest Finding to DNR for supplemental analysis of "important" transportation routes and to DGC for independent ACMP consistency determination. Supreme Court decision also returns review of agencies follow-up to Superior Court.

LEASE SALE LEGISLATION FACT SHEET

The Camden Bay Lease Sale Supreme Court Decision

On March 16, 1990, the Alaska Supreme Court found two errors in the procedures by which Oil and Gas Lease Sale 50 was held:

1. The court held that the "best interest finding" required by AS 38.05.035(e) failed to consider the environmental safety of transportation facilities should ANWR remain closed, a factor determined to be important notwithstanding the fact that before a lessee could obtain permits to produce and transport oil in the future, it would have to comply with all safety laws then in effect.

2. The court held that, because Lease Sale 50 involved more than one lease, AS 44.19.145(11) required the Division of Governmental Coordination (DGC) to conduct an independent review and render the coastal zone management consistency determination for the lease sale, notwithstanding the facts that (1) the statutory responsibility for holding the lease sales is vested in a single agency (DNR), and (2) DEC, ADF&G, and the North Slope Borough all agreed with DNR that the lease sale is consistent with the applicable plan.

Response to the Court Decision

1. The decision overlooks the fact that the best interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, DEC and ADF&G. To the extent that the court engrafted a new requirement on to the best interest statute - to require DNR to undertake a detailed study of hypothetical development and transportation scenarios and their feasibility - it is at odds with federal precedent and the court's own reasoning. With regard to federal environmental impact statements for oil and gas lease sales, a federal court of appeals recently observed:

> To require a cumulative EIS at the leasing stage ... would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted in comformity with state plans as yet undrafted.

The court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623, 624 (10th Cir. 1987). Moreover, the Alaska Supreme Court's opinion realized that economic feasibility of eventual production need not be assured in advance for the lease sale to be in the best interest of the state. The same is true of the feasibility of any transportation system: the lessee bears the risk of designing and obtaining approval for any future transporation facilities under laws applicable at

the time of any production.

2. DGC has always viewed itself as a coordinating agency, without the staff or authority to transform itself into a separate permitting agency. Here, DNR, DEC, ADF&G, and the North Slope Borough agreed that the lease sale was consistent with the applicable coastal zone management plan.

The Proposed Legislation

The proposed legislation would confirm existing lease sale and DGC coordinating practices. It would also ratify Lease Sale 50, which has been on the five year plan submitted to the legislature since 1982.

Consequences if the Legislation Is Not Passed

1. The legality of Lease Sale 50, held almost two years ago, could remain uncertain for two more years, or more. During the period of uncertainty, administrative and legal resources would be diverted from other projects, and exploration within the sale area would be chilled or stopped. Indeed, plaintiff environmental groups have already indicated an intent to seek an injunction against the Stinson Well, currently being drilled in the sale area.

2. If the sale is ultimately cancelled or invalidated, the state could have to refund bonus bids ($6.6 million) and rents, half of which have been deposited in the Permanent Fund, and could potentially be liable for exploration expenditures and the value of any discovery that may be made prior to cancellation or invalidation. One lessee has already expended about $50 million dollars exploring a Sale 50 lease.

3. All future oil and gas lease sales would be subject to the risk that a court, at the urging of a person or group opposed to leasing, will come up with an "important factor" that was allegedly overlooked or insufficiently discussed in the best interest finding.

4. DNR would need an increased appropriation to make even more extensive and specialized best interest findings. (The finding in this case was 89 pages long, and was based on a record over 11,000 pages long).

5. DGC would need an increased appropriation to greatly expand its staff and develop specialized expertise.

6. Coastal consistency determinations for projects regulated by all of the resource agencies - DNR, DEC, and ADF&G - would suffer delays pending the creation of sufficient DGC staff to handle DGC's new responsibilities under the court's opinion.

DNR'S POINT-BY-POINT RESPONSE TO TRUSTEES FOR ALASKA'S PRESS RELEASE

On Friday, March 30, 1990, Trustees for Alaska ("TfA") issued a press release concerning the Governor's proposed legislation responding to the Supreme Court's recent Lease Sale 50 (Camden Bay) decision. This responds to each point raised in order.

TfA's Claim: The legislation would "fast track" state lease sales.

> DNR's Response: This statement is false. Lease Sale 50, like all lease sales, was subject to the statutory procedures for an advance five year leasing schedule. AS 38.05.180(b) and (c). DNR first proposed adding Sale 50 to the leasing schedule in 1981. An administrative record in excess of 11,000 pages demonstrates that the lease sale was subject to lengthy and intensive review. DNR is not attempting to change the five year leasing schedule program, or to limit public review and involvement in the state's oil and gas leasing program.

TfA's Claim: The legislation would "authorize oil and gas lease sales without evaluating transportation safety or feasibility issues."

> DNR's Response: First, DNR did evaluate transportation safety issues. The state has filed a petition for rehearing with the Supreme Court setting forth the many places in the record where this issue was addressed. Copies of the petition for rehearing are available upon request.
>
> Second, the court expressly held that economic feasibility is an issue that need not be addressed by DNR at the leasing stage. Economic feasibility of development is a risk borne by the lessee. Likewise and the laws and technology that would apply at the time of production is presently unknown, the risk of complying with future environmental laws is borne by the lessee. DNR recognizes the importance of safe and environmentally sound transportation of oil. It simply points out that the issues can be more meaningfully addressed in the context of concrete information and plans once oil is discovered, and all of the options for transporting it are fully understood. The state's power to enforce transportation safety laws is in no way diminished.

Third, the present AS 38.05.035(e) merely requires that the Department of Natural Resources (DNR) prepare a written "best interest" finding prior to holding a lease sale. Thus, the legislation proposed and endorsed by the Governor would actually provide more specific substantive content by listing those things that must be covered in an oil and gas lease sale best interest finding.

TfA's Claim: "The legislation would circumvent a recent Alaska Supreme Court decision requiring DNR to analyze the environmental problems associated with oil transportation from offshore leasing areas."

DNR's Response: As noted above, the Alaska Supreme Court decision is subject to a petition for rehearing. DNR did analyze environmental problems associated with oil transportation from offshore leasing areas. Specific terms of sale were adopted to address those problems. Three of the ten years of the primary term of the oil and gas leases have already expired, and the legality of the sale is still in question. Lessees may be unwilling to bid for and explore oil and gas leases if legal certainty concerning the oil and gas lease sales cannot be achieved in a timely manner.

TfA's Claim: "The Governor has not learned the lessons of the Exxon Valdez spill. These bills would undercut environmental controls over the most risky aspect of offshore oil drilling -- transportation of crude oil."

DNR's Response: These bills would not in any way undercut the environmental controls over transportation of crude oil in offshore areas. The issuance of leases does not itself authorize the transportation of oil. In Alaska, it has typically taken 10 to 20 years after an oil and gas lease sale until actual production begins. At that time, separate authorizations from many federal and state agencies and a coastal consistency determination would be required for any offshore transportation system. Substantive environmental and safety considerations are not diminished by issuance of the leases.

TfA's Claim: The bill would "limit the analysis required before oil and gas lease sales are approved by DNR. Discussion of transportation feasibility and safety would be excluded from the analysis."

DNR's Response: As noted above, DNR did consider transportation issues. For instance, at the urging of the Department of Fish and Game (ADF&G) and the Department of Environmental Conservation (DEC) (and against the wishes of industry), DNR imposed lease stipulations restricting the use of causeways. Under the Governor's bill package, DNR would continue to consider reasonably foreseeable cumulative impacts and the comments of the public and other agencies in the preparation of written findings for each sale.

TfA's Claim: The bills would "give DNR rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program."

DNR's Response: Lease Sale 50 was determined to be consistent with the Alaska Coastal Management Program (ACMP) by the North Slope Borough, DEC, ADF&G and DNR. The issue is not who makes the determination, but who coordinates it. DGC has never had an independent staff of experts to make consistency determinations. DGC's purpose has been to coordinate reviews, to expedite the issuance of permits and to reduce and eliminate duplication in State government processes. DNR currently does not have the unilateral power to "determine" whether lease sales are consistent with the applicable plan. Rather, it must coordinate the consistency review and, with regards to the merits, it must gain concurrence in its consistency determination from the North Slope Borough, DEC, and ADF&G. The bill would merely confirm the long-standing practice and the uniform understanding of local governments and the various state agencies concerning how the ACMP program was intended to operate.

TfA's Claim : "After the Exxon Valdez spill, the state and oil companies need to be more, not less prepared for oil development and transportation problems."

DNR's Response: DNR agrees that environmental safety issues are important and that laws concerning those issues must continue to be reexamined and enforced. The answer is not, however, to foreclose the opportunity to have continued oil exploration and development in the state by stopping lease sales. Rather, the answer is to pay appropriate attention to the specific transportation and development issues as they arise. The particular oil development and

transportation problems that may apply in the offshore areas cannot be determined in a meaningful way until oil and gas deposits have been found, and particular transportation alternatives and their advantages and disadvantages are known.

TfA's Claim: "The Supreme Court has recently determined the level of analysis that is reasonable before the State makes a decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns."

DNR's Response: The Supreme Court was not clear on either what level of analysis is required or reasonable before the state makes a leasing decision. The state believes that it met the court's standard, and therefore has filed a petition for rehearing on that ground. Moreover, if the court intended to engraft a new requirement on the statutory best interest finding to require DNR to undertake a more detailed study of hypothetical development and transportation scenarios and their feasibility, it is at odds with common sense and federal precedent. With regard to federal environmental impact statements, which are subject to more stringent and specific standards than are applicable to the state's best interest finding requirements, a federal court of appeals recently observed, quoting an earlier federal case:

> To require a cumulative EIS at the leasing stage... would be tantamount to "demanding the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted and in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."

The federal court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. vs United States Department of Agriculture 817 F.2d 609, 624, and 623 (10th Cir. 1987). The intent of the bill package is to avoid uncertainty and needless speculative exercises, not to avoid appropriate attention at a meaningful time to real problems. Rather than enlarge the state bureaucracy to engage in speculation ten years or more before any possible oil and gas development, the state's resources are much better spent in

waiting to evaluate the risks and alternatives in the context of specific development and transportation proposals. The answer is not to say "No" to all oil and gas leasing and potential development before the existence of oil and gas is known, but to pay maximum attention to ensuring safe and environmentally sound development in the context of known deposits and concrete proposals for development.

TfA's Claim: "Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease [sic]. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered."

DNR's Response: The state should not say "no" to oil and gas leasing based upon a fear that the state, local, and federal agencies will not apply future environmental laws properly or conscientiously. At the lease sale stage the size and location of oil deposits are not known, the possible routes are not determined, the technology that might be available is unknown, and the laws that might apply are subject to change. When specific exploration and development activities are proposed, agencies have and use their authorities to protect the environment. For instance, in the Sale 50 area, the Stinson Well was dependent upon the receipt of more than 23 local, state and federal permits.

TfA's Claim: "Offshore oil exploration poses the danger of blowouts. A driller's sudden loss of control over gas pressure could turn the rig into an uncontrolled gusher causing spills, fires, or explosions. A blowout in the Arctic Ocean and around the state could have a devastating impact on marine life and subsistence communities. The Anchorage Daily News reported today that blowout equipment inspectors felt that the inspection process was inadequate."

DNR's Response: DNR recognizes that there is a small danger of blowouts in oil exploration activities. Significantly, the Alaska Supreme Court found no inadequacy in the lease sale process based upon this issue. Accordingly, contrary to the implication in TfA's there is no connection between the remote risk of oil rig blowouts and the supreme court decision or this bill package. Moreover, the drilling of a well is subject to a host of independent permitting requirements, including

coastal consistency determinations. The Stinson Well, currently being drilled within the Lease Sale 50 area, proceeded only after a host of permits were issued for the project. The North Slope Borough, DEC, and ADF&G all found the drilling of the Stinson Well consistent with the coastal program. No appeal was taken of the local, state, and federal agencies' decisions to issue the drilling permits. If an investigation shows that there is an inadequacy in the inspection process for exploratory wells, this certainly should be addressed. This issue is, however, entirely independent of the sale decision. DNR supports effective enforcement of all safety and environmental laws.

TfA's Claim: "The Governor should recognize that there is a system of checks and balances. He should let the courts grapple with the complex concerns raised by Natives and environmentalists about oil development in specific regions."

DNR's Response: The legislature (not the court) is the branch of government with the power to set the standards for oil and gas leasing. Under the legislature's statutes, the decision to dispose of interests in state land is committed to executive discretion. The courts do not have authority to "grapple" with complex substantive concerns. Indeed in the Sale 50 decision, the Alaska Supreme Court did not purport to decide specific environmental issues but simply interpreted two statutes passed by the legislature and remanded the matter to the state executive branch to reconsider in light of the Supreme Court ruling. The Governor's bill package was proposed because the court decision is inconsistent with longstanding state practice and with the legislative appropriations to DNR and DGC. Natives, environmentalists, and other members of the public have many opportunities to have their voice heard. They can make their points to the legislature concerning the items on the five year leasing program, and can make comments concerning the lease sale in the best interests finding process. Moreover, they can have substantial input into the ACMP process.

TfA: "The Governor's broad brush solution would allow safety issues be brushed under the rug."

Response: As indicated above, this charge is entirely without merit. Specific safety issues will simply be taken up at the appropriate time, when specific projects are proposed.

Trustees for ALASKA

A Non-Profit Public Interest Environmental Law Firm

For Immediate Release:
Friday, March 30, 1990

Contact: Randall Weiner
(907) 276-4244
Bob Childers
(907) 276-7986

Governor Introduces Legislation to "Fast Track" State Lease Sales

Governor Steve Cowper introduced legislation today giving the Department of Natural Resources (DNR) the power to authorize oil and gas lease sales without evaluating transportation safety or feasibility issues.

The legislation would circumvent a recent Alaska Supreme Court decision requiring DNR to analyze the environmental problems associated with oil transportation from offshore leasing areas.

"The Governor has not learned the lessons of the Exxon Valdez spill," said Randall Weiner, director of Trustees for Alaska, which has challenged offshore lease sales on behalf of eight environmental groups and the Native Village of Kaktovik. "These bills would undercut environmental controls over the most risky aspect of offshore oil drilling -- transportation of crude oil."

The Supreme Court's decision criticized DNR for failing to mention the facilities that would have to be built to transport oil from offshore wells to market, "much less examine the critical question of whether they are safe." The Court noted that such facilities represent "unique environmental risks."

The Governor's bills would do the following:

* Limit the analysis required before oil and gas lease sales

are approved by DNR. Discussions of transportation feasibility and safety would be excluded from the analysis. (House Bill 591 and Senate Bill 539.)

* Give DNR, rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program. (House Bill 592 and Senate Bill 540.)

* Ratify the lease sale in Camden Bay by nullifying the effect of the Supreme Court's March 16 ruling in Trustees for Alaska v. State. The bills would also ratify the adjacent state lease sale 55 (Demarcation Point) which was challenged by Kaktovik and environmental groups because of its impact on subsistence resources located in the Beaufort Sea and the Arctic National Wildlife Refuge. (Amendment to House Bill 128 [currently before Senate]).

In addition to Kaktovik, the groups challenging the oil and gas lease sales are the Wilderness Society, Alaska Center for the Environment, Northern Alaska Environmental Center, National Parks and Conservation Association, Sierra Club, American Wilderness Alliance, Alaska Wildlife Alliance, and Trustees for Alaska.

Why we oppose these bills:

* After the Exxon Valdez spill, the State and oil companies need to be more, not less, prepared for oil development and transportation problems.

* The Supreme Court has recently determined the level of analysis that is reasonable before the State makes the decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns.

* Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered.

* Offshore oil exploration poses the danger of blowouts, a driller's sudden loss of control over gas pressure that could turn the rig into a an uncontrolled gusher causing spills, fires or explosions. A blowout in the Arctic Ocean and around the state could have a devastating impact on marine life and subsistence communities. The Anchorage Daily News reported today that blowout equipment inspectors felt the inspection process was inadequate.

* The Governor should recognize that there is a system of checks and balances. He should let the courts grapple with the complex concerns raised by Natives, and environmentalists about oil development in specific regions.

* The Governor's bread brush solution will allow safety issues to be brushed under the rug.

3/21/90

SUMMARY OF ALASKA SUPREME COURT DECISION CONCERNING
OIL AND GAS LEASE SALE 50 (CAMDEN BAY) AND
RESULTING LEGAL CONSIDERATIONS

In Trustees for Alaska v. State of Alaska, ___ P.2d ___, Op. No. 3573 (Alaska, Mar. 16, 1990), the Alaska Supreme Court found two defects in the procedures by which State o Alaska Oil and Gas Lease Sale 50 (Camden Bay), located offshore ANWR, was conducte:. The court remanded the two issues to the trial court to remand to the Department of Natural Resources ("DNR") and the Office of Management and Budget, Division of Governmental Coordination ("DGC") for action.

First, the court held that DNR's best interest finding was defective, finding a failure to consider environmental safety factors relating to transportation facilities that would be necessary should production occur and ANWR remain closed for onshore support facilities. Second, the court held that the coastal consistency determination under the Alaska Coastal Management Program ("ACMP") was defective because AS 44.19.145(a)(11) requires the Office of Management and Budget ("OMB") to render a consistency determination when a lease sale involves more than one lease. These issues will be discussed separately below.

1. Consideration of hypothetical transportation facilities

With regard to offshore transportation facilities that would be necessary should oil be found and ANWR remain unavailable for onshore support, the court made several observations or holdings with which DNR and the Department of Law disagree:

(a) "These [transportation] facilities are unquestionably a vital part of the development of the sale area for oil production and thus are important factors in the decision to lease the sale area". Op. at 14.

> Comment: At page 15 of the Opinion, the Supreme Court rejected the proposition that DNR must "demonstrate the economic feasibility of developing Camden Bay." The court found that [no] law requires DNR to demonstrate "economic feasibility", and that, given the benefits from receiving bonus and lease income, the "court need not inquire into the feasibility of future development". The same rationale should apply to transportation facilities. The lessees bear the risk of (1) finding oil, (2) being able to produce the oil in an economically feasible manner given future oil prices, the size of the field, and the cost of extracting and transporting the oil, and (3) satisfying then applicable state and federal legal requirements insuring that the production and transportation of the oil will be environmentally safe. In other words, the state retains the option to prohibit oil production if laws designated to protect the environment and insure safety are not met when and if particular projects are proposed in the future.
>
> The benefits of leasing and the exploration to determine the extent of any accumulations of oil and gas, are separate issues. While DNR agrees that transportation facilities would be a vital part of development of the sale area, and agree that safety would be an important concern concerning those facilities, it disagrees that safety of hypothetical future transportation systems is an important concern to the leasing decision. Federal courts have repeatedly held that it would be speculative to hypothesize production and transportation systems at the leasing stage since the location and size of any discovery is

unknown, at that time. Similarly, at the leasing stage, it is unknown what particular technical problems may exist and what technologies may be available at the time of any production that may occur in the future. The federal courts have found that an effort to hypothesize such production and transportation facilities and evaluate their risks and benefits would be meaningless and a waste of time and resources. The Supreme Court did not address the case law that was cited to it on these points.

(b) "[The transportation facilities] would seem to present unique environmental risks." Op. at 14.

Comment: The record does not support this statement. Any production from state leases, like any production from the nearby OCS Sales, would be offshore, necessitating either pipelines, causeways, or sea-based transportation systems. Bringing the oil onshore outside of ANWR might impact the magnitude of the environmental risk, but would not impact the nature of those risks.

(c) "[T]he Finding is remarkable in that - as detailed as it is on other subjects - it fails to mention facilities of this magnitude at all, much less examine the critical question of whether they are safe." Op. at 14.

Comment: The decision document discusses transportation safety issues, and specifically incorporates by reference lengthy and detailed federal government discussions concerning potential offshore transportation facilities that could be used to transport oil if ANWR remains closed. The document also discusses the effects of potential spills from pipelines. Lease terms required by the best interest finding prohibit continuous causeways in support of development in the Camden Bay's sale area, discourage discontinuous causeway construction, and favor pipelines over tankers for transportation.

Lease terms prohibit tankerage of produced oil and gas once a pipeline is constructed.

In short, the decision document, which is extensive in detail, and is based on more than 11,000 pages

of background materials, is not "remarkably silent" on the issue of transportation, and does not fail

to examine safety issues in conjunction with transportation issues. Although DNR stated that there are decided limits to the utility of consideration of hypothetical production scenarios, it nonetheless undertook serious effort to discuss the issues given the information available at the leasing stage. If further analysis is required, DNR believes it will result in increased budget needs or a reduction in lease sales.

2. Compliance with the ACMP Consistency Requirements.

The court held that AS 44.19.145(a)(11) required OMB to perform the coastal consistency review for Sale 50 and to render the conclusive consistency determination. AS 44.19.145(a)(11) states that OMB shall "render on behalf of the state...a conclusive state consistency determination when a project requires two or more state or federal permits, leases, or authorizations." The court rejected the state's argument that Sale 50 required only a single agency authorization, the best interest finding. The court stated that since Sale 50 contemplated 35 leases, the statute required OMB to make the consistency determination and that OMB could not delegate that duty to DNR.

Comment: The court's holding represents a marked departure from the interpretation of the statute by OMB through its regulations. The court's decision requires significant changes in the manner in which the ACMP has been implemented by state agencies. The ACMP regulations now require an agency to perform the coastal consistency review and issue a conclusive consistency determination if a project requires the permits of only a single agency. Under the court's ruling, these regulations would need to be substantially rewritten.

Under the court's ruling, if one agency must issue more than one permit, OMB must take responsibility for the review and the determination. This ruling will require a significant increase in DGC's staff and budget. However, since the technical expertise

on pertinent issues lies in the resource agencies, it is unlikely that there will be a corresponding decrease in the resource agencies' staffs and budgets.

At least two arguments can be made that the court's holding is erroneous. First, nothing in the best interest finding "requires" that more than one lease be issued. In fact, the state expressly retains the right to reject any or all bids for any tract offered. Second, the fact that the statute may require OMB to "render" the determination does not necessarily mean that OMB is also required to "perform a consistency review of the sale."

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The Governor's bills would do the following:

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are approved by DNR. Discussions of transportation feasibility and safety would be excluded from the analysis. (House Bill 591 and Senate Bill 539.)

* Give DNR, rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program. (House Bill 592 and Senate Bill 540.)

* Ratify the lease sale in Camden Bay by nullifying the effect of the Supreme Court's March 16 ruling in Trustees for Alaska v. State. The bills would also ratify the adjacent state lease sale 55 (Demarcation Point) which was challenged by Kaktovik and environmental groups because of its impact on subsistence resources located in the Beaufort Sea and the Arctic National Wildlife Refuge. (Amendment to House Bill 128 [currently before Senate]).

In addition to Kaktovik, the groups challenging the oil and gas lease sales are the Wilderness Society, Alaska Center for the Environment, Northern Alaska Environmental Center, National Parks and Conservation Association, Sierra Club, American Wilderness Alliance, Alaska Wildlife Alliance, and Trustees for Alaska.

Why We oppose these bills:

* After the Exxon Valdez spill, the State and oil companies need to be more, not less, prepared for oil development and transportation problems.

* The Supreme Court has recently determined the level of analysis that is reasonable before the State makes the decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns.

* Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered.

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* The Governor's broad brush solution will allow safety issues to be brushed under the rug.

go0580sD
Chenoweth
5/5/90

Original sponsor(s): Rules/Governor

IN THE SENATE

HOUSE CS FOR CS FOR SENATE BILL NO. 539 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act ratifying Oil and Gas Lease Sale 50; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEASE SALE RATIFIED. Oil and Gas Lease Sale 50 resulting in the sale of 35 oil and gas leases covering 118,147 acres of offshore state land in Camden Bay is valid if

(1) the Department of Natural Resources

(A) considers the risks presented by reasonably foreseeable oil transportation methods should the Arctic National Wildlife Refuge remain closed to development; and

(B) prepares a best interest determination and supplemental written finding under AS 38.05.035(e) that incorporates the considerations set out in (1) of this section; and

(2) the office of management and budget in the Office of the Governor reviews and prepares a consistency determination for the Oil and Gas Lease Sale.

* Sec. 2. This Act is retroactive to January 1, 1986.

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

STEVE COWPER
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 30, 1990

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

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting two bills related to oil and gas lease sales and consistency determinations. As part of this package, I am also transmitting to the Senate Finance Committee (where the bill currently resides) a set of amendments to SCS CSHB 128(Res). Collectively, this package confirms existing oil and gas lease sale practices, confirms existing coastal consistency determination practices, and ratifies Oil and Gas Lease Sale 50. This package is necessary to avoid the serious adverse consequences of the Alaska Supreme Court's decision in Trustees for Alaska v. State of Alaska, ___ P.2d ___ (Op. No. 3537; March 16, 1990). The three items will be discussed separately below.

Amendments to SCS CSHB 128(Res):

The proposed amendments to SCS CSHB 128(Res) respond to the court's holding that the "best interest finding" for Oil and Gas Lease Sale 50 (Camden Bay), required by AS 38.05.035(e), failed to consider the environmental safety of transportation facilities should the Arctic National Wildlife Refuge (ANWR) remain unavailable for shore-based support facility siting under federal law. The decision overlooks the fact that the best-interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, the Department of Environmental Conservation (DEC) and the Department of Fish and Game (ADF&G). To the extent that the court engrafted a new requirement onto the best-interest statute -- to require the Department of Natural Resources (DNR) to undertake a detailed study of hypothetical development and transportation scenarios and their feasibility -- it is at odds with federal precedent and the court's own reasoning. With regard to federal environmental impact statements for oil and gas lease sales, a federal court of appeals recently observed,

quoting an earlier federal case:

> To require a cumulative EIS at the leasing stage . . . would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."

The federal court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 624, and 623 (10th Cir. 1987). Moreover, the Alaska Supreme Court's opinion regarding Sale 50 realized that economic feasibility of eventual production need not be assured in advance for the lease sale to be in the best interest of the state. The same is true of the feasibility of any transportation system: the lessee bears the risk of designing and obtaining approval for any future transportation facilities under laws applicable at the time of any production.

This set of amendments expressly identifies the subjects that DNR must discuss in an oil and gas best-interest finding by setting out the complete list of factors that must be addressed. The legislation is intended to preclude a court from determining the "important factors" that must be addressed before the executive decision is made concerning whether an oil and gas lease sale is in the best interest of the state. It is further intended to make clear that speculation concerning future activities that would be subject to independent permitting requirements is not necessary at the time of the lease sale decision. By specifying that only "reasonably foreseeable cumulative effects" be discussed, it is intended that DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, the technological feasibility of production or transportation, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot reasonably be foreseen at the time of leasing.

These changes will have two salutory effects on the state's leasing program. First, they will reduce the uncertainties that now interfere with the efficacy of the state's five-year leasing program. The legislature, DNR, and potential lessees would have more assurance that lease sales would be less subject to judicial interference. Second, because the amendments conform to existing practices, the bill will obviate the need for an increased appropriation to make even more extensive and specialized best-interest findings. (The finding in Lease Sale 50 was

89 pages long, and was based on a record more than 11,000 pages long.) If hypothetical development and transportation systems and their risk must be analyzed, DNR would need a greatly expanded budget for conducting the best-interest findings, and the Department of Law would need a larger budget to advise and defend against the inevitable challenges based upon contrary speculations.

Bill on Coastal Consistency Determination Statutes

The proposed amendments to AS 44.19.145(a)(11) and AS 44.19.152 are necessary to confirm existing procedures for issuance of coastal consistency determinations. In its opinion, the court held that, because Lease Sale 50 involved more than one lease, AS 44.19.145(a)(11) required the Division of Governmental Coordination (DGC) to conduct an independent review and render the coastal zone management consistency determination for the lease sale, notwithstanding the fact that statutory responsibility for holding the lease sales is vested in a single agency (DNR). Given the fact that DEC, ADF&G, and the North Slope Borough all agreed with DNR that the lease sale is consistent with the applicable plan, requiring DGC to render the determination in such a case would add no extra protections, while creating unnecessary bureaucracy.

The opinion also suggests that in those cases where DGC must render a consistency determination, it must conduct an independent review of the substantive issues. This is contrary to the common meaning of the term "render," and inconsistent with existing, long-established administrative practices. Consistent with its basic charge to coordinate the resource agencies to "avoid duplication" (AS 44.19.145(d)(1)), DGC has always viewed itself as a coordinating agency, without the staff or authority to transform itself into a separate permitting agency. Here, DNR, DEC, ADF&G, and the North Slope Borough agreed that the lease sale was consistent with the applicable coastal zone management plan. For DGC to make an independent judgment would require a vastly enlarged appropriation to hire more personnel (especially high-cost employees with specialized technical qualifications) where the resource agencies and their technical staffs have already agreed that a project is consistent. Failure to pass the bill would result in a needless waste of state resources, while creating bureaucratic delay -- results contrary to the fundamental purposes of OMB.

Finally, the bill would avoid delays in making coastal consistency determinations for projects regulated by all of the resource agencies -- DNR, DEC, and ADF&G. Such delays would impair projects under each resource agency's laws pending the creation of sufficient DGC staff to handle DGC's new responsibilities under the court's opinion.

Bill to Ratify Sale 50:

The other bill would ratify Oil and Gas Lease Sale 50. The court did not invalidate the sale, the state has filed a petition for rehearing, and remand proceedings could very well result in the eventual affirmation of the sale. Nevertheless, considerable uncertainty and delay are inevitable without expeditious ratification. Plaintiffs have already asked the Supreme Court to "clarify" its decision by declaring the leases invalid, have sought an injunction against current, ongoing exploration under a lease in the sale area, and are certain to fight any affirmation of the lease sale in both administrative and judicial fora.

This lease sale was planned in accordance with the legislature's prescribed five-year public planning process, starting in 1981. The sale was held almost three years ago. Extended uncertainty would result in diversion of administrative and legal resources from other projects, and exploration within the sale area would be chilled or stopped. If the sale is ultimately canceled or invalidated, the state might have to refund bonus bids ($6.6 million) and rents, half of which have been deposited in the Permanent Fund, and could possibly be liable for exploration expenditures and the value of any discovery that might be made before cancellation or invalidation. One lessee has already spent about $50 million exploring a Sale 50 lease.

Therefore, in light of the very serious practical and financial ramifications of the current situation, these bills and the amendments to SCS CSHB 128(Res) are vital to the state's best interests, and I urge your prompt and favorable action on them.

Sincerely,

Steve Cowper
Governor

S B
540

HOUSE COMMITTEE REPORT

(9)
Date Referred: April 24, 1990 FURTHER REFERRALS:

Date of Committee Action: 4/6/90

The RESOURCES Committee considered: CSSB 540(RESOURCES)

CS SB NO. 540 (Rules) STATE CONSISTENCY DETERMINATIONS

"An Act removing the requirement that the office of management and budget in the Office of the Governor render a conclusive state coastal zone consistency determination for a project that requires two or more state or federal permits, leases, or authorizations; requiring the office of management and budget in the Office of the Governor to render ..... see attached for full title.

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[ ] do pass

[ ] do not pass

[ ] no recommendation

[✓] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact_____

[ ] zero fiscal note_____

[ ] zero with analysis_____

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) 4/19/90 DNR

[ ] zero fn/analysis _____

SIGNING DO PASS:

MENARD

SHARP

FURNACE

FOSTER

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
DAVIDSON		✓	
JACKO		✓	
HUDSON		✓	
WADDERTE		✓	

Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS SB 540 (Rules) a
PUBLISH DATE: 4/19/90

FISCAL NOTE

REQUEST:

Revision Date:

Agency Affected: Natural Resources

Title: Issuance of State Consistency Determinations

BRU: Petroleum Management

Sponsor: Rules Committee

Components: Petroleum Management

Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Larry Ostrovsky
Phone: 465-2400
Division: Commissioner's Office
Date: March 29, 1990

Approved by Commissioner: Lennie Gorsuch
Date: March 29, 1990
Agency: Department of Natural Resources

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

Changes in C-SSB 340 (Rules) have no fiscal impact. This fiscal note is appropriate.

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 4, 1990

The Honorable Sam Cotten
Speaker of the Alaska State House
P.O. Box V
Juneau, AK 99811

Dear Sam:

As you may be aware, because of a recent Alaska Supreme Court ruling the State will now be required to have the Division of Governmental Coordination (DGC) coordinate consistency reviews for development projects having two or more State resource agency permits (Enclosure II). This ruling conflicts with the present permitting regulations which provide for DGC coordination only for projects which require permits from two or more agencies (Enclosure III). As the State's permitting regulations have been utilized successfully for six and one half years, the Administration has submitted legislation (SB 540, HB 592) which amends AS 44.19.145 to match the 6 AAC 50.030 regulation.

SB 540 has passed the Senate and has been referred to House Resources (the only House referral). Unless SB 540 is enacted, major delays will result in the time required for the State to process permitting reviews for nearly all proposed development in the State. The Administration strongly urges House passage of SB 540. Please call me or Denby Lloyd if you have questions. Your attention is appreciated.

Sincerely,

Steve Cowper
Governor

Enclosures

cc: House Resources Committee

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF GOVERNMENTAL COORDINATION

STEVE COWPER, GOVERNOR

P.O. BOX AW
JUNEAU, ALASKA 99811-0165
PHONE: (907) 465-3562

May 3, 1990

TO: House Resources Committee

FROM: Robert L. Grogan, Division of Governmental Coordination

SUBJECT: Background documents for Committee consideration of SB 540

CONTENTS

I. 4/25/90 memo to House Resources Committee regarding fiscal impacts related to a recent Alaska Supreme Court ruling

II. The fourth point of the Court's decision

(a) page 16 - language of existing statute

(b) page 18 - Court's decision

III. 6 AAC 50.030, State permitting regulations

IV. Permit reform article by Thomas Gallagher, Agroborealis, University of Alaska Fairbanks, January 1990

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF GOVERNMENTAL COORDINATION

STEVE COWPER, GOVERNOR

P.O. BOX AW
JUNEAU, ALASKA 99811-0165
PHONE: (907) 465-3562

April 25, 1990

TO: House Resources Committee

SUBJECT: Fiscal Impacts Related to SB 540/HB 592

Due to a recent court opinion, the State will be required to have the Division of Governmental Coordination (DGC) coordinate the consistency reviews of all development projects requiring two or more permits as opposed to projects requiring permits from two or more agencies, as has been the case previously and as presently exists in regulation. In response to the opinion, the Administration has requested passage of SB 540/HB 592 which seek to maintain the status quo. In the event SB 540/HB 592 do not pass, a substantial increase to the DGC project review budget will be needed if the State is to maintain present consistency review timeframes. The State's three resource agencies are presently projecting an additional 1,500 projects requiring DGC coordination. DGC's current annual workload consists of approximately 500 projects. Using these projections, the court's opinion essentially triples the current DGC workload.

Projected fiscal impacts follow:

DIVISION OF GOVERNMENTAL COORDINATION -- PERMIT COORDINATION

	FY 91 Governor's Budget	FY 91 Projected Budget
100	777.5	2,332.5
200	19.5	58.5
300	46.3	138.9
400	0	0
500	0	0
TOTAL	843.3	2,529.9
PFT	14.5	43.5

If the Legislature fails to pass SB 540/HB 592 and also does not appropriate additional funding required to deal with the increased

workload, major delays in project review time for virtually all proposed development in the State will result.

Sincerely,

Robert L. Grogan
Director

cc: Denby Lloyd, Office of the Governor, Juneau
Bob Evans, Office of the Governor, Juneau
Commissioner Collinsworth, DFG, Juneau
Commissioner Gorsuch, DNR, Juneau
Commissioner Kelso, DEC, Juneau
Alison Elgee, Division of Budget Review, Juneau

IV.

Has the State Complied with the ACMP Consistency Requirement?

The Alaska Coastal Management Program ("ACMP"), AS 46.40.010-210, protects numerous environmental and cultural values in Alaska's coastal zone. AS 46.40.020. See Hammond v. North Slope Borough, 645 P.2d 750, 761 (Alaska 1982). When a project requires two or more state or federal permits, leases, or authorizations, the Office of Management and Budget (OMB) must render a finding as to whether the project is consistent with the ACMP. AS 44.19.145(a)(11);[10] 6 AAC 50.010(1)(B). In this case, however, DNR performed the consistency review. Trustees contend that this was error, and request a remand so that OMB may make the required finding.

The state makes two arguments. First, that Sale 50 is not a project that requires multiple permits, leases, or

---

10. AS 44.19.145(a)(11) provides:

(a) The office shall

. . . .

(11) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (§ 307, Coastal Zone Management Act of 1972), and a conclusive state consistency determination when a project requires two or more state or federal permits, leases, or authorizations.

authorizations. Rather, it argues that the sale only requires DNR's best-interests finding, and thus is not subject to the OMB consistency review process.

The state's argument conflicts with the plain meaning of the regulations and statute at issue. OMB's regulation requires that it render the conclusive ACMP consistency determination when a "project" requires two or more state or federal permits. 6 AAC 50.010(1)(B). The term "project" applies to an activity which requires the issuance of one or more state permits. 6 AAC 50.190(14). The term "permit" includes leases. 6 AAC 50.190(13). Sale 50 contemplated issuing 35 leases and thus falls within 6 AAC 50.010(1)(B).

Second, the state argues that, pursuant to OMB's regulations, OMB could delegate the consistency determination to DNR. 6 AAC 50.030(b) provides that a resource agency (such as DNR) shall coordinate the consistency review and make the consistency determination when the project requires the permits of only a single state agency. Trustees challenge this regulation as invalid on the grounds that it conflicts with AS 44.19.145(a)(11).

To be valid a regulation must be consistent with the authorizing statute and reasonably necessary to carry out the statute's purpose. AS 44.62.030.[11] An administrative agency's

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11. A two-step analysis is used in assessing the

(Footnote Continued)

interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation. Tunley v. Municipality of Anchorage School Dist., 631 P.2d 67, 78, n.30 (Alaska 1981); State, Dep't of Highways v. Green, 586 P.2d 595, 602 n.21 (Alaska 1978). As Sale 50 is a project which requires two or more state leases, the plain language of AS 44.19.145(a)(11) clearly requires that OMB perform a consistency review of the sale.[12] The statute leaves no room for an exception for projects involving only one agency. We conclude, therefore, that OMB must render a consistency determination in this case.[13]

V.

Trustees had a fair opportunity to comment on DNR's finding that Sale 50 was in the state's best interests. However, DNR's Final Finding is deficient in that it did not review the environmental problems associated with oil transportation from

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(Footnote Continued)

validity of an administrative regulation. First, the court looks to whether the regulation is consistent with and reasonably necessary to carry out the purposes of the authorizing statute. Second, it must be determined whether the regulation is reasonable and not arbitrary. Chevron U.S.A. v. LeResche, 663 P.2d 923, 926 (Alaska 1983); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). Here, we are concerned with only the first step.

12. See footnote 10, supra.

13. Because we remand for OMB's consistency determination, we need not address Trustees other ACMP challenges.

(2) the responsibility of resource agencies to implement the ACMP by making conclusive consistency determinations for projects requiring the permit of a single state agency and no federal permit, and to expedite their permit review procedures, to the extent permitted by law, by coordinating their own procedures with the consistency review of a project. (Eff. 3/11/84, Reg. 89)

Authority: Art. III, Secs. 1, 16 and 24, Alaska Const.
AS 44.19.145(a)(11)
AS 46.40.100(a)

6 AAC 50.020. FEDERAL CONSISTENCY DETERMINATIONS. The division of governmental coordination (DGC) of the office of management and budget will coordinate a consistency review and render a response concurring in or objecting to a federal consistency certification or determination which is required or authorized by sec. 307 of the CZMA. DGC will coordinate the review in the manner provided in this chapter and will render a response in the time and manner prescribed in the CZMA or in the regulations implementing that Act. (Eff. 3/11/84, Reg. 89)

Authority: AS 44.19.145(a)(11)

6 AAC 50.030. STATE PERMIT CONSISTENCY DETERMINATIONS. (a) DGC will coordinate the review and render a determination for a project which requires the permits of two or more state agencies or a federal permit, in the manner provided in this chapter.

(b) A resource agency shall coordinate the consistency review and render a conclusive consistency determination for a project which requires only the permits of a single state agency and no federal permit. The agency shall coordinate the review and render its determination in the manner provided in this chapter.

(c) DGC will participate in a single-agency consistency review in the same manner as the other resource agencies participate. DGC will also, on request of the coordinating agency, act as a facilitator to attempt to resolve any disputed issues. If the project includes a disposal of interest in state land, DGC will either concur in the determination or require modifications necessary for its concurrence.

(d) DGC will, in its discretion, at any time, with reasonable notice, review the consistency review procedures, files, or decisions of a coordinating agency. (Eff. 3/11/84, Reg. 89)

Authority: Art. III, Secs. 1, 16 and 24, Alaska Const.
AS 44.19.145(a)(11)
AS 46.40.100(a)

6 AAC 50.040. PREAPPLICATION ASSISTANCE. DGC will, on request, assist a potential applicant for a state permit for a project by providing and explaining the coastal project questionnaire and the consistency review process as described in 6 AAC 50.070, identifying persons to contact in other state or federal agencies, determining the scope of activities which comprise the project, and providing any other assistance or information at its disposal to facilitate review and approval of the applicant's proposed project. A resource agency shall, on request, provide similar assistance and shall also provide application forms for its own permits. DGC and all resource agencies will attempt to regularly inform each coastal resource district of proposed projects which may have significant and direct impacts on that district. (Eff. 3/11/84, Reg. 89)

Authority: Art. III, Secs. 1, 16 and 24, Alaska Const.
AS 44.19.145(a)(11)
AS 46.40.100(a)

6 AAC 50.050. EXPEDITED REVIEW BY CATEGORICAL APPROVAL AND GENERAL CONCURRENCE DETERMINATIONS. (a) The consistency review of a project will be expedited as provided in (b) or (c) of this section if the project meets the requirements of one of those subsections.

(b) A project which requires one or more state or federal permits, each of which appears on the list published under (e) of this section listing permits which have been categorically approved by DGC as being consistent with the ACMP, is considered to have been conclusively determined by DGC to be consistent with the ACMP. A permit will be categorically approved if DGC determines that the activity authorized by the permit will have no significant impact in the coastal zone.

(c) A project which requires one or more state or federal permits not categorically approved as

Permit Reform in Alaska's Coastal Zone

Thomas J. Gallagher *

During the 1970s the number of proposals for development and the number of federal and state permits required for development increased dramatically in Alaska. The large number of projects and permits overloaded agencies (Environmental Protection Agency 1982). Permit applicants complained about delays and conflicting directives from agencies (Mueller, 1983).

Two factors aggravated the problem in the coastal zone. First, many oil industry projects, as well as public works projects funded by oil revenues, were proposed in the coastal zone. And second, coastal resources and coastal communities were given special status by the Alaska Coastal Management Act (ACMA) of 1977. The ACMA established broad goals for protection of coastal resources and established 33 coastal districts (Figure 1) to implement coastal management plans. Once a coastal plan was completed and approved, the district assumed the right to review projects within its boundary that required state or federal permits.

* **Associate Professor of Regional and Land Use Planning, School of Agriculture and Land Resources Management, University of Alaska Fairbanks.**

The coastal district review was important. State and federal agencies could not issue a permit until a project was found consistent with the coastal plan. Under state code, however, the state agency that issued a permit, after consultation with the coastal district, wrote the consistency review. Often districts and agencies did not agree on whether a project was consistent with the plan. Additional confusion occurred on projects that required permits from more than one state agency. In this situation each agency wrote its own consistency review. When these reviews did not agree, all parties—applicant, coastal districts, and agencies—were frustrated.

In 1984, increasing conflict among the players persuaded Governor Sheffield to establish a new coordination agency, the Division of Governmental Coordination (DGC). That same year, the legislature passed regulations (6 AAC 80, 85) that created a process to streamline permit review in the coastal zone. The DGC was appointed the process manager. Since 1984, the DGC has guided over 2500 projects through the process. This study presents an evaluation of the process by those who have participated most closely in the new process: project applicants, state agency staff, and coastal district staff.

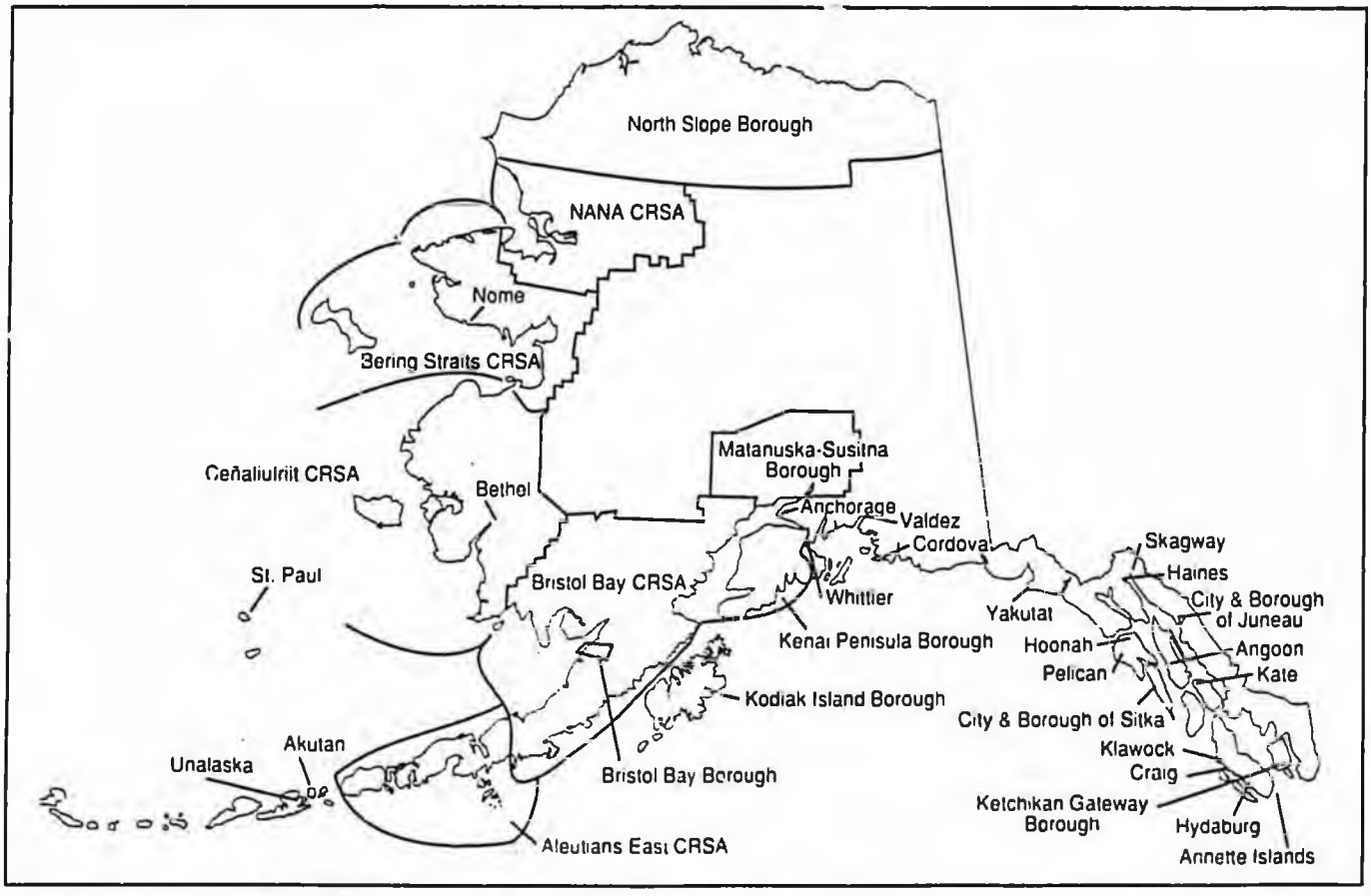

Figure 1. Alaska's coastal zone districts and coastal zone boundaries (approximate).

Consistency Review Process

The new process, called the "consistency review process," coordinates the coastal district review with state and federal permit reviews. Under the new process, when a project requires a permit from more than one state agency, the DGC writes the consistency determination. (For projects that involve only one permit, the permitting agency writes the determination.) The DGC mediates discussion among state agencies so that the state has one position toward a project. The agency also coordinates applicant and agency interaction with federal agencies. The new process does not change the criteria either state or federal agencies use to evaluate projects.

The process provides a timetable for the review and a deadline for state agencies to issue permits (Table 1). State agencies must issue their permit(s) not later than 30 days after an application is submitted, or 50 days if a permit requires a public hearing. Once the DGC issues a positive consistency review, agencies must issue their permits within five calendar days. Federal agencies are not obligated to follow these deadlines, but neither they, nor state agencies, may issue permits if the DGC issues a negative determination. If an applicant, the coastal district, or an agency is dissatisfied with the DGC's determination, there is a rapid appeals process to the commissioner level.

DGC plays several key roles in the process. Staff members guide applicants in completing the permit applications and manage the calendar of activities and deadlines. The DGC also serves as the clearinghouse for information flowing between applicants, agencies, and coastal districts. In addition, the agency keeps the primary set of project records.

Application of the process is limited in several ways. It does not apply outside Alaska's coastal zone, the boundary of which is established by each coastal district, as it prepares its coastal management plan. The process also does not apply to mining projects, which go through a separate "tri-agency application" developed specifically for mining. Projects that have a "de minimus" impact or require only a standard condition of approval, as determined by DGC, are given "categorical approval" and do not go through the process.

The DGC has guided about 500 projects through the process each year since 1984. About 100 projects each year have received categorical approval. Of those projects that enter the process, less than 10 percent are withdrawn by the applicant. Although no data is kept on reasons for withdrawal, reasons apparently range from changing business conditions to obvious inability to meet permit criteria. Of those projects that proceed through the process over 99 percent receive a positive determination. This high rate occurs in part because most projects are modified in location, design, construction detail, or operation as they move through the process. The high rate of positive determinations is consistent with that found in other states (Lowry and Eichenberg 1986).

Methods

People interviewed for this study were from three groups: applicants, coastal district staff, and state agency staff. Applicants were classified into four groups: small businesses, large business, local government, and state/federal agencies. Ten applicants were selected from each group. For coastal district staff, 17 of the 33 liaisons to DGC were selected. And for state agency staff, 17 of 32 liaisons to DGC were selected. All selections were random.

Interviews were conducted, in June of 1988, with people associated with the process in the 1987/88 fiscal year. In that fiscal year, 468 projects went through the process. The 74 interviews were conducted by telephone. Each interview involved asking the person to respond to 12 statements and one question. The response scale for statements was: 1 = strongly disagree, 2 = disagree, 3 = neutral, 4 = agree, and 5 = strongly agree. The statements, in summary form, were:

1. The process coordinates agency permits.
2. The process helps involve local communities.
3. The process helps identify participants' interests.
4. The process helps develop better solutions.
5. The process helps reduce conflict.
6. The process helps applicants receive their federal permits.
7. The process helps save us time and money.
8. The process time-frame is acceptable.
9. DGC staff is knowledgeable and helpful.
10. State permits are issued promptly.
11. Federal permits are issued promptly.
12. Alaska should keep the office/process.

After each response, people were asked to add comments. The interview concluded with the question, "What are the strong points of the process and what would you change?" Responses were evaluated by calculating mean scores for each group and comparing differences in scores and comments, among groups.

Results

Table 2 presents the mean scores for the six groups. For this study, scores between 2.50 and 3.49 are referred to as "neutral." Lower scores are referred to as "disagree" and higher scores are referred to as "agree" (3.50 to 4.49) and "strongly agree" (greater than 4.50).

Statement 1 concerned the primary goal of the permit reform, coordination of agency permits. All

groups agreed that the process helps coordination of permits. Large businesses and local governments were particularly strong in their agreement. Comments made following this statement were uniformly positive, such as "without the process, permitting would be a nightmare."

Statement 2 involved a primary goal of the AMCA, involving local communities more effectively in the decision process. All groups agreed with this statement except for state/federal applicants who were neutral. Comments from coastal district staff were very positive, such as "before DGC, we were often left out." Comments made by applicants indicated that they felt communities were able to participate, but perhaps too much, thus increasing the number of changes to a project.

Statement 3 addressed whether the process "helps to identify participants' interests and goals." All groups agreed with this statement. State liaisons had the strongest level of agreement, with one person commenting that the process "helps village people to understand agency policies."

Statement 4, concerning "develops better solutions," received diverse scores. State agency staff agreed that the process produced this value, but small business applicants disagreed. Comments from state agency staff indicated that they thought the process was valuable because it allowed changes to be made in the project. Small business applicants, however, felt that the "new solutions might be more acceptable, yes; but better, no." Many applicants noted the additional cost of changes made during the review process.

Statement 5 focused on whether the process "prevents or resolves conflict." All groups except small business applicants agreed with this statement. Comments indicated that the process itself precipitated some conflict. One state agency staff noted that the process "causes problems and then solves them," and a small business applicant stated that the process "probably solves more problems than it creates."

The value of the state-managed process in helping applicants receive their federal permits was addressed in statement 6. Only applicants were asked to respond to this statement and all agreed, although marginally. The few comments received were positive, including one small business applicant who called the DGC "the only helpful agency."

Statement 7 considered two of the major reasons

STEP	30-day Schedule DAY	50-day Schedule DAY
Pre-application meeting and other early contact.	—	—
"Day one."*	1	1
Applicant submits completed packet; DGC distributes packet and review schedule to resource agencies and coastal districts.	1-2	1-2
Review period.	3-17**	3-34**
Last day to file request for more information through DGC.	15	25
Last day for request for public hearing and last date for verbal comments from agencies (must be followed in writing within 5 days).	17***	34***
DGC prepares "proposed determination," notifies applicant, agencies, and districts.	18-24	35-44
Last day for written statement requesting elevation to director level.	29	49
If a concensus is reached, consistency determination prepared and distributed.	30	50
Latest date for issuance of state permits.	35	55
Time period for elevation (appeal) to director level.	30-45	50-65
Time period for elevation to commissioner level.	45-60	65-80

* "Day One" begins when applications are complete.
** 10-day extension is provided in the "unorganized borough," areas without municipal government.
*** Coordinating agency must decide within 7 days whether to hold a public hearing. If so, the agency must provide 15-30 days of notice and provide summary of hearing 5 days after.

Table 1. Timeline for Alaska consistency review process.

for permit coordination, time, and money. All groups, except state agency staff who were neutral, agreed that the process saved them time and money. Comments were generally positive, including "75 percent of applicants are helped, 25 percent are hurt," offered by a state agency staff person. And, "yes, especially time;" and "yes, because DGC projects are seldom litigated" by several large business applicants. Several small business applicants commented that, although the DGC process saved them time and money compared to acquiring permits by themselves, they scored this statement low because any expense for permits was excessive.

Statement 8 raised the question of "the time frame is acceptable." All scores for this statement were neutral, except for coastal district contacts who agreed. Applicants uniformly felt the time line was too long, although one small business applicant noted that the process was "much better than in 1984." Applicants noted that the time frame was too slow given Alaska's short construction season, and that minor and emergency projects were often unnecessarily bound up in the process. A large business applicant commented that Alaska's time frame was irrelevant since federal agencies were so much slower that projects were delayed anyway. Coastal district contacts and state agency staff, on the other hand, often felt that the time frame was too short. Coastal district contacts argued that it was often difficult to "talk around the village" in the short review period. And, state agency staff noted that it was often difficult for them to gather enough information to make a credible decision during the time frame.

Statement 9, concerning the knowledge and helpfulness of the DGC staff, received the highest level of agreement in the study from applicants and coastal district contacts. All applicant groups strongly agreed with this statement. All comments were positive, or positive with a single criticism. This criticism was, particularly from state agency staff, that the DGC staff lacked the technical knowledge they need to fully understand the projects. Still, the consensus of comments was that, without the staff, the "DGC would be just another bureaucracy."

Statements 10 and 11 provided an opportunity for those surveyed to compare the promptness of state and federal agencies in issuing permits. All groups agreed, except small businesses who were neutral, that "state permits are issued promptly." Many applicants commented that the DGC process was still too long, but most added that it was much better than in 1984. All groups were neutral about the statement that "federal permits are issued promptly." A representative comment was, "look at what the feds are doing, or not doing—it's a mess compared to the DGC process." The Corps of Engineers drew the most comments among federal agencies for delays. These comments are consistent with data that shows that state permits take an average of 10 days and federal permits take an average of 60 days following the consistency determination

	Applicant Subgroups						
	State Liasons (n = 17)	District Contacts (n = 17)	Applicants (all) (n = 40)	Small Business (n = 10)	Large Business (n = 10)	Local Government (n = 10)	Federal Agencies (n = 10)
Statements							
1."Coordinates agency permits"	3.94*	3.88*	4.00*	3.55*	4.33*	4.20*	3.90*
2."Involves local communities"	3.94*	3.69*	3.61	3.60	3.66	3.87	3.28
3."Identifies interests and goals"	4.00*	3.86*	3.68*	(a)	3.55	3.80*	3.70*
4."Develops better solutions"	3.70*	3.53	3.05	1.80	3.00	3.40	3.40
5."Prevents or resolves conflict"	3.70*	3.56*	3.72*	3.40	4.00*	3.88*	3.50*
6."Helps applicants receive federal permits"	na	na	3.59	3.80*	3.55	3.50*	3.50
7."Saves time and money (for entity)"	2.94	3.54	3.76	3.28	4.00*	4.14*	3.70
8."Time frame is acceptable"	3.23	3.52	3.05	2.30	3.30	3.30	3.05
9."Staff is knowledgeable and helpful"	3.94*	4.41*	4.47*	4.50*	4.53*	4.50*	4.55*
10."State permits are issued promptly"	3.88*	4.00*	3.67*	3.40	3.62	3.70*	4.00*
11."Federal permits are issued promptly"	2.62	3.25	2.74	2.50	2.88	2.70	2.90
12."Alaska should keep the office/process"	4.18*	4.41*	4.33*	4.10*	4.44*	4.44*	4.40*

Likert-scale used: 1 = strongly disagree, 2 = disagree, 3 = neutral, 4 = agree, and 5 = strongly agree.

* significant at $p < 0.05$ level.
na not applicable.
(a) insufficient response, less than 6 of 10.

Table 2. Mean scores for statements by groups and subgroups.

(Division of Governmental Coordination, 1988).

The last statement, "Alaska should keep the process," generated high scores. All groups agreed with this statement, several with scores near the strongly agree mark. Comments were overwhelmingly positive, even among some business applicants who would rather have no permits (and even no government). At worst, the process was seen as a "necessary evil" or "redundant." At best, it was described as "working very well," "something to fall back on," and "very valuable for private applicants."

The question about "the strong points of the process and what you would change" elicited a variety of responses. District contacts noted the value of the process by involving them early and giving them access to decisions. Several districts argued that the process reduces their need for staff. State liaisons noted the additional value of the process in "designing-out" problems and of providing a forum that generates consensus. Small business applicants enjoyed having a single contact person and found the extra "depository for records" valuable. Large businesses found value in forcing agencies to work with applicants, of resolving agency jurisdictional problems, and of organizing the process so that there were few opportunities for legal challenges based on procedural errors. Local government applicants responded that the process ensures that agencies follow rules and uniformly apply standards. Like the coastal districts, local governments also thought the DGC saved them from hiring additional staff. State and federal agencies recognized the value of DGC staff as mediators and the value of the extra help during rush periods.

District contacts asked for a readable guidebook, less jargon, a rational method for balancing values, training for their staff, extending the public review period, simplifying the process, and provision of extra funds to help them conduct their portion of the review. State liaisons wanted more consideration of other agency time lines, more staff to coordinate with DGC, and federal legislation to force federal agencies to develop a comparable process. Applicants asked that DGC be given more "clout" to control "radicals" (within agencies) and to "push" other agencies to complete their reviews as early as possible. They also asked that the time frames be shortened, that new processes be developed for very short or very large projects, and that there be a better "fit" of the process to Alaska's short construction season.

Conclusions

This study provides an evaluation of the DGC process by people who are directly involved with the process. Those involved found the process to be successful in achieving its primary goals of coordinating permits and involving local communities. The process also produced other benefits, such as savings in time and money, helping applicants receive their federal permits, reducing conflict, and developing better solutions. Participants in the survey also recommended a variety of changes to improve the program.

Perhaps the most important change that could be made in the permit reform movement would be to bring federal agencies into the process. Although applicants receive their state permits rapidly, most projects were delayed by federal permits. The time benefits produced by the state process were lost because of the lack of a comparable federal process. The potential for a joint state-federal review should be studied. For small or common projects that involve little coatroversy, the state's 30-day process might be appropriate. For very large projects, such as major mines, a more comprehensive process, such as the Colorado Joint Review Process (Gallagher 1987), might serve to bring state and federal agencies together with local government and interest groups interested in such large projects. This study provides ideas about the successes of the process and what might be changed. It also indicates the support the DGC and process receive from its constituency. Among this constituency are many of Alaska's major industries including oil, timber and fishery corporations. Also important are local governments. The process helps local government in two ways, when they apply for permits and when they participate in the coastal district review. The benefits of the process are undefined, but apparently surpass the DGC's $950,000 budget (FY 1987/88).

Alaska's process of permit reform is unique among the coastal states. It appears to be a particularly appropriate process in Alaska where environmental concerns demand strict adherence to permit requirements, and where development concerns—such as the short construction season—demand rapid decisions. This introductory evaluation suggests that the Alaska experiment in permit reform is working. ❑

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Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

CS SENATE BILL 540 (RULES)

LETTER OF INTENT

It is the intent of the House Resources Committee to have the Division of Governmental Coordination and the State's resource agencies work with the Committee to review actions which may affect state resources to determine if the criteria used to require DGC interagency coordination for project review should be modified.

It is also the intent that this Committee will request Legislative Budget and Audit to make a systematic review of the state's permitting practices and to determine if oil and gas leases and other large scale disposals of state property compel DGC permit coordination.

In the event this effort concludes that additional activities require DGC coordination, the administration will modify the state's permitting regulations to include them.

Representative Cliff Davidson
Co-Chair
House Resources Committee

Representative Curt Menard
Co-Chair
House Resources Committee

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

Testimony regarding Senate Bill 540.

Trustees for Alaska proposes the following language in place of that proposed in Senate Bill ~~[illegible]~~ 540.

(11) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each [A] conclusive state consistency determination when a project requires (A) a permit or authorization from two or more state resource agencies, [OR FEDERAL PERMITS, LEASES OR AUTHORIZATIONS] or (B) a sale, lease or other disposal of land or resources by a state resource agency.

The changes would clarify that consistency determination for projects requiring multiple permits or authorizations from a single agency could be made by the resource agency. Sales, leases or other disposals of land or resources would require a consistency determination prepared by the Division of Governmental Coordination (DGC).

We concur with the arguments of the resource agencies that many projects requiring multiple permits or authorizations, such as stream crossing permits prepared by the Alaska Department of Fish and Game (ADFG), are unlikely to raise concerns from either the public or other agencies. As a result, we see no reason to require DGC to make the consistency determinations for these types of activities.

We feel strongly, however, that decisions to lease or otherwise dispose of land should be the subject of consistency determinations prepared by DGC, which plays an important role as an independent agency which seeks to establish a consensus of opinion from among the effected resource agencies.

Decisions to lease or otherwise dispose of land are much more likely to effect the responsibilities of agencies other than the Department of Natural Resources. Recent oil and gas lease sales, for instance, have been the subject of comments by both ADFG and the Alaska Department of Environmental Conservation (ADEC). The public, as well, is much more likely to be involved in a long term land use decision than other single agency government decisions.

It is important that DGC, rather than an interested resource agency, prepare and circulate the consistency determinations for these long range and often controversial decisions, since the drafter is the primary shaper of most of the ultimate decision. While disgruntled agencies have the authority to elevate decisions to the director level or higher, according to the federal agency with oversight over the Alaska Coastal Management Program (ACMP),

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

IT IS THE INTENT OF THE HOUSE RESOURCES COMMITTEE TO HAVE THE DIVISION OF ENVIRONMENTAL COORDINATION AND THE STATE'S RESOURCE AGENCIES WORK WITH THE COMMITTEE TO REVIEW ACTIONS WHICH MAY EFFECT STATE RESOURCES TO DETERMINE IF THE CRITERIA USED TO REQUIRE DGC INTERAGENCY COORDINATION FOR PROJECT REVIEW SHOULD BE MODIFIED. IN THE EVENT THIS EFFORT CONCLUDES THAT ADDITIONAL ACTIVITIES REQUIRE DGC COORDINATION, THE ADMINISTRATION WILL MODIFY THE STATE'S PERMITTING REGULATIONS TO INCLUDE THEM.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1795
PHONE: (907) 465-2400

April 3, 1990

The Honorable Drue Pearce
Chair, Senate Special Committee on Oil and Gas
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Senator Pearce:

Subject: Senate Bill 539, which ratifies State Oil and Gas Lease Sale 50.

Position: The Department of Natural Resources supports this bill. The bill is necessary to avoid the serious adverse consequences, both practical and financial, of the Alaska Supreme Court's recent decision in Trustees for Alaska v. State of Alaska.

While the state has filed a petition for rehearing, and the court did not invalidate the sale, uncertainty will continue until the court acts on the petition or the Legislature validates the sale.

If the court ultimately cancels the sale, the state may need to refund the $6.6 million in Sale 50 bonus bids as well as exploration costs and the value of any discovery made in the area (drilling has already started on one lease).

This bill will protect the public's interest in responsible oil and gas exploration and development at Camden Bay.

Please let me or Oil and Gas Director Jim Eason know if you would like additional information about this matter.

Sincerely,

Lennie Gorsuch

Lennie Gorsuch
Commissioner

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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The changes would clarify that consistency determination for projects requiring multiple permits or authorizations from a single agency could be made by the resource agency. Sales, leases or other disposals of land or resources would require a consistency determination prepared by the Division of Governmental Coordination (DGC).

We concur with the arguments of the resource agencies that many projects requiring multiple permits or authorizations, such as stream crossing permits prepared by the Alaska Department of Fish and Game (ADFG), are unlikely to raise concerns from either the public or other agencies. As a result, we see no reason to require DGC to make the consistency determinations for these types of activities.

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Decisions to lease or otherwise dispose of land are much more likely to effect the responsibilities of agencies other than the Department of Natural Resources. Recent oil and gas lease sales, for instance, have been the subject of comments by both ADFG and the Alaska Department of Environmental Conservation (ADEC). The public, as well, is much more likely to be involved in a long term land use decision than other single agency government decisions.

It is important that DGC, rather than an interested resource agency, prepare and circulate the consistency determinations for these long range and often controversial decisions, since the drafter is the primary shaper of most of the ultimate decision. While disgruntled agencies have the authority to elevate decisions to the director level or higher, according to the federal agency with oversight over the Alaska Coastal Management Program (ACMP),

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such elevations are used "reluctantly" because "differences between agencies may be perceived as undesirable inter-agency conflict."[1]

The changes we propose would, in addition, preserve the integrity of the Alaska Supreme Court's ruling on March 16 that DGC, not DNR, should have made the consistency determination for Lease Sale 50. The legislature should think long and hard about changing judicially imposed responsibilities which can be readily performed by DGC. Thus, if changes are made, they should not be made retroactive.

We thank you for the opportunity to submit this testimony on SB 540.

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[1] Draft Evaluation of the ACMP, Office of Ocean and Coastal Resource Management. U.S. Department of Commerce, February 13, 1990, p. 11.

IT IS THE INTENT OF THE HOUSE RESOURCES COMMITTEE TO HAVE THE DIVISION OF ENVIRONMENTAL COORDINATION AND THE STATE'S RESOURCE AGENCIES WORK WITH THE COMMITTEE TO REVIEW ACTIONS WHICH MAY EFFECT STATE RESOURCES TO DETERMINE IF THE CRITERIA USED TO REQUIRE DEC INTER-AGENCY COORDINATION FOR PROJECT REVIEW SHOULD BE MODIFIED. IN THE EVENT THIS EFFORT CONCLUDES THAT ADDITIONAL ACTIVITIES REQUIRE DEC COORDINATION, THE ADMINISTRATION WILL MODIFY THE STATE'S PERMITTING REGULATIONS TO INCLUDE THEM..

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
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This bill will protect the public's interest in responsible oil and gas exploration and development at Camden Bay.

Please let me or Oil and Gas Director Jim Eason know if you would like additional information about this matter.

Sincerely,

Lennie Gorsuch

Lennie Gorsuch
Commissioner

cc: Committee Members
Bob Evans, Legislative Liaison
Office of the Governor
Denby Lloyd, Special Staff Assistant
Office of the Governor

STEVE COWPER
GOVERNOR

HB 591 Sub
SB 539

CSHB 592
SB 540

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 30, 1990

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

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting two bills related to oil and gas lease sales and consistency determinations. As part of this package, I am also transmitting to the Senate Finance Committee (where the bill currently resides) a set of amendments to SCS CSHB 128(Res). Collectively, this package confirms existing oil and gas lease sale practices, confirms existing coastal consistency determination practices, and ratifies Oil and Gas Lease Sale 50. This package is necessary to avoid the serious adverse consequences of the Alaska Supreme Court's decision in Trustees for Alaska v. State of Alaska, ___ P.2d ___ (Op. No. 3537; March 16, 1990). The three items will be discussed separately below.

Amendments to SCS CSHB 128(Res):

The proposed amendments to SCS CSHB 128(Res) respond to the court's holding that the "best interest finding" for Oil and Gas Lease Sale 50 (Camden Bay), required by AS 38.05.035(e), failed to consider the environmental safety of transportation facilities should the Arctic National Wildlife Refuge (ANWR) remain unavailable for shore-based support facility siting under federal law. The decision overlooks the fact that the best-interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, the Department of Environmental Conservation (DEC) and the Department of Fish and Game (ADF&G). To the extent that the court engrafted a new requirement onto the best-interest statute -- to require the Department of Natural Resources (DNR) to undertake a detailed study of hypothetical development and transportation scenarios and their feasibility -- it is at odds with federal precedent and the court's own reasoning. With regard to federal environmental impact statements for oil and gas lease sales, a federal court of appeals recently observed,

quoting an earlier federal case:

> To require a cumulative EIS at the leasing stage . . . would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."

The federal court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 624, and 623 (10th Cir. 1987). Moreover, the Alaska Supreme Court's opinion regarding Sale 50 realized that economic feasibility of eventual production need not be assured in advance for the lease sale to be in the best interest of the state. The same is true of the feasibility of any transportation system: the lessee bears the risk of designing and obtaining approval for any future transportation facilities under laws applicable at the time of any production.

This set of amendments expressly identifies the subjects that DNR must discuss in an oil and gas best-interest finding by setting out the complete list of factors that must be addressed. The legislation is intended to preclude a court from determining the "important factors" that must be addressed before the executive decision is made concerning whether an oil and gas lease sale is in the best interest of the state. It is further intended to make clear that speculation concerning future activities that would be subject to independent permitting requirements is not necessary at the time of the lease sale decision. By specifying that only "reasonably foreseeable cumulative effects" be discussed, it is intended that DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, the technological feasibility of production or transportation, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot reasonably be foreseen at the time of leasing.

These changes will have two salutory effects on the state's leasing program. First they will reduce the uncertainties that now interfere with the efficacy of the state's five-year leasing program. The legislature, DNR, and potential lessees would have more assurance that lease sales would be less subject to judicial interference. Second, because the amendments conform to existing practices, the bill will obviate the need for an increased appropriation to make even more extensive and specialized best-interest findings. (The finding in Lease Sale 50 was

89 pages long, and was based on a record more than 11,000 pages long.) If hypothetical development and transportation systems and their risk must be analyzed, DNR would need a greatly expanded budget for conducting the best-interest findings, and the Department of Law would need a larger budget to advise and defend against the inevitable challenges based upon contrary speculations.

Bill on Coastal Consistency Determination Statutes

The proposed amendments to AS 44.19.145(a)(11) and AS 44.19.152 are necessary to confirm existing procedures for issuance of coastal consistency determinations. In its opinion, the court held that, because Lease Sale 50 involved more than one lease, AS 44.19.145(a)(11) required the Division of Governmental Coordination (DGC) to conduct an independent review and render the coastal zone management consistency determination for the lease sale, notwithstanding the fact that statutory responsibility for holding the lease sales is vested in a single agency (DNR). Given the fact that DEC, ADF&G, and the North Slope Borough all agreed with DNR that the lease sale is consistent with the applicable plan, requiring DGC to render the determination in such a case would add no extra protections, while creating unnecessary bureaucracy.

The opinion also suggests that in those cases where DGC must render a consistency determination, it must conduct an independent review of the substantive issues. This is contrary to the common meaning of the term "render," and inconsistent with existing, long-established administrative practices. Consistent with its basic charge to coordinate the resource agencies to "avoid duplication" (AS 44.19.145(d)(1)), DGC has always viewed itself as a coordinating agency, without the staff or authority to transform itself into a separate permitting agency. Here, DNR, DEC, ADF&G, and the North Slope Borough agreed that the lease sale was consistent with the applicable coastal zone management plan. For DGC to make an independent judgment would require a vastly enlarged appropriation to hire more personnel (especially high-cost employees with specialized technical qualifications) where the resource agencies and their technical staffs have already agreed that a project is consistent. Failure to pass the bill would result in a needless waste of state resources, while creating bureaucratic delay -- results contrary to the fundamental purposes of OMB.

Finally, the bill would avoid delays in making coastal consistency determinations for projects regulated by all of the resource agencies -- DNR, DEC, and ADF&G. Such delays would impair projects under each resource agency's laws pending the creation of sufficient DGC staff to handle DGC's new responsibilities under the court's opinion.

Bill to Ratify Sale 50:

The other bill would ratify Oil and Gas Lease Sale 50. The court did not invalidate the sale, the state has filed a petition for rehearing, and remand proceedings could very well result in the eventual affirmation of the sale. Nevertheless, considerable uncertainty and delay are inevitable without expeditious ratification. Plaintiffs have already asked the Supreme Court to "clarify" its decision by declaring the leases invalid, have sought an injunction against current, ongoing exploration under a lease in the sale area, and are certain to fight any affirmation of the lease sale in both administrative and judicial fora.

This lease sale was planned in accordance with the legislature's prescribed five-year public planning process, starting in 1981. The sale was held almost three years ago. Extended uncertainty would result in diversion of administrative and legal resources from other projects, and exploration within the sale area would be chilled or stopped. If the sale is ultimately canceled or invalidated, the state might have to refund bonus bids ($6.6 million) and rents, half of which have been deposited in the Permanent Fund, and could possibly be liable for exploration expenditures and the value of any discovery that might be made before cancellation or invalidation. One lessee has already spent about $50 million exploring a Sale 50 lease.

Therefore, in light of the very serious practical and financial ramifications of the current situation, these bills and the amendments to SCS CSHB 128(Res) are vital to the state's best interests, and I urge your prompt and favorable action on them.

Sincerely,

Steve Cowper
Governor

Introduced: 3/30/90
Referred: Senate Spec. Comte. on Oil & Gas

go00580s

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

CS (ooh) Same Except for change in lots

IN THE SENATE

SENATE BILL NO. 539

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act ratifying Oil and Gas Lease Sale 50; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) the leasing of oil, gas, and associated substances in Camden Bay is in the best interest of the state, regardless of whether the Arctic National Wildlife Refuge may be used as a site for shore-based support and transportation facilities;

(2) a lessee of state oil and gas rights must apply for and receive permits from numerous local, state, and federal agencies before the lessee may drill for, produce, or transport oil, gas, or associated substances;

(3) each government agency charged with evaluating and issuing a permit for an oil and gas lessee's application to conduct exploration and production activities, including transportation, must undertake a review, under applicable laws, of relevant facts and technologies that are then available before granting or denying a permit;

(4) the lessees have undertaken the risks of finding oil and gas and of producing and transporting any oil and gas that is found in a manner that will satisfy laws then in effect providing for environmental protection and safety; and

(5) state oil and gas leases expressly provide for their cancellation if continued lease operations are likely to cause serious harm or

damage to biological resources, to property, to mineral resources, or to the environment.

(b) It is the purpose of this Act to counter the effect of the Alaska Supreme Court's decision in Trustees for Alaska v. State, ___ P.2d ___ (Op. No. 3573, March 16, 1990), and to ratify and declare valid Oil and Gas Lease Sale 50, held June 30, 1987.

* Sec. 2. LEASE SALE RATIFIED. Oil and Gas Lease Sale 50, resulting in the sale of 35 oil and gas leases covering 118,147 acres of offshore state land in Camden Bay is valid, notwithstanding the court's finding of lack of compliance with laws or regulations relating to that sale, including the requirements of AS 38.05.035(e) and AS 44.19.145(a)(11). The validity of the issuance of leases under that sale is ratified and confirmed.

* Sec. 3. This Act is retroactive to March 11, 1984. Senate changed this Sec

* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

Original sponsor(s): Rules/Governor

HB 592 is same except for Title

IN THE SENATE BY THE RULES COMMITTEE

CS FOR SENATE BILL NO. 540 (Rules)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act removing the requirement that the office of management and budget in the Office of the Governor render a conclusive state coastal zone consistency determination for a project that requires two or more state or federal permits, leases, or authorizations; requiring the office of management and budget in the Office of the Governor to render a conclusive state coastal zone consistency determination for a project that requires permits, leases, or authorizations from more than one state resource agency; defining 'render' and 'resource agency' for purposes of coastal zone consistency determinations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.19.145(a) is amended to read:

(a) The office shall

(1) provide technical assistance to the governor and the legislature in identifying long range goals and objectives for the state and its political subdivisions;

(2) prepare and maintain a state comprehensive development plan;

(3) provide information and assistance to state agencies to aid in governmental coordination and unity in the preparation of agency plans and programs;

(4) review planning within state government as may be necessary for receipt of federal, state, or other funds;

(5) participate with other countries, provinces, states, or subdivisions of them in international or interstate planning, and assist the state's local governments, governmental conferences, and councils in planning and coordinating their activities;

(6) encourage educational and research programs that further state planning and development, and provide administrative and technical services for them;

(7) publish such statistical information or other documentary material as will further the provisions and intent of AS 44.19.-141 - 44.19.152;

(8) assist the governor and the Department of Community and Regional Affairs in coordinating state agency [THE] activities that [OF STATE AGENCIES WHICH] have an effect on the solution of local and regional development problems;

(9) serve as a clearinghouse for information, data, and other materials that may be helpful or necessary to federal, state, or local governmental agencies in discharging their respective responsibilities or in obtaining federal or state financial or technical assistance;

(10) review all proposals for the location of capital improvements by any state agency and advise and make recommendations concerning location of these capital improvements;

(11) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each [A] conclusive state consistency determination when a project requires a permit, lease, or authorization from two or more state resource agencies [OR

FEDERAL PERMITS, LEASES, OR AUTHORIZATIONS].

* Sec. 2. AS 44.19.152 is amended by adding new paragraphs to read:

(3) "render" means to coordinate and issue;

(4) "resource agency" means

(A) the Department of Environmental Conservation;

(B) the Department of Fish and Game; or

(C) the Department of Natural Resources.

* Sec. 3. This Act is retroactive to March 11, 1984.

* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

A M E N D M E N T

OFFERED IN THE SENATE BY _____

TO: SCS CSHB 128(Res)

Page 1, line 18, after "state.":

Insert "A written finding for an oil and gas lease sale under AS 38.-05.180 is subject to (g) of this section."

Page 2, following line 23:

Insert a new bill section to read:

"* Sec. 2. AS 38.05.035 is amended by adding a new subsection to read:

(g) When the director prepares a written finding required by (e) of this section for an oil and gas lease sale scheduled under AS 38.05.180, the written finding need only include

(1) property descriptions and locations;

(2) a description of the property's petroleum potential in general terms;

(3) descriptions of fish and wildlife species and their habitats in the sale area;

(4) a description of current and projected uses in the area, including uses and value of fish and wildlife and an analysis of their compatibility with oil and gas exploration, development, and production;

(5) a discussion of governmental powers to control lease-hold activities;

(6) a discussion of reasonably foreseeable cumulative effects on resources in the sale area;

(7) a discussion of stipulations applicable to the leases;

(8) a summary of public comments received and the department's responses to those comments; and

(9) a discussion of the basis for the director's determination that, on balance, leasing the area would be in the state's best interest."

Renumber the following bill sections accordingly.

Page 5, after line 1:

Insert a new bill section to read:

"Sec. 6. Section 2 of this Act is retroactive to March 11, 1984."

Chronology for Lease Sale 50, Camden Bay

October 1981	DNR proposes to add Sale 50 to leasing schedule; call for comments issued.
January 1982	Sale 50 added to Five Year Oil and Gas Leasing Program.
July 26, 1985	Call for general information.
January 27, 1986	Request for socioeconomic and environmental information.
August 21, 1986	Call for comments, 1987 Five Year Oil and Gas Leasing Program
November 20, 1986	Preliminary Analysis of the Director and Preliminary ACMP Consistency Determination; request for comments; public notice as required under AS 38.05.945(a)(3).
March 1987	Public meetings held in Kaktovik and Anchorage.
April 30, 1987	Final Finding and Decision of the Director and ACMP Consistency Determination; public notice required under AS 38.05.945(a)(4).
June 1, 1987	Groups represented by Trustees for Alaska (TfA) file motion with DNR to reconsider its Sale 50 decision and postpone Sale 50 pending DNR's reconsideration decision.
June 4, 1987	DNR notifies the groups it will not postpone Sale 50 pending reconsideration.
June 22, 1987	TfA file their reconsideration brief.
June 24, 1987	TfA file action for declaratory and injunctive relief challenging Sale 50.
June 25, 1987	DNR responds to reconsideration brief and reaffirms conclusion that holding Sale 50 is in the best interests of the state.
June 29, 1987	Judge Hunt holds a hearing and then denies the groups injunction request.
June 29-30, 1987	Bids accepted for Sale 50; sale held; 35 tracts sold for a total bonus bid of $6.6 million.
June 2, 1988	Judge Bosshard issues a lengthy decision upholding Sale 50 in every respect.
July 5, 1988	TfA files appeal to Alaska Supreme Court.
September 28, 1989	Supreme Court hears oral arguments on Sale 50.
March 16, 1990	Alaska Supreme Court issues decision on Sale 50 remanding the Best Interest Finding to DNR for supplemental analysis of "important" transportation routes and to DGC for independent ACMP consistency determination. Supreme Court decision also returns review of agencies follow-up to Superior Court.

LEASE SALE LEGISLATION FACT SHEET

The Camden Bay Lease Sale Supreme Court Decision

On March 16, 1990, the Alaska Supreme Court found two errors in the procedures by which Oil and Gas Lease Sale 50 was held:

1. The court held that the "best interest finding" required by AS 38.05.035(e) failed to consider the environmental safety of transportation facilities should ANWR remain closed, a factor determined to be important notwithstanding the fact that before a lessee could obtain permits to produce and transport oil in the future, it would have to comply with all safety laws then in effect.

2. The court held that, because Lease Sale 50 involved more than one lease, AS 44.19.145(11) required the Division of Governmental Coordination (DGC) to conduct an independent review and render the coastal zone management consistency determination for the lease sale, notwithstanding the facts that (1) the statutory responsibility for holding the lease sales is vested in a single agency (DNR), and (2) DEC, ADF&G, and the North Slope Borough all agreed with DNR that the lease sale is consistent with the applicable plan.

Response to the Court Decision

1. The decision overlooks the fact that the best interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, DEC and ADF&G. To the extent that the court engrafted a new requirement on to the best interest statute - to require DNR to undertake a detailed study of hypothetical development and transportation scenarios and their feasibility - it is at odds with federal precedent and the court's own reasoning. With regard to federal environmental impact statements for oil and gas lease sales, a federal court of appeals recently observed:

> To require a cumulative EIS at the leasing stage ... would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted in comformity with state plans as yet undrafted.

The court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623, 624 (10th Cir. 1987). Moreover, the Alaska Supreme Court's opinion realized that economic feasibility of eventual production need not be assured in advance for the lease sale to be in the best interest of the state. The same is true of the feasibility of any transportation system: the lessee bears the risk of designing and obtaining approval for any future transporation facilities under laws applicable at

the time of any production.

2. DGC has always viewed itself as a coordinating agency, without the staff or authority to transform itself into a separate permitting agency. Here, DNR, DEC, ADF&G, and the North Slope Borough agreed that the lease sale was consistent with the applicable coastal zone management plan.

The Proposed Legislation

The proposed legislation would confirm existing lease sale and DGC coordinating practices. It would also ratify Lease Sale 50, which has been on the five year plan submitted to the legislature since 1982.

Consequences if the Legislation Is Not Passed

1. The legality of Lease Sale 50, held almost two years ago, could remain uncertain for two more years, or more. During the period of uncertainty, administrative and legal resources would be diverted from other projects, and exploration within the sale area would be chilled or stopped. Indeed, plaintiff environmental groups have already indicated an intent to seek an injunction against the Stinson Well, currently being drilled in the sale area.

2. If the sale is ultimately cancelled or invalidated, the state could have to refund bonus bids ($6.6 million) and rents, half of which have been deposited in the Permanent Fund, and could potentially be liable for exploration expenditures and the value of any discovery that may be made prior to cancellation or invalidation. One lessee has already expended about $50 million dollars exploring a Sale 50 lease.

3. All future oil and gas lease sales would be subject to the risk that a court, at the urging of a person or group opposed to leasing, will come up with an "important factor" that was allegedly overlooked or insufficiently discussed in the best interest finding.

4. DNR would need an increased appropriation to make even more extensive and specialized best interest findings. (The finding in this case was 89 pages long, and was based on a record over 11,000 pages long).

5. DGC would need an increased appropriation to greatly expand its staff and develop specialized expertise.

6. Coastal consistency determinations for projects regulated by all of the resource agencies - DNR, DEC, and ADF&G - would suffer delays pending the creation of sufficient DGC staff to handle DGC's new responsibilities under the court's opinion.

DNR'S POINT-BY-POINT RESPONSE TO
TRUSTEES FOR ALASKA'S PRESS RELEASE

On Friday, March 30, 1990, Trustees for Alaska ("TfA") issued a press release concerning the Governor's proposed legislation responding to the Supreme Court's recent Lease Sale 50 (Camden Bay) decision. This responds to each point raised in order.

TfA's Claim: The legislation would "fast track" state lease sales.

> DNR's Response: This statement is false. Lease Sale 50, like all lease sales, was subject to the statutory procedures for an advance five year leasing schedule. AS 38.05.180(b) and (c). DNR first proposed adding Sale 50 to the leasing schedule in 1981. An administrative record in excess of 11,000 pages demonstrates that the lease sale was subject to lengthy and intensive review. DNR is not attempting to change the five year leasing schedule program, or to limit public review and involvement in the state's oil and gas leasing program.

TfA's Claim: The legislation would "authorize oil and gas lease sales without evaluating transportation safety or feasibility issues."

> DNR's Response: First, DNR did evaluate transportation safety issues. The state has filed a petition for rehearing with the Supreme Court setting forth the many places in the record where this issue was addressed. Copies of the petition for rehearing are available upon request.
>
> Second, the court expressly held that economic feasibility is an issue that need not be addressed by DNR at the leasing stage. Economic feasibility of development is a risk borne by the lessee. Likewise and the laws and technology that would apply at the time of production is presently unknown, the risk of complying with future environmental laws is borne by the lessee. DNR recognizes the importance of safe and environmentally sound transportation of oil. It simply points out that the issues can be more meaningfully addressed in the context of concrete information and plans once oil is discovered, and all of the options for transporting it are fully understood. The state's power to enforce transportation safety laws is in no way diminished.

Third, the present AS 38.05.035(e) merely requires that the Department of Natural Resources (DNR) prepare a written "best interest" finding prior to holding a lease sale. Thus, the legislation proposed and endorsed by the Governor would actually provide more specific substantive content by listing those things that must be covered in an oil and gas lease sale best interest finding.

TfA's Claim: "The legislation would circumvent a recent Alaska Supreme Court decision requiring DNR to analyze the environmental problems associated with oil transportation from offshore leasing areas."

DNR's Response: As noted above, the Alaska Supreme Court decision is subject to a petition for rehearing. DNR did analyze environmental problems associated with oil transportation from offshore leasing areas. Specific terms of sale were adopted to address those problems. Three of the ten years of the primary term of the oil and gas leases have already expired, and the legality of the sale is still in question. Lessees may be unwilling to bid for and explore oil and gas leases if legal certainty concerning the oil and gas lease sales cannot be achieved in a timely manner.

TfA's Claim: "The Governor has not learned the lessons of the Exxon Valdez spill. These bills would undercut environmental controls over the most risky aspect of offshore oil drilling -- transportation of crude oil."

DNR's Response: These bills would not in any way undercut the environmental controls over transportation of crude oil in offshore areas. The issuance of leases does not itself authorize the transportation of oil. In Alaska, it has typically taken 10 to 20 years after an oil and gas lease sale until actual production begins. At that time, separate authorizations from many federal and state agencies and a coastal consistency determination would be required for any offshore transportation system. Substantive environmental and safety considerations are not diminished by issuance of the leases.

TfA's Claim: The bill would "limit the analysis required before oil and gas lease sales are approved by DNR. Discussion of transportation feasibility and safety would be excluded from the analysis."

DNR's Response: As noted above, DNR did consider transportation issues. For instance, at the urging of the Department of Fish and Game (ADF&G) and the Department of Environmental Conservation (DEC) (and against the wishes of industry), DNR imposed lease stipulations restricting the use of causeways. Under the Governor's bill package, DNR would continue to consider reasonably foreseeable cumulative impacts and the comments of the public and other agencies in the preparation of written findings for each sale.

TfA's Claim: The bills would "give DNR rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program."

DNR's Response: Lease Sale 50 was determined to be consistent with the Alaska Coastal Management Program (ACMP) by the North Slope Borough, DEC, ADF&G and DNR. The issue is not who makes the determination, but who coordinates it. DGC has never had an independent staff of experts to make consistency determinations. DGC's purpose has been to coordinate reviews, to expedite the issuance of permits and to reduce and eliminate duplication in State government processes. DNR currently does not have the unilateral power to "determine" whether lease sales are consistent with the applicable plan. Rather, it must coordinate the consistency review and, with regards to the merits, it must gain concurrence in its consistency determination from the North Slope Borough, DEC, and ADF&G. The bill would merely confirm the long-standing practice and the uniform understanding of local governments and the various state agencies concerning how the ACMP program was intended to operate.

TfA's Claim : "After the Exxon Valdez spill, the state and oil companies need to be more, not less prepared for oil development and transportation problems."

DNR's Response: DNR agrees that environmental safety issues are important and that laws concerning those issues must continue to be reexamined and enforced. The answer is not, however, to foreclose the opportunity to have continued oil exploration and development in the state by stopping lease sales. Rather, the answer is to pay appropriate attention to the specific transportation and development issues as they arise. The particular oil development and

transportation problems that may apply in the offshore areas cannot be determined in a meaningful way until oil and gas deposits have been found, and particular transportation alternatives and their advantages and disadvantages are known.

TfA's Claim: "The Supreme Court has recently determined the level of analysis that is reasonable before the State makes a decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns."

DNR's Response: The Supreme Court was not clear on either what level of analysis is required or reasonable before the state makes a leasing decision. The state believes that it met the court's standard, and therefore has filed a petition for rehearing on that ground. Moreover, if the court intended to engraft a new requirement on the statutory best interest finding to require DNR to undertake a more detailed study of hypothetical development and transportation scenarios and their feasibility, it is at odds with common sense and federal precedent. With regard to federal environmental impact statements, which are subject to more stringent and specific standards than are applicable to the state's best interest finding requirements, a federal court of appeals recently observed, quoting an earlier federal case:

> To require a cumulative EIS at the leasing stage... would be tantamount to "demanding the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted and in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."

The federal court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. vs United States Department of Agriculture 817 F.2d 609, 624, and 623 (10th Cir. 1987). The intent of the bill package is to avoid uncertainty and needless speculative exercises, not to avoid appropriate attention at a meaningful time to real problems. Rather than enlarge the state bureaucracy to engage in speculation ten years or more before any possible oil and gas development, the state's resources are much better spent in

waiting to evaluate the risks and alternatives in the context of specific development and transportation proposals. The answer is not to say "No" to all oil and gas leasing and potential development before the existence of oil and gas is known, but to pay maximum attention to ensuring safe and environmentally sound development in the context of known deposits and concrete proposals for development.

TfA's Claim: "Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease [sic]. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered."

DNR's Response: The state should not say "no" to oil and gas leasing based upon a fear that the state, local, and federal agencies will not apply future environmental laws properly or conscientiously. At the lease sale stage the size and location of oil deposits are not known, the possible routes are not determined, the technology that might be available is unknown, and the laws that might apply are subject to change. When specific exploration and development activities are proposed, agencies have and use their authorities to protect the environment. For instance, in the Sale 50 area, the Stinson Well was dependent upon the receipt of more than 23 local, state and federal permits.

TfA's Claim: "Offshore oil exploration poses the danger of blowouts. A driller's sudden loss of control over gas pressure could turn the rig into an uncontrolled gusher causing spills, fires, or explosions. A blowout in the Arctic Ocean and around the state could have a devastating impact on marine life and subsistence communities. The Anchorage Daily News reported today that blowout equipment inspectors felt that the inspection process was inadequate."

DNR's Response: DNR recognizes that there is a small danger of blowouts in oil exploration activities. Significantly, the Alaska Supreme Court found no inadequacy in the lease sale process based upon this issue. Accordingly, contrary to the implication in TfA's there is no connection between the remote risk of oil rig blowouts and the supreme court decision or this bill package. Moreover, the drilling of a well is subject to a host of independent permitting requirements, including

coastal consistency determinations. The Stinson Well, currently being drilled within the Lease Sale 50 area, proceeded only after a host of permits were issued for the project. The North Slope Borough, DEC, and ADF&G all found the drilling of the Stinson Well consistent with the coastal program. No appeal was taken of the local, state, and federal agencies' decisions to issue the drilling permits. If an investigation shows that there is an inadequacy in the inspection process for exploratory wells, this certainly should be addressed. This issue is, however, entirely independent of the sale decision. DNR supports effective enforcement of all safety and environmental laws.

TfA's Claim: "The Governor should recognize that there is a system of checks and balances. He should let the courts grapple with the complex concerns raised by Natives and environmentalists about oil development in specific regions."

DNR's Response: The legislature (not the court) is the branch of government with the power to set the standards for oil and gas leasing. Under the legislature's statutes, the decision to dispose of interests in state land is committed to executive discretion. The courts do not have authority to "grapple" with complex substantive concerns. Indeed in the Sale 50 decision, the Alaska Supreme Court did not purport to decide specific environmental issues but simply interpreted two statutes passed by the legislature and remanded the matter to the state executive branch to reconsider in light of the Supreme Court ruling. The Governor's bill package was proposed because the court decision is inconsistent with longstanding state practice and with the legislative appropriations to DNR and DGC. Natives, environmentalists, and other members of the public have many opportunities to have their voice heard. They can make their points to the legislature concerning the items on the five year leasing program, and can make comments concerning the lease sale in the best interests finding process. Moreover, they can have substantial input into the ACMP process.

TfA: "The Governor's broad brush solution would allow safety issues be brushed under the rug."

Response: As indicated above, this charge is entirely without merit. Specific safety issues will simply be taken up at the appropriate time, when specific projects are proposed.

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

For Immediate Release:
Friday, March 30, 1990

Contact: Randall Weiner
(907) 276-4244
Bob Childers
(907) 276-7986

Governor Introduces Legislation to "Fast Track" State Lease Sales

Governor Steve Cowper introduced legislation today giving the Department of Natural Resources (DNR) the power to authorize oil and gas lease sales without evaluating transportation safety or feasibility issues.

The legislation would circumvent a recent Alaska Supreme Court decision requiring DNR to analyze the environmental problems associated with oil transportation from offshore leasing areas.

"The Governor has not learned the lessons of the Exxon Valdez spill," said Randall Weiner, director of Trustees for Alaska, which has challenged offshore lease sales on behalf of eight environmental groups and the Native Village of Kaktovik. "These bills would undercut environmental controls over the most risky aspect of offshore oil drilling -- transportation of crude oil."

The Supreme Court's decision criticized DNR for failing to mention the facilities that would have to be built to transport oil from offshore wells to market, "much less examine the critical question of whether they are safe." The Court noted that such facilities represent "unique environmental risks."

The Governor's bills would do the following:

* Limit the analysis required before oil and gas lease sales

are approved by DNR. Discussions of transportation feasibility and safety would be excluded from the analysis. (House Bill 591 and Senate Bill 539.)

* Give DNR, rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program. (House Bill 592 and Senate Bill 540.)

* Ratify the lease sale in Camden Bay by nullifying the effect of the Supreme Court's March 16 ruling in Trustees for Alaska v. State. The bills would also ratify the adjacent state lease sale 55 (Demarcation Point) which was challenged by Kaktovik and environmental groups because of its impact on subsistence resources located in the Beaufort Sea and the Arctic National Wildlife Refuge. (Amendment to House Bill 128 [currently before Senate]).

In addition to Kaktovik, the groups challenging the oil and gas lease sales are the Wilderness Society, Alaska Center for the Environment, Northern Alaska Environmental Center, National Parks and Conservation Association, Sierra Club, American Wilderness Alliance, Alaska Wildlife Alliance, and Trustees for Alaska.

Why we oppose these bills:

* After the Exxon Valdez spill, the State and oil companies need to be more, not less, prepared for oil development and transportation problems.

* The Supreme Court has recently determined the level of analysis that is reasonable before the State makes the decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns.

* Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered.

* Offshore oil exploration poses the danger of blowouts, a driller's sudden loss of control over gas pressure that could turn the rig into a an uncontrolled gusher causing spills, fires or explosions. A blowout in the Arctic Ocean and around the state could have a devastating impact on marine life and subsistence communities. The Anchorage Daily News reported today that blowout equipment inspectors felt the inspection process was inadequate.

* The Governor should recognize that there is a system of checks and balances. He should let the courts grapple with the complex concerns raised by Natives, and environmentalists about oil development in specific regions.

* The Governor's broad brush solution will allow safety issues to be brushed under the rug.

3/21/90

SUMMARY OF ALASKA SUPREME COURT DECISION CONCERNING
OIL AND GAS LEASE SALE 50 (CAMDEN BAY) AND
RESULTING LEGAL CONSIDERATIONS

In Trustees for Alaska v. State of Alaska, ___ P.2d ___, Op. No. 3573 (Alaska, Mar. 16, 1990), the Alaska Supreme Court found two defects in the procedures by which State of Alaska Oil and Gas Lease Sale 50 (Camden Bay), located offshore ANWR, was conducted. The court remanded the two issues to the trial court to remand to the Department of Natural Resources ("DNR") and the Office of Management and Budget, Division of Governmental Coordination ("DGC") for action.

First, the court held that DNR's best interest finding was defective, finding a failure to consider environmental safety factors relating to transportation facilities that would be necessary should production occur and ANWR remain closed for onshore support facilities. Second, the court held that the coastal consistency determination under the Alaska Coastal Management Program ("ACMP") was defective because AS 44.19.145(a)(11) requires the Office of Management and Budget ("OMB") to render a consistency determination when a lease sale involves more than one lease. These issues will be discussed separately below.

1. Consideration of hypothetical transportation facilities

With regard to offshore transportation facilities that would be necessary should oil be found and ANWR remain unavailable for onshore support, the court made several observations or holdings with which DNR and the Department of Law disagree:

(a) "These [transportation] facilities are unquestionably a vital part of the development of the sale area for oil production and thus are important factors in the decision to lease the sale area". Op. at 14.

> Comment: At page 15 of the Opinion, the Supreme Court rejected the proposition that DNR must "demonstrate the economic feasibility of developing Camden Bay." The court found that [no] law requires DNR to demonstrate "economic feasibility", and that, given the benefits from receiving bonus and lease income, the "court need not inquire into the feasibility of future development". The same rationale should apply to transportation facilities. The lessees bear the risk of (1) finding oil, (2) being able to produce the oil in an economically feasible manner given future oil prices, the size of the field, and the cost of extracting and transporting the oil, and (3) satisfying then applicable state and federal legal requirements insuring that the production and transportation of the oil will be environmentally safe. In other words, the state retains the option to prohibit oil production if laws designated to protect the environment and insure safety are not met when and if particular projects are proposed in the future.
>
> The benefits of leasing and the exploration to determine the extent of any accumulations of oil and gas, are separate issues. While DNR agrees that transportation facilities would be a vital part of development of the sale area, and agree that safety would be an important concern concerning those facilities, it disagrees that safety of hypothetical future transportation systems is an important concern to the leasing decision. Federal courts have repeatedly held that it would be speculative to hypothesize production and transportation systems at the leasing stage since the location and size of any discovery is

unknown, at that time. Similarly, at the leasing stage, it is unknown what particular technical problems may exist and what technologies may be available at the time of any production that may occur in the future. The federal courts have found that an effort to hypothesize such production and transportation facilities and evaluate their risks and benefits would be meaningless and a waste of time and resources. The Supreme Court did not address the case law that was cited to it on these points.

(b) "[The transportation facilities] would seem to present unique environmental risks." Op. at 14.

Comment: The record does not support this statement. Any production from state leases, like any production from the nearby OCS Sales, would be offshore, necessitating either pipelines, causeways, or sea-based transportation systems. Bringing the oil onshore outside of ANWR might impact the magnitude of the environmental risk, but would not impact the nature of those risks.

(c) "[T]he Finding is remarkable in that - as detailed as it is on other subjects - it fails to mention facilities of this magnitude at all, much less examine the critical question of whether they are safe." Op. at 14.

Comment: The decision document discusses transportation safety issues, and specifically incorporates by reference lengthy and detailed federal government discussions concerning potential offshore transportation facilities that could be used to transport oil if ANWR remains closed. The document also discusses the effects of potential spills from pipelines. Lease terms required by the best interest finding prohibit continuous causeways in support of development in the Camden Bay's sale area, discourage discontinuous causeway construction, and favor pipelines over tankers for transportation.

Lease terms prohibit tankerage of produced oil and gas once a pipeline is constructed.

In short, the decision document, which is extensive in detail, and is based on more than 11,000 pages

of background materials, is not "remarkably silent" on the issue of transportation, and does not fail

to examine safety issues in conjunction with transportation issues. Although DNR stated that there are decided limits to the utility of consideration of hypothetical production scenarios, it nonetheless undertook serious effort to discuss the issues given the information available at the leasing stage. If further analysis is required, DNR believes it will result in increased budget needs or a reduction in lease sales.

2. Compliance with the ACMP Consistency Requirements.

The court held that AS 44.19.145(a)(11) required OMB to perform the coastal consistency review for Sale 50 and to render the conclusive consistency determination. AS 44.19.145(a)(11) states that OMB shall "render on behalf of the state...a conclusive state consistency determination when a project requires two or more state or federal permits, leases, or authorizations." The court rejected the state's argument that Sale 50 required only a single agency authorization, the best interest finding. The court stated that since Sale 50 contemplated 35 leases, the statute required OMB to make the consistency determination and that OMB could not delegate that duty to DNR.

Comment: The court's holding represents a marked departure from the interpretation of the statute by OMB through its regulations. The court's decision requires significant changes in the manner in which the ACMP has been implemented by state agencies. The ACMP regulations now require an agency to perform the coastal consistency review and issue a conclusive consistency determination if a project requires the permits of only a single agency. Under the court's ruling, these regulations would need to be substantially rewritten.

Under the court's ruling, if one agency must issue more than one permit, OMB must take responsibility for the review and the determination. This ruling will require a significant increase in DGC's staff and budget. However, since the technical expertise

on pertinent issues lies in the resource agencies, it is unlikely that there will be a corresponding decrease in the resource agencies' staffs and budgets.

At least two arguments can be made that the court's holding is erroneous. First, nothing in the best interest finding "requires" that more than one lease be issued. In fact, the state expressly retains the right to reject any or all bids for any tract offered. Second, the fact that the statute may require OMB to "render" the determination does not necessarily mean that OMB is also required to "perform a consistency review of the sale."

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The Supreme Court's decision criticized DNR for failing to mention the facilities that would have to be built to transport oil from offshore wells to market, "much less examine the critical question of whether they are safe." The Court noted that such facilities represent "unique environmental risks."

The Governor's bills would do the following:

* Limit the analysis required before oil and gas lease sales

are approved by DNR. Discussions of transportation feasibility and safety would be excluded from the analysis. (House Bill 591 and Senate Bill 539.)

* Give DNR, rather than the Division of Governmental Coordination, the power to determine if lease sales are consistent with the Alaska Coastal Management Program. (House Bill 592 and Senate Bill 540.)

* Ratify the lease sale in Camden Bay by nullifying the effect of the Supreme Court's March 16 ruling in Trustees for Alaska v. State. The bills would also ratify the adjacent state lease sale 55 (Demarcation Point) which was challenged by Kaktovik and environmental groups because of its impact on subsistence resources located in the Beaufort Sea and the Arctic National Wildlife Refuge. (Amendment to House Bill 128 [currently before Senate]).

In addition to Kaktovik, the groups challenging the oil and gas lease sales are the Wilderness Society, Alaska Center for the Environment, Northern Alaska Environmental Center, National Parks and Conservation Association, Sierra Club, American Wilderness Alliance, Alaska Wildlife Alliance, and Trustees for Alaska.

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* After the Exxon Valdez spill, the State and oil companies need to be more, not less, prepared for oil development and transportation problems.

* The Supreme Court has recently determined the level of analysis that is reasonable before the State makes the decision to hold an oil and gas lease sale. The Governor has made an emotional response based on fiscal concerns, rather than a measured response based on safety concerns.

* Offshore oil and gas lease sales pose dangers that are not present with onshore oil and gas development. These dangers must be thoroughly evaluated before there is a decision to hold a state oil and gas lease. Once a lease sale is held and the state and companies have invested substantial sums to explore for oil, it is unlikely to ever be stopped, even if environmental and safety problems are encountered.

* Offshore oil exploration poses the danger of blowouts, a driller's sudden loss of control over gas pressure that could turn the rig into a an uncontrolled gusher causing spills, fires or explosions. A blowout in the Arctic Ocean and around the state could have a devastating impact on marine life and subsistence communities. The Anchorage Daily News reported today that blowout equipment inspectors felt the inspection process was inadequate.

* The Governor should recognize that there is a system of checks and balances. He should let the courts grapple with the complex concerns raised by Natives, and environmentalists about oil development in specific regions.

* The Governor's broad brush solution will allow safety issues to be brushed under the rug.

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5/5/90

Original sponsor(s): Rules/Governor

IN THE HOUSE

CS FOR HOUSE BILL NO. 592 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act requiring the office of management and budget, in the Office of the Governor, to render state conclusive coastal zone consistency determinations when a project requires a permit or authorization from two or more state resource agencies, a federal permit, or a sale, lease, or other disposal of land or resources by a state resource agency; removing the requirement that the office of management and budget render state conclusive coastal zone consistency determinations for projects requiring two or more leases or authorizations; defining 'render' and 'resource agency' for purposes of coastal zone consistency determinations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.19.145(a) is amended to read:

(a) The office shall

(1) provide technical assistance to the governor and the legislature in identifying long range goals and objectives for the state and its political subdivisions;

(2) prepare and maintain a state comprehensive development plan;

(3) provide information and assistance to state agencies to aid in governmental coordination and unity in the preparation of

agency plans and programs;

(4) review planning within state government as may be necessary for receipt of federal, state or other funds;

(5) participate with other countries, provinces, states or subdivisions of them in international or interstate planning, and assist the state's local governments, governmental conferences, and councils in planning and coordinating their activities;

(6) encourage educational and research programs that further state planning and development, and provide administrative and technical services for them;

(7) publish such statistical information or other documentary material as will further the provisions and intent of AS 44.19.-141 - 44.19.152;

(8) assist the governor and the Department of Community and Regional Affairs in coordinating state agency [THE] activities that [OF STATE AGENCIES WHICH] have an effect on the solution of local and regional development problems;

(9) serve as a clearinghouse for information, data, and other materials that may be helpful or necessary to federal, state or local governmental agencies in discharging their respective responsibilities or in obtaining federal or state financial or technical assistance;

(10) review all proposals for the location of capital improvements by any state agency and advise and make recommendations concerning location of these capital improvements;

(11) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each [A] conclusive state consistency determination when a project requires

(A) a permit or authorization from two or more state resource agencies;

(B) a [OR] federal permit; or

(C) a sale, lease, or other disposal of land or resources by a state resource agency [PERMITS, LEASES, OR AUTHORIZATIONS].

* Sec. 2. AS 44.19.152 is amended by adding new paragraphs to read:

(3) "render" means to coordinate and issue;

(4) "resource agency" means

(A) the Department of Environmental Conservation;

(B) the Department of Fish and Game; or

(C) the Department of Natural Resources.

* Sec. 3. This Act is retroactive to March 11, 1984.

* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).