ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7919 • HOUSE JUDICIARY •

DOC INMATE POPULATION COMPARISON '93 TO '94 SNAPSHOT

LOCATION	MARCH 16, 1993	MARCH 16, 1994	Difference
State Correctional Facility	2647	2717	+70
Out-of-State	63	53	-10
CRC	272	389	+117
Treatment Beds	0	51	+51
Pt. MacKenzie	0	30	+30
Out-of-CRC	0	8	+8
	2,982	3,248	+266

Cost per day per bed
= $113 per state correctional bed
= $ 57 per CRC bed, statewide
= $ 98 average (weighted average of all beds)

Construction per bed
= $ 50,000 per minimum security bed
= $ 90,000 per medium security bed
= $160,000 per maximum security bed
= $100,000 average

Institutional Inmate Count -- Alaska Department of Corrections -- March 1994

	104	403	200	233	53	170	79	66	172	176	108	466	210	113	92	Emergency Capacity *	2665
	102	397	189	225	47	164	76	62	165	176	104	466	204	112	88	Maximum Capacity *	2577

Day	AMCC	CIPT	FCC	HMCC	KCC	LCCC	MSPT	MCCC	PCC/MED	PCC/MIN	SIXTH	SCCC	WWCC	WWPT	YKCC	Emerg. Cap.	Totals	%
1	99	397	213	233	55	198	89	60	238	172	132	439	150	111	116	2665	2710	102%
2	97	401	219	235	60	196	95	61	236	172	119	439	149	110	116	2665	2705	102%
3	99	397	220	235	64	195	91	61	229	176	114	439	150	108	119	2665	2697	101%
4	98	391	216	238	63	197	89	61	235	173	125	439	150	111	119	2665	2705	102%
5	99	402	215	238	65	199	92	60	232	176	127	439	150	108	118	2665	2729	102%
6	100	403	214	240	66	197	96	60	238	176	124	439	147	109	118	2665	2730	102%
7	99	405	212	236	64	198	99	60	238	176	124	439	150	99	99	2665	2698	101%
8	100	407	206	236	65	197	98	59	237	173	131	439	148	107	103	2665	2706	102%
9	99	405	206	235	69	198	92	58	245	174	128	439	147	111	102	2665	2707	102%
10	102	397	198	237	69	194	96	62	239	176	136	440	154	113	102	2665	2715	102%
11	102	404	201	237	57	196	92	62	243	176	127	440	158	105	103	2665	2707	102%
12	101	398	202	233	60	193	94	60	242	180	135	442	164	113	104	2665	2721	102%
13	100	394	208	227	61	196	92	66	241	182	131	441	165	112	105	2665	2713	102%
14	100	414	207	227	60	195	86	68	238	182	121	441	164	117	100	2665	2720	102%
15	100	404	228	225	62	193	94	68	220	182	129	441	165	116	106	2665	2725	102%
16	100	413	228	224	62	192	82	65	220	180	121	441	165	115	111	2665	2717	102%
17	99	409	225	224	60	193	86	65	222	179	127	441	165	111	108	2665	2709	102%
18																2665	0	0%
19																2665	0	0%
20																2665	0	0%
21																2665	0	0%
22																2665	0	0%
23																2665	0	0%
24																2665	0	0%
25																2665	0	0%
26																2665	0	0%
27																2665	0	0%
28																2665	0	0%
29																2665	0	0%
30																2665	0	0%
31																2665	0	0%
Avg	99.65	402.4	212.7	233.1	62.41	195.5	92.35	62.12	235.118	176.76	126.5	439.9	155.4	110.4	108.5	2665	2713	102%
10 day	0	4	7	0	31	401	76	0	520	6	76	0	0	0	55			
30/90	0	26	89	43	72	90	79	2	90	15	82	0	0	48	80			

* NOTE - Emergency and maximum capacities include 105 beds which are not operational, due to funding.

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To Diane Schenker	From Jon Martin
Co.	Co. Dept. Corrections
Dept. Juneau Prob.	Phone #
Fax #	Fax #

Community Residential Centers - Inmate Beds March 17, 1994

	Cordova	Parkview	Glenwood	N.S.	Tundra	Glacier		
Total Contract Beds								
	120	80	75	80	24	30	Total	409
Institutional Beds								
# Assigned Beds	120	80	50	65	17	23	Total	355
# Beds Filled								
Furlough	81	78	4	45	21	23	252	
Cofined Misd.	28	1	17	19	0	1	66	
Restitution	0	1	34	5	0	0	40	
Total Filled Beds	109	80	55	69	21	24	Total	358
Field Beds								
# Assigned Beds	0	0	25	15	7	7	Total	54
# Beds Filled								
Probation	2	0	12	3	2	5	24	
Parole	2	0	6	5	0	1	14	
Unsentenced	0	0	0	0	0	0	0	
Total Filled Beds	4	0	18	8	2	6	Total	38
TOTAL CRC BEDS								
Total Filled Beds	113	80	73	77	23	30	Total	396

TOTAL INSTITUTIONAL, OUT OF STATE AND CRC COUNT

INSTITUTIONAL	2709
OUT OF STATE	53
CRC	396
TREATMENT BEDS	52
PROJECT HOPE	30
OUT OF CRC	8
TOTAL	3248

Community Residential Program - Treatment Beds March 17, 1994

	G.H.S.	Cithros	A.N.A.R.C	Akeela	Ketch	RCAOA	PATC	NLRC	HOPE H.		
Total Contract Beds											
	3	20	2	3	2	2	2	2	1	Total	37
Institutional Beds											
# Assigned Beds	0	12	1	3	2	1	1	1	0	Total	21
# Beds Filled											
Furlough	0	11	2	3	2	4	4	1	1	28	
Confined Misd.	0	0	0	0	0	0	0	0	0	0	
Restitution	0	0	0	0	0	0	0	0	0	0	
Total Filled Beds	0	11	2	3	2	4	4	1	1	Total	28
Field Beds											
# Assigned Beds	3	8	1	0	0	1	1	1	1	Total	16
# Beds Filled											
Probation	3	9	0	0	0	6	3	1	1	23	
Parole	0	0	0	0	0	1	0	0	0	1	
Unsentenced	0	0	0	0	0	0	0	0	0	0	
Total Filled Beds	3	9	0	0	0	7	3	1	1	Total	24
TOTAL TREATMENT BEDS											
Total Filled Beds	3	20	2	3	2	11	7	2	2	Total	52

FISCAL NOTE

STATE OF ALASKA **BILL NO: SB 292**

1994 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Public Safety

Title: Interstate transfer of prisoners BRU: Alaska State Troopers

Component: Detachments

Sponsor: Senator Frank

Requestor: Senator Frank COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 94) impact: $ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

As currently written, the Department of Public Safety does not anticipate any fiscal impact.

Prepared By: Lee Ann Lucas Phone: 465-4322

Division: Commissioner's Office Date: 02/28/94

Approved by Commissioner: _____ Date: 02/28/94

Agency: Richard F. Burton, Dept. of Public Safety

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 292

Revision Date:
Title: An Act relating to transfers of prisoners under the Interstate Compact
Sponsor: Sen. Frank
Requestor: Senate Judiciary

Dept. Affected: Corrections
BRU: All
Component: Office of Commissioner; Institutions; Admin. Svcs.
COMPONENT SERIAL NO. 694-1884

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004-GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached fiscal analysis.

Prepared by: Diane Schenker, Special Assistant
Division: Office of the Commissioner
Phone: 465-4643/786-2147
Date: 2/14/94

Approved by Commissioner: J. Frank Prewitt, Jr.
Agency: Department of Corrections
Date: 2/14/94

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The bill would modify language in the Interstate Corrections Compact, making the standard for determining the impact of an out-of-state transfer consistent with AS 33.30.061, i.e., that the transfer will not substantially impair the prisoner's rehabilitation. This could lessen the chances of successful inmate litigation protesting out-of-state placement.

By facilitating out-of-state transfer of prisoners, the bill provides a greater opportunity for the department to avoid increasing operating and capital expenditures for new prison beds in Alaska. Although there is a nationwide shortage of prison space, any prison space available outside Alaska is likely to cost less than building, operating, maintaining, and repairing prison space in Alaska.

According to The Corrections Yearbook (1993), Alaska's daily operating cost per bed in 1992 ($100.76) was double the national average ($50.22). Construction costs were almost twice as high as in other states.

SB

293

FISCAL NOTE MAR 2 3 1994

STATE OF ALASKA BILL NO. SB293

1994 LEGISLATIVE SESSION

Revision Date: Original Dept Affected: Natural Resources

Title: "An Act relating to the authority of the commissione BRU: Resource Development

of natural resources to reconvey, or relinquish an interest in..." Component: Land Development

Sponsor: Senator Jacko

Requestor: Senator Jacko Component Serial No. 431

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
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 EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: $ None

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill authorizes the department to reconvey Native allotments that have been relocated on state land to a different location to avoid public interest conflicts. In order for a relocation to occur it must be with the consent of the department and the applicant. This bill allows Native allotment applicants to receive title to land that they can use while avoiding conflicts over public interest values such as access routes, heavy public use areas and important administrative sites.

Prepared by: Ron Swanson, Director Phone : 762-2692

Division: Land Date : 22-Mar-94

Approved by Commissioner:

Harry A. Noah Date: 22-Mar-94

Agency: Natural Resources

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(SB293.XLS Rev 3/20/94) For further distribution information call the Governor's Legislative Office

(9) [redacted] IOUSE COMMITTEE REP[redacted]

Date Referred: April 12, 1994 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/18/93

The RESOURCES Committee considered: SB 293

SENATE BILL NO. 293 NATIVE ALLOTMENTS ON STATE LAND

"An Act relating to the authority of the commissioner of natural resources to reconvey, or relinquish an interest in, land to the United States if that land or interest being reconveyed or relinquished is identified in an amended application for a land allotment under federal law."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title
[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [✓] zero fiscal note(s) DNR / 3-24-94

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Bill Hudson	✓	Jim Duncan		✓	
Pat Carney	✓				
Joe Hayes	✓				
Jeannette James	✓				
W.K. Williams	✓				

W.K. Williams
CHAIRMAN'S SIGNATURE

SENATOR GEORGE JACKO

STATE CAPITOL, ROOM 125 JUNEAU, ALASKA 99801-1182 (907) 465-4942 FAX: (907) 465-2997

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MEMORANDUM

TO: Representative Bill Williams, Chair
House Resources Committee

FROM: Senator George Jacko, Sponsor
Senate Bill 293

DATE: April 14, 1994

RE: Scheduling request -- SB 293

This memo is to respectfully request the waiver of Senate Bill 293 from the House Resources Committee. I understand HB 404, which is nearly identical to SB 293, was heard by your committee but no action was taken.

SB 293 grants the Commissioner of the Department of Natural Resources the authority to relocate, with the cooperation of the allotee and the federal government, native allotments which are located on top of any state lands set aside for a public purpose. HB 404 has a narrower focus addressing only native allotments which are located in state parks. DNR strongly supports SB 293.

In 1992, Congress authorized the Bureau of Land Management to relocate Native Allotment claims to avoid conflict with legislatively designated areas. SB 293 will grant the Commissioner of Department of Natural Resources the authority to reconvey the land to BLM once the allotment has been relocated.

If you need further information, please contact Bryce Edgmon at 465-4942. Thank you for considering this request.

REQUEST / SPONSOR STMT

District T: Adak, Akiachak, Akiak, [illegible] Point, Cold Bay, Dillingham, Dutch [illegible] nofski, Chignik, Chignik Lagoon, Chignik Lake, Clark's [illegible] asiglik, King Cove, King Salmon, Kipnuk, Koliganek,

MEMORANDUM State of Alaska

DIVISION OF PARKS AND OUTDOOR RECREATION
DEPARTMENT OF NATURAL RESOURCES

TO: Ron Swanson
Director
Division of Land

DATE: 9 December 1993

TELEPHONE: 762-2600
762-2535 FAX

FROM: Peter J. Panarese
Chief, Field Operations

SUBJECT: Native Allotments in Alaska State Parks

Below listed are the approximate numbers of Native Allotment Applications in units of the state park system. The numbers reported are for pending applications still to be adjudicated. Records on file in the Division of Land may be more accurate in units such as the Alaska Chilkat Bald Eagle Preserve and Denali State Park.

Alaska Chilkat Bald Eagle Preserve	35
Wood-Tikchik State Park	104
Kachemak Bay State Park	2
Captain Cook State Rec. Area	2
Denali State Park	12
Shuyak Island State Park	4
Total	159

Numerous allotment applications in state park units have been adjudicated and patent awarded. Developing detailed information one the number of pending or patented Native allotment claims will take more time. Please give me a call if I can be of further assistance.

PARKS & RECREATION

State offers relocations for Native allotments in park

By Eric Fry

BayTimes Staff

To resolve long-standing Native allotment applications in Wood-Tikchik State Park, the state is proposing two options that will circumvent federal adjudication and quicken the process.

The state Department of Natural Resources is offering to relocate allotments in the state park to unencumbered parcels of equal size anywhere in the state.

And the state is seeking voluntary conservation easements from allottees in the park, in which some of the parcel is left undeveloped.

Dan Hourihan, district ranger for Wood-Tikchik State Park, recently visited villages near the park to explain the state's position.

There are now 127 allottees who claim 104 parcels of state-owned land in the 1.6 million-acre park. The average allotment is 80 acres, and they total about 9,600 acres of park land.

The state is concerned about large-scale commercial development and large-scale subdivision and sales within the park, Hourihan said at a Dec. 14 meeting in Dillingham.

"The concern is private lands being cut up into small parcels and subdivided and sold," Hourihan said. "And I don't think it's the people from Koliganek and New Stuyahok, Ekwok and Aleknagik who will be buying these lands."

There are now five sportfishing lodges in the park, four on five-acre parcels and one on a slightly larger parcel, Hourihan said.

Three years ago the Golden Horn Lodge was bought by a Japanese company that wanted to build a hotel that would handle 200 guests a week, he said.

"They wanted to lease more land. Local people were concerned. The

See Park, page 3

Park ...

From page 1

only reason that development isn't there is the five-acre lot size. If they had even 10 acres, they would have built an airstrip," Hourihan said.

"Our concern is that in the 20-, 30-, 40-year time range, current use, traditional use, and habitat will be impacted severely."

The options are intended to diminish that threat yet see the certificate of allotment go to the allottee, Hourihan said.

The allotments originally came under the Native Allotment Act of 1906, which was sunseted in 1971 with the passage of the Alaska Native Claims Settlement Act.

As a result, many applications for allotments were filed in 1971. But in 1961 the state had selected the land that is now Wood-Tikchik State Park as part of its statehood entitlement.

The park itself was created in 1978 with the mandate to protect the area's fish and wildlife breeding and support systems, and to preserve the continued use of the area for subsistence and recreation.

Applicants for allotments in the state park must prove use and occupancy of their parcel to the potential exclusion of others prior to 1961.

Proof can include witnesses statements as well as physical evidence such as access roads, cabins, steambaths, wood stove remains, or fuel barrels, said Dugan Nielsen of Bristol Bay Native Association Realty.

Also considered is the presence of resources on site that support the user's claim, and the applicant's personal knowledge of the parcel, he said.

If an applicant can support the facts that establish a right to the allotment, Nielsen said, then the federal government has the responsibility to recover title to the land from any present landowner, including the state.

It has been 21 years since the applications were made, Hourihan said. "Nothing has happened. It's still in the application phase. Little or no action has been taken in the Bureau of Land Management to adjudicate the applications and determine their validity."

The allotments in Wood-Tikchik State Park are just a small part of the total allotments to be reconveyed from the federal government to Natives.

"When we got ANCSA passed, there were about 15,000 Native parcels filed on," said Wayne Boden, BLM deputy state director for conveyance management.

"It costs a lot of money to get them surveyed and make sure the application is valid," he said. "The survey is the big thing. It costs quite a bit to get an aircraft and surveyor out and get all the approvals."

The allotments originally came under the Native Allotment Act of 1906

Boden said about 7,400 parcels remain to be certificated statewide. "We're trying to do it in a systematic blocking process so we can go in and do a whole area at one time. We're trying to close out a window at a time," he said.

Gusty Chythlook of BBNA Realty said at the meeting that 1994 is the window for the upper Nushagak and the Mulchatna area, but there is no window for Wood-Tikchik State Park.

This past summer, on the urging of Tom Hawkins, chief executive officer of the Bristol Bay Native Corp., a meeting was held with representatives of the state DNR, the federal BLM, BBNC and BBNA.

Out of that came an agreement that BLM would work on 10 case files a month during the winter, meaning that it would send out "90-day letters" for 10 applications each month.

The letters give notice to interested parties that they have 90 days to make comments for or against the application.

"What it does is start the process moving," Boden said. "They had been held up because of their status in the park over along period of time. There were controversies with the state over this process."

Last year, Rep. Don Young, R-Alaska, sponsored an amendment to ANCSA that allows valid allottees to relocate their parcel of state land to other state land. The relocation must be voluntary. The state DNR and Rep. Lyman Hoffman, D-Bethel, are seeking a similar amendment to state law.

"There's some debate on whether that is necessary," said Hourihan. "We're going to proceed with discussions with anybody who is interested. ...Relocation will appeal to some people, but many will want their original parcel."

Hourihan said that an applicant who wants to relocate should identify the desired land and contact BBNA Realty, which will notify Hourihan. He will do a title search.

"Once BLM is notified, there is no adjudication. There is no use and occupancy criteria associated with this," Hourihan said.

There are applications with use and occupancy that dates back as far as 1903 and 915, he said. "There are a lot of people who are elders in the community whose applications and the validity of them cannot be questioned."

But there are also allottees in their early 40s who claim use and occupancy when they were eight to 10 years old.

"I expect that there are a number of applicants that if the state decided to go to the ground would be defeated. What we're saying is, we don't want to go that way. We want to create a win-win situation," Hourihan said.

Conservation easements are another option the state is seeking for allotments in the state park. They are voluntary land use covenants that become part of the reconveyance process when the land goes from the state to the federal government and then to the allottee.

Hourihan said there are three basic zones the state likes to see used in a parcel that has a conservation easement: a non-development zone with no structures, a subsistence heritage zone that can include private homes and camps, and a development zone for any commercial purpose.

"We're open to discussions with anybody based upon what they'd like to do with their land. We can craft an agreement to fit individual needs," Hourihan said.

"We notify BLM if we reach agreement with an individual allottee for a conservation easement on an application in the park. We would notify BLM of our attempt to reconvey, and it would abrogate any further need for BLM to determine use and occupancy. So there's an incentive," Hourihan said.

Dugan Nielsen spoke in an interview of the importance of Native allotments.

"Native people's culture is based on the fact that we have land to exist from. Without that, what are we? Where does our identity go? What are we about, then?

"The issue of subsistence is way high in priority, obviously, for the Native people. Granted, you can't do your total subsistence off a 160-acre parcel of land. But you can to a certain degree," he said.

"Without that land base from which to exist on, what importance is subsistence? How much subsistence can you eke out of the sidewalk in Anchorage?

"We could win the subsistence issue, and I'll be forced to live in some metropolis or something larger than a village because we don't have a land base," Nielsen said.

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BRISTOL BAY
NATIVE CORPORATION
300 CORDOVA / P.O. BOX 100220 / ANCHORAGE, ALASKA 99510 / (907) 278-3602
TELECOPY (907) 276-3924

October 28, 1993

Honorable George Jacko
Alaska State Senate
716 W. 4th Avenue, #520
Anchorage, AK 99501-2133

Dear Senator Jacko:

Earlier this year, I wrote to you about allotments in Wood-Tikchik State Park. The log jam has broken and the paper has begun to move between BLM and the State Park Division. Cooperation between BBNA, BLM and Alaska State Parks got the ball rolling. Thank you for your interest in this matter.

Another matter deserves your current attention. Last year Congress authorized BLM to allow Native allottees to relocate their claims to avoid conflicts with legislatively designated State lands. Alaska Department of Natural Resources (ADNR) has determined that an amendment to Title 38.05.035b(9) will be necessary to authorize these relocations. The amendment will be offered along with a number of other Title 38 changes proposed by ADNR.

The ability to relocate a claim out of conflict with legislative designations could benefit many of your constituents. This amendment could also benefit allottees in conflict with the Haines Baid Eagle Preserve, Captain Cook Recreation Area, and other locations around the State. It could be legislation that you would introduce separately so that its fate is not connected to other Title 38 changes.

The language was drafted by the Attorney General's office. Proposed deletions are bracketed; proposed additions are underlined:

AS 38.05.035(b) The director may

xxxx

(9) quit claim land or an interest in land to the federal government on a determination that the land or interest in land was wrongfully conveyed by the federal government to the state [;] , or that it is in the best interest of

BACK UP

the state to reconvey the land or interest in land under terms authorized by 43 U.S.C. 1617(c)(Supp. 1993);

If you have questions or comments, please give me a call.

Sincerely yours,

Tom Hawkins
Senior Vice President

cc: Dugan Nielsen, BBNA Realty

BRISTOL BAY NATIVE ASSOCIATION

P.O. Box 310

DILLINGHAM, ALASKA 99576

(907) 842-5257

FEB 03 1994

Senator George Jacko
Rm. 125 State Capitol
Juneau, Ak. 99801-1182

Re: Amendments to Title 38 January 28,1994

Dear Senator Jacko,

As per your request I am forwarding to you information regarding the amendment to 38 that will have a direct effect on Native Allotments in the Wood/Tikchik State Park and other allotments in conflict with State Parks and Refuges. I am enclosing the amendment to ANCSA, amendment language from John Baker of the AGO, and a portion of the Legislative Digest. I hope that this will assist you in crafting a piece of legislation that will serve our needs and be passed by the legislature this season. If there is any way we can assist your efforts please do not hesitate to call upon us.

Sincerely,

Dugan G. Nielsen
Realty Officer

cc Reading file
W/T file

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CTIVES

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r Alaska

ONS

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ging allotments or pending

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§ 1617. Indian allotment authority in Alaska; revocation; charging allotments on pending application against statutory acreage grant

(a)–(b) [Unchanged]

(c)(1)(A) Notwithstanding any other provision of law, an allotment applicant, who had a valid application pending before the Department of the Interior on December 18, 1971, and whose application remains pending as of the date of enactment of this subsection [enacted Oct. 14, 1992], may amend the land description in the application of the applicant (with the advice and approval of the responsible officer of the Bureau of Indian Affairs) to describe land other than the land that the applicant originally intended to claim if—

(i) the application pending before the Department, either describes land selected by, tentatively approved to, or patented to the State of Alaska or otherwise conflicts with an interest in land granted to the State of Alaska by the United States prior to the filing of the allotment application;

(ii) the amended land description describes land selected by, tentatively approved to, or patented to the State of Alaska of approximately equal acreage in substitution for the land described in the original application; and

(iii) the Commissioner of the Department of Natural Resources for the State of Alaska, acting under the authority of State law, has agreed to reconvey or relinquish to the United States the land, or interest in land, described in the amended application.

(B) If an application pending before the Department of the Interior as described in subparagraph (A) describes land selected by, but not tentatively approved to or patented to, the State of Alaska, the concurrence of the Secretary of the Interior shall be required in order for an application to proceed under this section.

(2)(A) The Secretary shall accept reconveyance or relinquishment from the State of Alaska of the land described in an amended application pursuant to paragraph (1)(A), except where the land described in the amended application is State-owned land within the boundaries of a conservation system unit as defined in the Alaska National Interest Lands Conservation Act. Upon acceptance, the Secretary shall issue a Native Allotment certificate to the applicant for the land reconveyed or relinquished by the State of Alaska to the United States.

(B) The Secretary shall adjust the computation of the acreage charged against the land entitlement of the State of Alaska to ensure that this subsection will not cause the State to receive either more or less than its full land entitlement under section 6 of the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", approved July 7, 1958 (commonly referred to as the "Alaska Statehood Act") [48 USCS note prec. § 21], and section 906 of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635). If the State retains any part of the fee estate, the State shall remain charged with the acreage.

(As amended Oct. 14, 1992, P. L. 102-415, § 3, 106 Stat. 2112.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Alaska National Interest Lands Conservation Act", referred to in subsec. (c), is Act Dec. 2, 1980, P. L. 96-487, 94 Stat. 2371. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1992. Act Oct. 14, 1992, added subsec. (c).

INTERPRETIVE NOTES AND DECISIONS

Native Alaskans whose families have used and occupied lands located inside 3 national wildlife refuges do not have right to apply for allotments of such lands, where each applicant's personal use and occupancy commenced after land ceased to be vacant, unappropriated, and unreserved. Akootchook v United States, Dept. of Interior (1984, CA9 Alaska) 747 F2d 1316.

Alaska Natives applying for allotment within national forest under 1906 Alaskan Native Allotment Act must establish personal use and occupancy of land prior to establishment of forest. Shields v United States (1981, DC Alaska) 504 F Supp 1216.

Alaskan native's allotment is land held in trust for an Indian under 30 USCS § 185, and therefore excluded from United States land subject to grant of right of way under Trans-Alaska Pipeline Act (43 USCS § 1652), native allotment application filed in 1971 has priority over pipeline application filed in 1969 because vested native preference relates back to initiation of occupancy; apparent United States approval of right-of-way agreement was by unauthorized official, and government is not estopped to deny approval; pipeline company and state will be awarded title to improvements, but holders of native allotment claim may be entitled to damages. Alaska v 3,990 Acres of Land (1985, DC Alaska) 625 F Supp 1215.

§ 1618. Reservations; revocation; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Supplemental appropriation for Native Groups. Act Dec. 2, 1980, P. L. 96-487, Title XIV, Part B, 94 Stat. 2498, provided: "The Secretary shall pay by grant to each of the Native Group Corporations established pursuant to section 14(h)(2) of the Alaska Native Claims Settlement Act [43 USCS § 1613(h)(2)] and finally certified as a Native Group, an amount

Sec. 38.05.010. Appointment of director. The commissioner shall appoint a director. The director is the executive officer of the division of lands. (§ 2 art II ch 169 SLA 1959)

Sec. 38.05.015. Director serves at pleasure of commissioner. The director serves at the pleasure of the commissioner. (§ 3 art II ch 169 SLA 1959)

Sec. 38.05.020. Authority and duties of the commissioner. (a) The commissioner shall supervise the administration of the division of lands.

(b) The commissioner may

(1) establish reasonable procedures and adopt reasonable regulations necessary to carry out this chapter and, whenever necessary, issue directives or orders to the director to carry out specific functions and duties; regulations adopted by the commissioner shall be adopted under the Administrative Procedure Act (AS 44.62); orders by the commissioner classifying land, issued after January 3, 1959, are not required to be adopted under the Administrative Procedure Act (AS 44.62);

(2) enter into agreements considered necessary to carry out the purposes of this chapter, including agreements with federal and state agencies;

(3) review any order or action of the director;

(4) exercise the powers and do the acts necessary to carry out the provisions and objectives of this chapter;

(5) notwithstanding the provisions of any other section of this chapter, grant an extension of the time within which payments due on any lease or sale of state land, minerals, or materials may be made, including payment of rental and royalties, on a finding that compliance with the requirements is or was prevented by reason of war, riots, or acts of God;

(6) classify tracts for agricultural uses and require the prequalification, including the submission of conservation plans, development plans, or other plans, schedules, or programs, of persons who apply to participate in an agricultural development project under AS 44.33.475;

(7) waive, postpone, or otherwise modify the development requirements of a contract for the sale of agricultural land if

(A) the land is inaccessible by road; and

(B) transportation, marketing, and development costs render the required development uneconomic. (§ 4 art II ch 169 SLA 1959; am § 1 ch 31 SLA 1964; am § 1 ch 76 SLA 1964; am § 3 ch 72 SLA 1972; am §§ 25 — 27 ch 3 FSSLA 1973; am § 1 ch 129 SLA 1982; am § 15 ch 152 SLA 1984)

PARKS AND OUTDOOR RECREATION
CONCEPTUAL CHANGES TO TITLE 38

• Exchange of Native Allotments Within State Park Units. AS 38.05.35 lists the powers and duties of the DNR Commissioner. We propose an addition. About 100 parcels of land in Wood-Tikchik State Park are claimed as Native allotments. These are also prime sites for public fishing and camping. Private development of these parcels could block public use and degrade the recreational and scenic resources that attract tourists and Alaskans to the park. We propose to authorize the Commissioner to allow allotment applicants to choose new sites outside park boundaries. Some allotment applications have been pending for 30 years. This authority would help applicants get title to good land, and solve park management problems. Most applicants who choose to move would probably pick new sites along the Nushagak and Mulchatna rivers.

U.S. Congress

Alaska Land Status Technical Corrections Act of 1992 - Referred to as the "ANCSA Technical Amendments Package," the bill contained twenty provisions at final passage, of which twelve were land related and worked on by the AFN Land Committee.

The process employed to generate the bill included an extensive list of proposed amendments by the Department of the Interior (Bureau of Land Management) and the State of Alaska. Since the rules laid down by Congress indicated that only amendments that were non-controversial would be included in the bill, there was a period of approximately eight months when AFN's Land Committee worked with federal and state representatives to forge agreement on proposed amendments.

The Land Committee focused on the following provisions that became law on October 14, 1992:

Section 2. Fort Davis Native Allotment - Legislatively approved Native allotment claims in the Fort Davis (Nome) area.

Section 3. Native Allotment Relocation - Provides an opportunity whereby an allotment applicant with a valid application as of December 18, 1971 and whose application remains pending as of October 14, 1992, may amend the applications land description, if said description describes land selected by the State of Alaska, to another parcel of State land elsewhere. The exchange is purely voluntary on the part of the allotee. This legislation resolves allotee/State conflicts over land primarily in State park areas.

Section 5. Shareholder Homesite - Extends indefinitely the time frame for village corporations to implement Shareholder Homesite Programs.

Section 6. Chugach National Forest Boundary Change - Modified the boundary of the National Forest to include an additional 9,300 acres. A review of the proposal concluded there would be no adverse impact to adjacent ANCSA corporations.

Section 12. Alaska Native Allotments - Provides an opportunity for the Secretary of the Interior to accept land relinquished by ANCSA corporations in NPRA in order that Native allotments in the respective areas may be certified.

Section 13. Point Hope Townsite - Provides a mechanism by which the Native residents of Point Hope may receive deeds to the lots within the village in accordance with the terms of the Alaska Native Townsite Act of 1926 and allows for reconveyance of lands from the regional and village corporation's to the Department of the Interior when necessary to convey lots to individual Natives.

SB

308

April 27, 1994

Honorable Brian Porter
Honorable Members of the House Judiciary Comm. Room 120
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

RE: **SB 308**

Dear Chairman Porter and Honorable Members
of the House Judiciary Committee:

The undersigned coastal districts request that the Judiciary Committee not take action on SB 308 until additional language changes are discussed relative to the items identified below. We have been involved in the significant effort that was devoted to a Working Group on SB 308 in the Senate. We supported the efforts of the Senate Finance committee to develop a consensus on this bill. Unfortunately, there was not adequate time in the Senate to resolve the remaining issues. We anticipated having the opportunity to resolve the remaining issues, in a similar fashion, in the House, and hope that the Judiciary Committee can help us to do so. We believe that passage of this legislation, as currently drafted, will leave these legal and procedural questions unanswered, and will leave the interpretation of problematic wording to the courts.

We respectfully request that the House Judiciary Committee afford us the opportunity to address these remaining issues with a continuation of the previous Working Group. We look forward to working with members of the House of Representatives or their staff to facilitate the resolution of these issues.

Remaining Issues in SB 308

- Phasing of all land disposals under Title 38

Throughout the review of SB 308, municipalities and coastal districts have identified a fundamental problem with this legislation that arises under Title 38, which proposes to allow phasing for all land disposals. While the provisions of section 38.05.035(g) afford the necessary guidance to DNR to

phase oil and gas lease sales, that same guidance is not provided for phasing of other types of disposals (timber, mining etc.) We support the development of specific standards, against which each Director will examine the decision to phase disposals. Without such standards there is no assurance that important local and public concerns will be met.

- Phasing under Title 46 (ACMP)

SB 308 states that the phasing of projects for ACMP consistency review is to be based on facts pertaining to the use or activity "for which the consistency determination is sought" and which are "material" to the consistency determination. There is no definition of what issues are "material" and that word does not appear elsewhere in the ACMP. The addition of this undefined language could result in litigation on the specific meaning of the word "material." Some municipalities, coastal districts, fishing groups and environmental groups are concerned that this language leaves too much discretion in the administrative agency to limit review by deeming certain facts or issues as not "material." These groups have recommended that the word "material" be deleted.

There has also been a recommendation that the language "use or activity for which the consistency determination is sought" be reexamined. The language, as written, implies that only effects of the particular phase will be examined, and this approach to phasing does not appear to conform with the federal model for how the review of phased projects in the coastal zone should be conducted. The original language of the bill which addressed review of the entire "project" was deleted without consultation of the working group.

- Standing to Request Reconsideration/Appeal

The issue of standing is one that significantly affects public participation under this legislation. DNR has altered the requirements for how the public must participate, in order to later be able to challenge a DNR action in court. DNR has stated that the intent of this legislation is to provide that any person who has submitted written or oral comments during the comment period will be allowed to request reconsideration. There is confusion in the bill as to whether the commenting person may raise <u>any</u> issue that has been identified during the public comment period, or whether

the person will be limited to those issues that he or she personally raised. Many coastal districts and fishing groups have expressed support for the concept that a commenting person may raise any issue that was raised during the administrative review, by any person. This ensures that the commenters will be able to draw on the comments of other public agencies and private individuals, in seeking reconsideration of DNR's decision.

There has been a further suggestion that the SB 308 requirement that a person may only appeal/request reconsideration if he is "affected by the decision" be deleted from the bill. The current language would result in a limitation on the public's right to seek administrative or judicial review and does not comport with the existing Alaska law on standing as established by the state Supreme Court.

- Clarification of "Economic Feasibility"

Section 4 of the bill states that the director may not be required to speculate about the "economic feasibility" of ultimate development. That provision has been questioned by the SB 308 Working Group and others because "economic feasibility" is not defined, and has implications for disposals that affect coastal districts. It has been suggested that the bill would be improved by the addition of clarifying language stating that the best interest finding shall consider the potential economic benefits and potential economic detriments to the state from a disposal, and that a definition of "economic feasibility" be provided.

- Changing the words "may address only" to "shall address"

The language in Section 2 states that the scope of review and finding of the Director "may address only" reasonably foreseeable significant effects. The use of the word "may" means that the director is not obligated to address those effects. The addition of the word "may ...only" implies that there is no ability to look further if, in the Director's discretion, there are other effects that should be analyzed. It also results in the conferring of discretion on the Director as to whether or not to address reasonably foreseeable significant effects. It is suggested that the language be changed to read: "The Director shall, at a minimum, address reasonably foreseeable significant effects....." This will result in a mandatory requirement to consider

"reasonably foreseeable significant effects" and will allow the flexibility to the Director to consider other effects.

Conclusion

As coastal districts who are committed to developing the best public policy through consensus, we have been highly successful in the past in developing legislation which has passed both houses without significant opposition. SB 238 (this session) and HB 99 (last session) are two examples of how divergent interests can come together to successfully resolve such issues. We are committed to this same process for SB 308, a bill which significantly affects local governments and coastal districts, as well as other interests. We request that the House Judiciary Committee give us the opportunity to resolve these remaining issues, so that this legislation may be as broadly supported as our past efforts. Without a consensus, the result will be a bill which is divisive and generates controversy in the communities of Alaska.

Respectfully submitted,

Kodiak Island Borough

North Slope Borough

Northwest Arctic Borough

Bering Straits Coastal Resource Service Area

Bristol Bay Coastal Resource Service Area

Cenaliuriit Coastal Resource Service Area

* Due to abbreviated schedule for this bill, and the geographic distance of the signatories, we were unable to provide the actual signatures for this letter. Signatures will be provided at a later time.

cc: Hon. Governor Walter Hickel

Kodiak Island Borough

710 MILL BAY ROAD
KODIAK, ALASKA 99615-6340
PHONE (907) [redacted]

April 15, 1994

VIA FAX 465-3872

Senator Drue Pearce
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

RE: SB 308 version X and proposed amendments (April 14, 1994)

Dear Senator Pearce:

Due to time constraints this letter of necessity will be brief. After careful consideration of the recent amendments proposed for version X of SB 308, the Kodiak Island Borough feels we can work with you to gain passage of this legislation.

We want to thank you and your staff, especially David Rogers, and the administration, especially Jim Eason for your efforts to resolve issues surrounding this bill. Such effort, on all sides, has improved this bill dramatically.

As you are aware, the Kodiak Island Borough previously objected to the inclusion of phasing, as a concept, in this bill. It is evident to us that the Senate intends to include phasing in this bill and to that end we have worked to make the language of the bill acceptable. We believe the most recent amendments, for the most part, accomplish this.

There are five sections of the bill that continue to contain language that is unclear to us. We believe that we have conceptual agreement on the intent of this language, however, we would like to continue discussions about the implications of this language. The language in question is: the meaning of "may address only" on line 22, page 3; the implications of "aggrieved" and

"affected" on lines 13 and 27 of page 9, respectively; the meaning of "economic feasibility" on line 9 page 9; the meaning "material" on line 23 page 13; and the meaning of "for which the consistency determination is sought", to be added on page 13. We hope to continue productive, informative dialog about this language; at the same time we applaud and support your efforts to resolve the other issues we have identified in previous versions of the bill.

Again, please accept our thanks for working with us to improve the language of this bill.

Sincerely,

Linda L. Freed, Director
Community Development Director

c.c. Jerome Selby, Borough Mayor
Kodiak Island Borough Assembly

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 • 0389
(907) 283-3600 • FAX (907) 283-3306

April 26, 1994 SENT BY TELEFAX

Representative Brian Porter,
Chair, House Judiciary Committee
State Capitol, Room #120
Juneau, AK. 99801-1182

SUBJECT: HB474 / CS SB308 (FIN) am
UCIDA POSITION: Opposed

Dear Representative Porter,

United Cook Inlet Drift Association (UCIDA) represents the 585 salmon drift permit holders in Upper Cook Inlet. Some 350 permit holders are current members of our association. UCIDA is also active at the state and federal levels as a member of the Executive Committee of United Fishermen of Alaska (UFA).

UCIDA Opposes the CS SB308 (FIN) am which is to be considered by your Committee. Even though SB308 has undergone many amendments, neither of our two initial primary concerns have been resolved by any version of this legislation. These concerns are:

1) The inappropriate "phasing" of best interest and consistency findings that allow the initial disposal of the state's resources to be treated as a **paper transaction**, and
2) The inclusion of non-oil and gas disposals in this legislation.

Finally, I should note that SB308 was amended on its last day in the Senate to include the current Section 4 which:

A) Will allow DNR to speculate freely about the benefits of a disposal while ignoring even reasonably foreseeable significant detriments of the disposal in making its "best interest finding", and

B) Drastically alters the public's standing to file an administrative appeal or request for reconsideration.

In conclusion, UCIDA can not support CS SB308 (FIN) am unless:

A) Non-oil & gas disposals are deleted from the bill.

B) Phasing is deleted under both Title 38 and Title 46. On the other hand, it should be noted that commercial fishing groups and other concerned user groups, have committed to forming a working group to work on this concept and drafting appropriate statutory language, and

3) Section 4 should be deleted in its entirety.

I have taken the liberty to include relevant UCIDA testimony and/or correspondence on this legislation. Unfortunately, most of our previous comments and concerns are as relevant to SB308, as amended in the Senate, as they were at the time they were submitted.

I would appreciate it if this letter and our previous comments could be distributed to the members of your Committee.

Sincerely,

Theo Matthews

Theo Matthews
Administrative Assistant

CC Governor Hickel
Representative Phillips
Representative Davis
Representative Navarre
Senator Little
Senator Salo
Alaska Environmental Lobby, Inc.
Trustees For Alaska
United Fishermen of Alaska

April 28, 1994

Testimony of Jon Isaacs
Jon Isaacs and Associates

Honorable Representative Brian Porter
Chair, House Judiciary Committee

Thank you for the opportunity to testify today; in my testimony, I am representing myself and do not speak for any coastal districts.

As a member of an informal coastal district working group, I have been participating in the review of Senate Bill 308 with representatives of the Department of Natural Resources, coastal distircts, environmental, groups, fishing groups, and a representative of the Senate Finance Committee. Over the last two months, I have participated in several Senate Finance Committee Meetings and workgroup discussions to develop a bill that addresses the concerns of the Department of Natural Resources without creating significant problems for the coastal districts and other municipalities.

I greatly appreciate the efforts of Jim Eason and other members of the administration, the Senate Finance Committee, coastal districts, fishing groups, and environmental groups in trying to reach consensus. While not a perfect bill that makes everyone happy, the language changes have addressed some major concerns.

On the afternoon of April 15, a small group of individuals worked on the significant outstanding issues identified by the informal coastal district working group. I should mention that this group does not represent or speak for all coastal districts, many of whom have other valid concerns regarding this legislation. In this meeting, we came to consensus on many of the major issues, with a few exceptions. Issues where there is still some differences regarding language or resolution include:

- use of "may address only" vs. shall address reasonably foreseeable significant effects related to the use in Section 2 (A)of AS 38.05.035(e). DNR's verbal intent is that, at a minimum, reasonably foreseeable significant effects related to the use will be addressed. The appropriate language needs to be used.

- standing to request appeal or reconsideration of a best interest finding; I understand that DNR is looking into what language may be more appropriate

- in Section 8, page 13, line 22, the concept of material to the consistency determination has not been previously used or defined; I would prefer the term relevant be used in its place or material defined

- finally, I understand that some municipalities are still concerned about the lack of guidance regarding other best interest findings besides oil and gas, mining, timber, and commercial recreation; while language in the bill requires

addressing reasonably foreseeable significant effects related to the use, and the basis of phasing can be appealed, I strongly suggest that DNR continue to consider other solutions.

The language of the current bill is a major improvement over whree the administration started. If some of these concerns can be addressed, it will be improved further. Thank you all for your efforts.

Sincerely,

Jon Isaacs

NATIVE VILLAGE OF TUNUNAK

Tununak IRA Council
DEPARTMENT OF NATURAL RESOURCES
P.O. Box 107
Tununak, Alaska 99681
(907)652-6527 / Fx. 652-6011

April 25, 1994

HONORABLE BRIAN PORTER
HONORABLE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Subject: **House Bill 474/CSSB308(Fin)**

Chairman Porter and Honorable Members of the House Judiciary Comm.:

The Tununak IRA Council has grave concerns about the unfairness of **House Bill 474 and CSSB 308(FIN)am**, and its conflict with federal coastal zone requirements and the Alaska Coastal Management Program's guided principles to protect us from the dominance of some agencies' bureaucratic dilemmas and their decision making process to dispose state land for development under these bills.

Subject to the State's Best Interest amid amendments to dispose land as described in CSSB308(FIN)am, nevertheless, provide the **opposite** of the legislature's intent to permit development in the best intelligent manner. We find inconsistencies and controversy that conflict with the original intent of the Coastal Zone Management requirements.

PHASING

We will discuss CSSB308(FIN)am, passed by the Senate. We wish to caution that, phasing under this bill limits the ability to require Alaska's Department of Natural Resources (DNR) to consider all costs and impacts of proposed projects from the beginning.

At the ***"director's discretion"*** **(Page 3, Line 17)** the state would only assess one phase, and ***"may address only reasonably foreseeable significant effects..."*** **(Page 3, Line 22).** Thus, avoid argument to address impacts by the first phase of development. Depletion of fish and

wildlife resources and their habitat from cumulative effects caused by the first phase gives the Director unfair judgment and discretion to reject any argument, and determine new resource information immaterial and nonexistent. Moreover, it accelerates and binds the process to continue with development, despite imbalances, by rendering phasing **(Page 12, Lines 22-31, and Page 14, Lines 1-6).**

RECOMMENDATION: Delete ***"may address only"*** to **"shall address."**

The Director with his new discretionary power shall decide if your concerns are ***"material"*** **(Page 7, Lines 13-31; Page 8, Lines 1-28)** enough to consider in his ***"preliminary or final finding, as applicable"*** **(Page 8, Line 29-31).**

IGNORES SCIENCE AND OBSERVED KNOWLEDGE

Phasing will give the Director unlimited power to ignore science and long developed experiential and traditional knowledge, as ***speculative*** **(Section 1(8)-Page 2, Line 25-27; Page 9, Lines 3-11)** and immaterial. This agency has shown valid observations as **"speculative, unscientifically based, and only a belief"** no matter how long observations were made throughout one's lifetime. These terms have been given the determining factor to control and manage our resources, giving the agencies ultimate say, however unfit a decision may be.

This piecemeal approach, derives ignorance to all land disposals **(Page 6, Lines 9-27)** away from intelligent decision-making processes, and modifies safeguards against unsound development as originally intended by the Alaska Coastal Management Program.

DIRECTOR HAS FULL DISCRETION

Written findings under this rule ***"is not required before the approval"*** **(Page 6, Line 7)** to all ***"other disposal of available land"*** including sales contracts, leases, permits, mineral claims, and licenses **(Page 6, Lines 9-22)** ***"or an interest in land for oil and gas"***, as established by ***"material fact"*** **(Page 6, Line 4)** under the Director's discretion.

We question the validity of not requiring written findings before a project is approved. Does this mean once a project is approved, the Director may write one after the decision is made?

RECOMMENDATION: Delete *"material"*.

The Director can ***"limit the scope of an administrative review and finding...that pertain solely to a discrete phase of the project"*** **(Section 2(e) (1)(C), Page 4, Lines 7-19)**, by using what is material only to his point of view with broad authority. The amended language under Section 2 changes AS 38.05.035(e) will limit public participation, if not eliminated, under this process. The Director ***"may address only reasonably foreseeable significant effects of the uses to be proposed"*** **(Page 3, Line 22).**

RECOMMENDATION: Delete ***"may address only"*** to **"shall address"**. Delete the word ***'may'*** throughout the language of the bill to **"shall"** where applicable.

Phasing used by the federal government guarantees the method of assessing all costs and effects of a proposed project, by incorporating public knowledge, known facts and findings, provided to them at the beginning, not as a tool to limit legitimate concerns, but gives due deference to legitimate concerns.

Section 404 of the Clean Water Act, require entire projects to be submitted for review, including wetlands. HB 474 and CSSB 308(Fin)am limit reviews and proper analysis of projects required under **33 C.F.R. Ss325.1(d)(2)** (*"all activities which the applicant plans to undertake which are reasonable related to the same project and for which a permit would be required."); and* **40 C.F.R. Ss230.11(g)**. The agency is given the ability to proceed without thoroughly understanding and assessing cumulative and long-term impacts of projects.

DESPITE INSUFFICIENCIES TO BEST INTEREST FINDINGS REVIEWERS ARE ALLOWED MINIMAL TIME TO MAKE FULL ASSESSMENT.

Requests for reconsideration submitted under CSSB308(FIN) **Section 4(i)** allows *20 days* in which to challenge a final written finding submitted to the commissioner. The commissioner ***"shall grant or deny the request"*** **(Page 9, Line 30).**

RECOMMENDATION: Change *20 days* to **30 days.**

This is a radical change from present law under the administrative process.

As written, the bill restricts standing to appeal to:

1) People who have meaningfully participated in the process leading up to findings;

2) People affected by the process. Some rural communities lack technical experience to adequately address and understand findings. This process unfairly closes those communities.

This language also supports the Director's decisions if the commissioner does not ***"act on the request"*** **(Page 9, Line 31)** within 30 days after the request. Thus, force the aggrieved party to ***"appeal to the superior court"*** **(Page 10, Line 2).** We question how this language affects Senate Bill 238.

Timing developed by DNR in CSSB308(Fin)am gives the Director the ability to reject information as insufficient evidence to support what is material to him. Timing is inadequate for interested parties to properly assess the directors' findings and provide information, especially in a rural setting, with only 20 days after the finding is issued **(Page 9, Line 14).**

RECOMMENDATION: Replace 20 days to **30 days** (Page 9, Line 14).

Notice Of An Action is given insufficient time when advertised ***"...once a week for two consecutive weeks"*** **(Page 11. Lines 22-25)** and only given ***"30 days"*** **(Page 12, Line 7)** before an action.

RECOMMENDATION: **'Four consecutive weeks, twice weekly, at daily newspapers,'** and **'Four consecutive weeks, Once weekly, at weekly newspapers'.** Again, **60 days,** prior to an action should be made.

DNR wishes a legislative quick-fix for its own mistakes it created. It will increase litigation under HB474 and CSSB308(Fin)am. DNR established these bills from three lawsuits under the current process, and wishes to develop significant impacts in a more efficient manner.

We support well thought, thoroughly planned development. Let us not repeat mistakes by the 18th century's lack of respect for the land, fish and wildlife

resources, and the blind sighted approach to haphazard development. We do not wish to see the creation of a bull dozing bureaucratic monster for lack of equitable language.

We recommend that a working group be developed to come to a more appropriate consensus on these bills, than a hasty development with conflicting language.

Several meetings took place between DNR and some coastal districts, but were not given enough opportunity to settle differences. SB 238 presents a good model, which addresses how petitions will be handled, the language was developed between DNR, the Coastal Districts and the Alaska Coastal Policy in a cooperative agreement. Why not allow such a group to develop a similar approach.

Thank you for the opportunity to comment.

Sincerely,
NATIVE VILLAGE OF TUNUNAK
Department of Natural Resources

John J. Oscar
President

SENATOR LITTLE

Letter of Intent #2 as am

CS Senate Bill 308(FIN)

It is the intent of the legislature that the sections of this legislation pertaining to AS 46.40 will be consistent with the federal coastal zone management ~~program and intent governing phased consistency determinations~~. act

4/21/94: Adopted by Senate

Adopted

No. 6

FISCAL NOTE

Bill Version: CSSB 308 (FIN)

STATE OF ALASKA BI (S) Publish Date: 4.21.94

1994 LEGISLATIVE SESSION

Revision Date: 15-Apr-94 Dept Affected: Natural Resources

Title: "An Act modifying administrative procedures and decisions by state agencies that relate to uses and dispositions..." BRU: Resource Development

Component: Oil & Gas Development

Sponsor: Senate Resources Committee

Requestor: Senator Pearce Component Serial No. 439

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
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 EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: $ None

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

SEE ATTACHED.

Replaced #5

Prepared by: Jim Eason, Director Phone : 762-2547

Division: Oil & Gas Date : 15-Apr-94

Approved by Commissioner:

Harry A. Noah Date: 15-Apr-94

Agency: Natural Resources

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(SB308.XLS Rev 4/15/94) For further distribution inform... call the Governor's Legislative Office

Attachment to CSSB308(FIN)am
April 15, 1994

The fiscal note is revised to reflect the effects of amendments since the last fiscal note was prepared. As a result of amendments expanding the administrative process and extending timelines for potential appeals of best interest findings, current sale schedules will have to be revised to assure time for compliance with the new provisions. This will result in fewer sales during the next two years, allowing funds from deferred sales to be used to pay for the increased costs associated with remaining sales. To balance delays of some future sales, however, CSSB308 should provide increased defensibility of sales and disposals conducted under its provisions. In addition, public participation and acceptance of these disposals should increase.

FISCAL NOTE No. 3

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO Bill Version: SB 308
(S) Publish Date: 2-23-94

Revision Date:
Title: "An act modifiying administrative procedures related to land disposal."
Sponsor: Senate Resources
Requestor: Senate Resources

Dept. Affected: Fish and Game
BRU: Habitat and Restoration
Component: Habitat

COMPONENT SERIAL NO. 486

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: $ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Frank Rue
Division: Habitat and Restoration
Approved by Commissioner:
Agency: Alaska Department of Fish and Game

Phone: 465-3065
Date: 2/14/94
Date: 2/14/94

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Changes in CSSB 308 (FIN) have no fiscal impact. This fiscal note is appropriate.
4/3/94 date — KN Comte Aide (initial)

Changes in CSSB 308 (Res) have no fiscal impact. This fiscal note is appropriate.
3.23.94 date — Comte Aide (initial)

FISCAL NOTE

(...2

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Bill Version: SB 308
(S) Publish Date: 2-23-94

Revision Date:
Title: Modifying administrative procedures and decisio
by State agencies that relate to uses of State land
Sponsor: Senate Resources Committee
Requestor:

Dept. Affected: Office of the Governor
BRU: Office of Management & Budget
Component: Governmental Coordination

COMPONENT SERIAL NO. 0018

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost $ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Changes in CSSB 308 (FIN) have no fiscal impact. This fiscal note is appropriate.

4-12-94 date — KH by Paul Comte Aide (initial)

) Changes in CSSB 308(RES) have no fiscal impact. This fiscal note is appropriate.

2-23-94 date — CS Comte Aide (initial)

Prepared by: Paul C. Rusanowski, Director
Division: Governmental Coordination
Phone: 465-3562
Date: 2/14/94

Approved by Commissioner: Patrick D. Ryan
Agency:
Date: 2-14-94

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FISCAL NOTE

No. 1

Bill Version: SB 308

STATE OF ALASKA

BILL N(

(S) Publish Da'e: 2-23-94

1994 LEGISLATIVE SESSION

Revision Date:

Department Affected: Environmental Conservation

Title: An Act Modifying Administrative Procedures

BRU: Environmental Quality

Sponsor: Senate Resources Committee

Component: Water Quality Management

Requestor: Senate Resources Committee

COMPONENT SERIAL NO. 645

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
FUND SOURCE						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: $

POSITIONS:			
FULL-TIME	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0

Changes in CSSB 308 (FIN) have no fiscal impact. This fiscal note is appropriate.

4-12-94 date — KH Comte Aide (initial)

ANALYSIS: (Attach a separate page if necessary.)

Changes in CSSB 308 (Res) have no fiscal impact. This fiscal note is appropriate.

2.23.94 date — Comte Aide (initial)

Prepared by: Bob Poe, Director

Phone: 465-5010

Division: Information & Administrative Services

Date: 2/14/94

Approved by Commissioner: For IAS

Agency: Department of Environmental Conservation

Date: 2/14/94

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SENATE AMENDMENT

BY: SENATOR PEARCE

TO: SENATE BILL 308

Page 2 Line 22
after the word "not"
delete "necessary"
Insert "required by the state"

Page 3 Line 2
after the word "completion"
insert "but is not intended to artificially divide or segment a proposed development project to avoid thorough review of the project or to avoid consideration of potential future environmental, sociological, or economic effects"

Page 4 Line 16
after the word "department"
insert "describes its reasons for a decision to phase and"

Page 6 Line 29
after the word "finding"
insert ".if required."

Page 7 Line 11
after "a"
insert "preliminary or"

Page 8 Line 19-28
delete all material

Page 8 Line 29
delete "(3)"
Insert "(2)"

Page 9 Line 7
delete all material

Page 9 Line 8
delete "(2)"
Insert "(1)"

Page 9 Line 9
delete "(3)"
insert "(2) except as otherwise provided in AS 38.05.073,"

Page 9 Line 10
delete "(4)"
insert "(3)"

Page 9 Line 12
after the word "file"
insert "an administrative appeal or"
after the word "reconsideration"
insert ",as appropriate,"

Page 9 Line 15
after the word "finding,"
insert "file an administrative appeal or"

Page 9 Line 16
after the word "file"
insert "an administrative appeal or"

Page 9 Line 20
after the word "comment;"
insert "or"

Page 9 Line 22
delete "or"
insert "and"

Page 9 Line 23-26
delete all material

Page 9 Line 28
after "(1)"
delete the word "A"
insert "An administrative appeal or a"

Page 9 Line 30
after the word "the"
insert "appeal or"

Page 10 Line 3
after the word "If"
insert "an administrative appeal or"

Page 10 Line 8
after the word "request,"
insert "an administrative appeal or"

Page 10 Line 9
after the word "on"
insert "administrative appeal or"

Page 10 Line 13
after the word "person's"
insert "administrative appeal or"

Page 13 Line 18
after the word "activity"
delete "proposed for that phase"
insert "for which the consistency determination is sought"

Page 13 Line 24
after the word "activity"
delete "proposed for that phase"
insert "for which the consistency determination is sought"

Page 13 Line 26
after the word "subsection,"
delete "prepare and issue a written statement describing"
insert "describe in the consistency determination"

ADDITIONS/CORRECTIONS TO SENATE AMENDMENT OF CSSB 308
APRIL 18, 1994

- **Page 3, Line 2**

  Purpose: Fixes glitch - language was adopted in the wrong place.

- **Page 9, Line 12**

  Purpose: To clarify that there may be appeals or requests for reconsideration, depending upon whether or not the best interest finding is issued with the advanced review and concurrence of the commissioner.

- **Page 9, Line 15**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 9, Line 16**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 9, Line 20**

  Purpose: To clarify that a party may demonstrate meaningful participation in the administrative process by either submitting written comment or presenting oral testimony.

- **Page 9, Line 22**

  Purpose: Technical amendment, to clarify that meaningful participation for the purposes of judicial appeal requires submittal of written or oral comments and that the party is a party who is affected by the final writen finding.

- **Page 9, Line 28**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 9, Line 30**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 10, line 3**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 10, Line 8**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 10, Line 9**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 10, Line 13**

  Purpose: Technical amendment, same as page 9, line 12.

- **Page 13, Line 26**

  Purpose: Fixes glitch - eliminates redundancy; deletes "shall."

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

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

(907)762-2547

April 21, 1994

The Honorable Ramona Barnes
Speaker of the House
Alaska State Legislature
Room 208
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Barnes:

As you will recall, HB 474 was introduced earlier this session following a series of adverse court decisions concerning oil and gas lease sales and offshore prospecting permits. A summary of the lawsuits which led to the drafting of HB 474/SB 308 is enclosed. The decisions in those lawsuits confirmed the need to amend the Title 38 Best Interest Finding provisions and the Title 46 Alaska Coastal Management Program requirements. In response, these bills were drafted to clarify the legislature's intent regarding the procedures to be followed in preparing for resources disposals, as well as permitting projects in Alaska's Coastal Zone. It is critical that the legislature act this session to ensure the state's continued ability to conduct its oil and gas leasing and other disposal programs.

Earlier today, the Senate passed its amended counterpart of HB 474, CSSB 308 (Fin). It is my understanding that CSSB 308 (Fin) is being referred to the House Resources Committee where hearings are expected to be held next week. With limited time remaining in the session, I wanted to be sure that you are aware of the recent amendments to this legislation, and how these amendments have broadened public acceptance and support for this bill.

To that end, I have enclosed several documents which address the specific amendments made to SB 308 between the time the bill moved into the Senate Finance Committee and its passage by the Senate. These documents include April 9 and 12, 1994 memoranda from me to Senator Pearce describing amendments which had been made as of those respective dates. In addition, I have enclosed the three-page amendment which subsequently was offered by Senator Pearce and adopted by the Senate just prior to the bill's passage. An accompanying document provides a short description of the basis for each provision of Senator Pearce's amendment on a page and line number basis.

I have also enclosed letters of support from Mr. Jon Isaacs and Ms. Nancy Wainwright, both of whom are independent consultants to certain of the Coastal Districts, as well as from Ms. Linda Freed of the Kodiak Island Borough. Also enclosed is a copy of Resolution #94-046 from the Matanuska-Susitna Borough, reversing its earlier Resolution #94-032 and supporting passage of CSSB 308 (Fin), as amended on the floor by Senator Pearce. It is important to note that both Mr. Isaacs and Ms. Wainwright submitted their letters of support on behalf of themselves, and not as representatives of the district.

I hope that your review of these materials confirms that in the intervening weeks since you last saw this legislation, it has undergone many substantive amendments in response to concerns raised by the public, the Coastal Districts and affected municipalities, among others. As with any legislation of this scope, however, it is virtually impossible to accommodate every amendment suggested. Nevertheless, I feel that all the parties have made a good faith effort to assure that reasonable compromises are represented in the bill which now comes to the House. I believe CSSB 308 responds to public concerns, while at the same time maintaining the protections which are necessary to assure continuation of these vital state programs. I urge you and your colleagues to support passage of this very important legislation.

I look forward to the opportunity to answer any questions which you or your staff may have or to discuss the legislation and its background in greater detail if you desire.

Sincerely,

James E. Eason
Director

Enclosures

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

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

TO: Senator Drew Pearce
Senator Steve Frank

DATE: March 28, 1994

FILE NO.:

PHONE: 762-2553

FROM: Barbara Fullmer
Kyle Parker

SUBJECT: SB308 - Litigation Summary

Resources Disposal Litigation Summary

BACKGROUND

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

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

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

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

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

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

OIL AND GAS LEASE SALE 50 (CAMDEN BAY)

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

1) The Court rejected Trustees' claim that they had been denied a fair opportunity to comment on the issues concerning offshore development, holding that the preliminary best interest finding gave sufficient notice that offshore facilities were contemplated.

2) The Court rejected Trustees' argument that DNR's best interest finding, in general, did not sufficiently explain the basis for its decision that the sale was in the best interest of the state.

3) The Court rejected Trustees' claim that DNR did not adequately address the cumulative effects of its leasing decision.

4) The Court agreed with Trustees' claim that DNR did not adequately consider the methods and risks of oil transportation from Camden Bay if ANWR remains unavailable for onshore support facilities.

5) The Court rejected Trustees' argument that leasing Camden Bay was unreasonable because oil production and transportation would not be economically feasible without onshore support facilities in ANWR, holding that "this court need not inquire into the feasibility of future development."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] In its Opinion, the Court specifically rejects the need to conduct field surveys and exploration in an effort to identify unknown sites.

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

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

OIL AND GAS LEASE SALE 55 (DEMARCAT'ON POINT)

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

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

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

GOODNEWS BAY OFFSHORE PROSPECTING PERMIT DISPOSAL

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

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

OIL AND GAS LEASE SALES 57 AND 75A

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

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

Oil and Gas Lease Sale 57 (North Slope Foothills)

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

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

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

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

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

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

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

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

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

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

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

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

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

In order to establish standing to appeal Sale 75A, Trustees also needed to demonstrate that they participated in the administrative proceedings below. DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment on proposed Sale 75A. See, e.g., January 15, 1993 Call for Comments; and March 23, 1993 Notice of Intent to Issue a Final Finding (inviting the public to submit written comment on any aspect of the sale, and giving notice of an April 14, 1993 public hearing scheduled in accordance with AS 38,05.180(d)(2)). Trustees never availed themselves of those opportunities. Therefore, Trustees lacked standing to challenge DNR's decision and their appeal of Sale 75A was frivolous.

OIL AND GAS LEASE SALE 78 (LOWER COOK INLET)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

MEMORANDUM

TO: Senator Drue Pearce

FROM: Jim Eason, Director
Division of Oil and Gas, DNR

RE: CSSB 308

DATE: April 9, 1994

You have asked that I respond to the concerns raised in the "Coastal Districts' Briefing Paper on CSSB 308" dated April 7, 1994, which was addressed to members of the Senate Finance Committee. My comments below address the issues raised in that document, and summarize briefly the responsive amendments reflected in the current CSSB 308. In addition, I have outlined certain other amendments which are currently being drafted which will respond to specific recommendations received during yesterday's hearing and subsequently.

Based upon my review, I believe there may be some confusion arising from the fact that the Districts' comments are directed to the prior version of CSSB 308, version K. The work draft of CSSB 308 which the Finance Committee adopted yesterday is version U. Version U represents DNR's response to the working groups' comments and recommendations which were raised during the five meetings between the parties since S.B. 308 arrived in the Senate Finance Committee.

Version U of CSSB 308 contains many substantive amendments which were made to address concerns of the Districts, as well as others including the federal Office of Coastal Resource Management (OCRM). The changes which were incorporated to address specific concerns identified in the Coastal Districts' Briefing Paper are summarized below.

First, in response to the groups' concerns about scope of review, language was incorporated in the Findings of Section 1 to make clear that the scope of review for findings will include a response to all

concerns raised during the public review period before a disposal. For oil and gas lease sales, for example, all factors listed under current A.S. 38.05.035 (g) must be addressed plus any other issues raised by the public.

In response to concerns about potential abuse of the right to phase consideration of projects, language was added in Findings 10 and 11 to clarify intent, and Section 8 was amended to make clear that phasing of state disposals and projects would occur only under the same circumstances as federal regulations now provide.

Under both federal and state law, as amended by Version K of CSSB 308, phasing would be appropriate when not enough is known about the potential future aspects of a development project to issue just one conclusive consistency determination. If the specifics of a proposed project can be sufficiently defined in the beginning, phasing cannot be allowed.

To further strengthen this concept, Finding 11 provides explicit guidance to a director that "...consideration of a disposal as a phase of a development project is not intended to avoid consideration of potential future environmental or sociological effects, but rather is intended to allow for consideration of those issues when sufficient data are available upon which to make reasoned decisions."

The Briefing Paper expressed concern that "...certain portions of S.B. 308 may be disallowed by the federal government..." and referenced earlier correspondence from OCRM and an April 24, 1994 Alaska Attorney General's Opinion. However, both the OCRM letter and the Attorney General's Opinion were written in response to version K of S.B. 308.

The two provisions of version K which both of those documents questioned as potentially being disallowed were the effect of limiting the review of effects under both best interest findings and consistency determinations to "direct effects", and not defining the circumstances under which phased review of projects would be allowed.

We have addressed both concerns in the current version of CSSB 308 by deleting the references to "direct" in Sections 2 and 8 and, as mentioned above, by adopting the standard applied under the

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

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

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

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

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

- The requirement to issue a preliminary best interest finding for oil and gas lease sales has been codified in statute. Further, the amendments provide that the preliminary finding will be issued no later than six months before a scheduled sale, and that the public will have no less than 60 days in which to comment.

- The public notice provisions for preliminary and final best interest findings have been enhanced. New minimum standards have been established to assure that notice for oil and gas disposal decisions will consist of legal notices, display ad notices, notice by electronic media and at least one other method.

- The proposed amendment to A.S. 38.05.035 (g) to limit discussion of fish and wildlife species and their habitats to those within the sale area has been deleted.

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

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

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

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

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

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

file

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

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April 12, 1994

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

via fax 465-3372 and mail

Subject: Amendments to CSSB 308

Dear Senator Pearce:

By memorandum dated April 9, 1994 I discussed the amendments reflected in version U of CSSB 308. In addition, I described two amendments which were, at that time, being drafted in response to comments which had been received during and after the Senate Finance Committee hearing on April 8.

In addition to the two amendments which were being drafted at the time, eight additional amendments have now been drafted for consideration by the Finance Committee. I have summarized below the purpose for each of those amendments.

- Amendment #3 clarifies that persons may meaningfully participate in an administrative review by presenting oral testimony or by affirmatively adopting the testimony of others by submitting a written statement to that effect during the period allowed for receipt of public comment or during the public hearing.

- Amendment #4 was drafted in response to any public comments indicating concern that comments on proposed disposals or projects would be summarily dismissed if determined by the Director to be non-material. The amendment clarifies that the Director will discuss, in writing, the reasons for any determination of non-materiality, as well as discussing, in writing, those issues which he finds material to a proposed disposal or project.

- Amendment #5 clarifies that the determinations of the state's best interest are those rendered under Title 38; specifically, AS 38.05.

- Amendment #6 clarifies that it is the Legislature's intent that the public have an opportunity to timely and meaningfully participate in the Director's determination of the scope of review appropriate to a specific finding.

- Amendment #7 simply adds economic effects to environmental or sociological effects in finding #11 of CSSB 308.

- Amendment #8: The language of this amendment is designed to reinforce legislative intent that a Director should not "divide or segment" proposed projects in order to avoid a thorough review of the project.

- Amendment #9 clarifies that both Oil and Gas Preliminary and Final Best Interest Findings will include a summary of agency and public comments received as of the time of each finding, as well as the department's responses to those comments. In addition, this amendment codifies the requirement that all written findings issued under AS 38.05.035 will include a summary of agency and public comments, as well as the department's response to those comments.

- Amendment #10 establishes a requirement that when a consistency review is limited to consideration of a specific phase, the Director or the responsible agency will prepare and issue a statement describing its bases for making a consistency determination in phases.

If you have any additional questions, please feel free to call.

Sincerely,

James E. Eason

James E. Eason
Director

041294dp.jk

MATANUSKA-SUSITNA BOROUGH
RESOLUTION SERIAL NO. 94-046

A RESOLUTION OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY REVISING THE BOROUGHS POSITION REGARDING PROPOSED SENATE BILL 308 OF THE ALASKA STATE LEGISLATURE.

WHEREAS, proposed Senate Bill 308 would modify administrative procedures and decisions by State agencies that relate to uses and dispositions of State land, property, and resources, and to the interests within them, and further modify administrative procedures that relate to uses and activities involving land, property, and resources, and to the interests within them that are subject to the Coastal Management Program when the use or activity is to be authorized or developed in phases; and

WHEREAS the Matanuska-Susitna Borough previously adopted MSB Resolution Serial No. 94-032 opposing House Bill 308 and its identical counterpart House Bill 474; and

WHEREAS, since the adoption of MSB Resolution Serial No. 94-032 the Borough has participated with the State of Alaska and other interested parties in review and revision of Senate Bill 308; and

WHEREAS, the Borough recognizes the cooperative review and legislative committee process is working and has produced an improved revised CS Senate Bill 308 (FIN) and significant proposed amendments to the Bill which if approved, would relieve many concerns of the Borough; and

WHEREAS, the Bill if approved by the Senate will proceed to the House of the Alaska State Legislature for further review, and possible revision; and

NOW THEREFORE BE IT RESOLVED the Matanuska-Susitna Borough supports passage by the Senate of CS Senate Bill 308 (FIN) if it is amended as proposed by Senator Pearce in accordance with the senate amendment document dated 4-18-94

BE IT FURTHER RESOLVED the Borough supports the Senate passage of a letter of intent for CS Senate Bill 308 (FIN) as submitted by Senator Suzanne Little and which reads as

follows: ("It is the intent of the legislature that the sections of this legislation pertaining to AS 46.40 will be consistent with the federal coastal zone management program regulations and intent governing phased consistency determinations."); and

BE IT FURTHER RESOLVED that the Borough asks the State legislature to ensure the rights of the local government to protect the interests of its residents are preserved within the implementation of this act through preliminary and final best interest findings conducted under AS 38 and consistency determinations conducted under AS 46.

ADOPTED by the Matanuska-Susitna Borough Assembly this 19 day of April, 1994.

Ernest W. Brannon

ERNEST W. BRANNON, Borough Mayor

ATTEST:

Linda A. Dahl

LINDA A. DAHL, Borough Clerk

gp/94036

Number: RESO 94-046
ORD 94-__
AM 94-__

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

SB 308: Amendments to Title 38 and the Alaska Coastal Management Program

The Alaska Environmental Lobby (AEL) opposes SB 308. This legislation is a direct attack on the Alaska Coastal Management Program. It will also affect state resource disposals of timber, minerals and lands. In all cases, it takes power away from the public and local communities and gives it to the directors of the state's resource agencies.

SB 308 attempts to reduce the state's legal obligations when it disposes of public resources. When a public resource is leased, sold or otherwise disposed of, the state is required to determine whether the disposal will best serve the interests of the state. The state is also required to show that the disposal is consistent with the Alaska Coastal Management Program. This legislation would narrow the scope of the factors that the state must consider when preparing a best interest finding and when making a consistency determination.

AEL's specific concerns are:

1. SB 308 gives resource agency directors the authority to decide which facts are material to the scope of review of best interest findings. It will significantly diminish consideration of issues the public finds important and it will insert a powerful bias into a finding since the director usually operates under a mandate to develop the resource.

2. **SB 308 narrows standing** by restricting who may contest a best interest finding to only those who participated in the initial public review process and who have been materially affected by the disposal.

3. These bills allow best interest findings and consistency determinations to be limited to discrete phases of a project.

- Such a limited focus would diminish consideration of the long term and cumulative impacts of a project.
- Oil and gas disposals are already phased to some degree under federal regulations. But the federal intent of phasing is to

broaden the scope of review by including *all* information known about the project and to phase only when critical information is not known at that time. SB 308 limits the scope of review to "significant effects of the use or activity proposed **for that phase.**"

- Once the initial permits are approved, and the project begins to move forward, it would be very difficult for the permitting agency to deny subsequent permits. If it were to do so, the state might be legally liable for project costs, repurchase of the leases, penalty fees and lawsuits.
- SB 308 does not explicitly provide the public with the right to appeal the director's decision to phase a project.
- SB 308 fails to provide any criteria or guidelines to guide or evaluate the director's decision to phase a project.

4. **SB 308 affects all resource disposals** including land, minerals and timber. None of these disposals are currently phased, none receive the same level of oversight that oil and gas do and none have any statutory guidelines delineating the scope of review. SB 308 gives resource directors extraordinary discretion in determining the disposal of state resources.

These bills are not needed. The problem is not in Title 38 or the Alaska Coastal Management Program. The problem lies with DNR's inability to competently prepare a best interest finding. When the Supreme Court rejected DNR's finding for Lease Sale 55 for example, it noted that DNR had copied *"without alteration"* the Lease Sale 50 finding which the Court had previously rejected. It is hard for DNR to defend its competency or its commitment to the public interest when it reuses a rejected finding.

The Alaska Supreme Court has found that "DNR must take a hard look at any salient problems associated with a [lease] sale," and that it must "consider the probable cumulative impact of all anticipated activities which will be a part of [the project]." The public, industry and the state must be provided with all the relevant concerns before a project begins, to ensure that it proceeds responsibly and with minimal impact on local communities, other resources and the environment.

4/18/94

Kodiak Island Borough

710 MILL BAY ROAD
KODIAK, ALASKA 99615-6340
PHONE (907) [redacted]

April 15, 1994

VIA FAX 465-3872

Senator Drue Pearce
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

RE: SB 308 version X and proposed amendments (April 14, 1994)

Dear Senator Pearce:

Due to time constraints this letter of necessity will be brief. After careful consideration of the recent amendments proposed for version X of SB 308, the Kodiak Island Borough feels we can work with you to gain passage of this legislation.

We want to thank you and your staff, especially David Rogers, and the administration, especially Jim Eason for your efforts to resolve issues surrounding this bill. Such effort, on all sides, has improved this bill dramatically.

As you are aware, the Kodiak Island Borough previously objected to the inclusion of phasing, as a concept, in this bill. It is evident to us that the Senate intends to include phasing in this bill and to that end we have worked to make the language of the bill acceptable. We believe the most recent amendments, for the most part, accomplish this.

There are five sections of the bill that continue to contain language that is unclear to us. We believe that we have conceptual agreement on the intent of this language, however, we would like to continue discussions about the implications of this language. The language in question is: the meaning of "may address only" on line 22, page 3; the implications of "aggrieved" and

Kodiak Island Borough

"affected" on lines 13 and 27 of page 9, respectively; the meaning of "economic feasibility" on line 9 page 9; the meaning "material" on line 23 page 13; and the meaning of "for which the consistency determination is sought", to be added on page 13. We hope to continue productive, informative dialog about this language; at the same time we applaud and support your efforts to resolve the other issues we have identified in previous versions of the bill.

Again, please accept our thanks for working with us to improve the language of this bill.

Sincerely,

Linda L. Freed, Director
Community Development Director

c.c. Jerome Selby, Borough Mayor
Kodiak Island Borough Assembly

jon isaacs and associates . 2418 forest park drive . anchorage, alaska . 99517 . (907)274-9719 . fax 276-6117

April 15, 1994

Honorable Senator Drue Pearce
Chair, Senate Finance Committee

Dear Senator Pearce:

As a member of an informal coastal district working group, I have been participating in the review of Senate Bill 308 with representatives of the Department of Natural Resources, and Mr. David Rogers, who has been representing your committee. Over the last two months, I have participated in several Senate Finance Committee Meetings and workgroup discussions to develop a bill that addresses the concerns of the Department of Natural Resources without creating significant problems for the coastal districts and other municipalities.

On the afternoon of April 15, a small group of individuals worked on the significant outstanding issues identified by the informal coastal district working group. I should mention that this group does not represent or speak for all coastal districts, many of whom have other valid concerns regarding this legislation. In this meeting, we came to consensus on most of the major issues, with a few exceptions. The issues where consensus was reached was to:

- include finding language that phasing of coastal consistency determinations is not intended to artificially segment a project

- that the reasons for phasing a best interest finding are included in the preliminary finding, and are subject to public comment and appeal under appropriate avenues

- that when a consistency review is phased, the consistency review will be based on the use or activity for the consistency determination is sought rather than restricted to the phase - this allows consideration of "known facts" and reasonably foreseeable significant effects related to the use of activity

- that when a consistency review is phased, the consistency determination will include a basis for phasing the review, and that this basis is subject to standard coastal management elevation or appeal rights.

Issues where there is still some differences regarding language or resolution include:

- use of "may address only" vs. shall address reasonably foreseeable significant effects related to the use in Section 2 (A)of AS 38.05.035(e). DNR's verbal intent is that, at a minimum, reasonably foreseeable significant effects related to the use will be addressed. The appropriate language needs to be used.

• on page 5, item (6), DNR has indicated that 21 days may not be adequate time for public involvement in this step; they are researching best interest requirements and have indicated that they will come up with an appropriate number

• standing to request appeal or reconsideration of a best interest finding; I understand that DNR is looking into what language may be more appropriate

• in Section 8, page 13, line 22, the concept of material to the consistency determination has not been previously used or defined; I would prefer the term relevant be used in its place or material defined

• finally, I understand that some municipalities are still concerned about the lack of guidance regarding other best interest findings besides oil and gas, mining, timber, and commercial recreation; while language in the bill requires addressing reasonably foreseeable significant effects related to the use, and the basis of phasing can be appealed, I suggest that DNR continue to consider other solutions.

I greatly appreciate the efforts of members of the Senate and particularly Senator Pearce in supporting this working group process and resulting in better legislation. I also appreciate the efforts of Jim Eason and other members of the administration, David rogers, coastal districts, fishing groups, and environmental groups in trying to reach consensus. While not a perfect bill that makes everyone happy, the language changes as provided by Mr. Rogers has addressed major concerns. Again, the legislature should be aware that I can only speak for myself and not represent or speak for all coastal districts, many of whom have other concerns. thank you all for your efforts.

Sincerely,

Jon Isaacs

April 15, 1994

Honorable Senator Drue Pearce
State of Alaska Senate

Dear Senator Pearce:

I have been part of the informal working group which has been working to try an achieve consensus on SB 308. I have had an opportunity to review Version X, and to discuss, in concept, the amendments which are to be proposed on April 15, 1994. There has been substantial improvement in the bill and I appreciate the efforts of DNR and the Senate Finance Committee to attempt to address concerns raised by the coastal districts and others. I believe the efforts of those who have worked on this bill will result in a better public process. There are a few remaining issues which need to be resolved, and I support the continued efforts of the Legislature to resolve the remaining issues this session.

There have been numerous revision made to this legislation, and I wish to highlight a few which I can support without reservation:

I support the examination of "reasonably foreseeable significant effects" and commend DNR for its selection of this as a standard for what will be examined upon the decision to phase.

I endorse the public notice provisions and the provision that a final best interest finding will be issued not less than 90 days before the sale lease or other disposal.

I also endorse the establishment of the requirement for a preliminary best interest finding for oil and gas lease sales in statute, a practice which DNR has, heretofore, undertaken voluntarily.

I commend DNR and the Senate Finance Committee for their agreement that the effects on fish and wildlife species and their habitats in the area will remain in the existing statute.

Finally, I commend DNR and the administration for adopting the federal language on phasing, into the Title 45 portions of the statute.

There are remaining issues which, I believe, can be resolved through the legislative process. These issues are addressed below:

<u>Phasing of all land disposals under Title 38</u>

Throughout this process the some coastal districts have identified a fundamental problem with this legislation that arises under Title 38, which proposes to allow phasing for all land disposals. I believe that the provisions of section 38.05.035(g)

affords the necessary guidance to DNR to phase oil and gas lease sales. However, that same guidance is not provided for phasing of other types of disposals (timber, mining etc.) I believe that there need to be specific factors developed or referenced which the Director will examine in the decision to phase other disposals.

Phasing under Title 46 (ACMP)

There is one remaining question under Title 46. The language states that the consistency review shall be based on facts pertaining to the use or activity for which the consistency determination is sought that are "material" to the consistency determination. There is no definition of what constitutes issues which are "material" and that language does not appear elsewhere in the ACMP. Since this section addresses phasing for all projects, we believe that this vague language will result in additional litigation on the specific meaning of that word. We recommend deletion of that section. I understand that the language proposed to be added "for which the consistency determination is sought.". is intended to mirror the federal scope of review for phased projects. If that intent is confirmed, then I believe this language will be adequate to meet concerns I have previously expressed about phasing under the ACMP.

Standing to Request Reconsideration/Appeal

The issue of standing is one which significantly affects public participation under this legislation. DNR has stated that the intent of this legislation is to provide for that any person who has submitted written or oral comments during the comment period be allowed to request reconsideration or, as appropriate, administrative appeal. There is remaining confusion as to whether the commenting person may raise any issue that has been identified during the public comment period, or whether the person will be limited to those issues which he or she personally raised. I believe that any issue which was raised during the administrative review should be examined on reconsideration if raised by a person who has commented during the administrative review.

I further believe that the words "is affected by the decision" (page 9, line 27) should be deleted from the bill, because it does not comport with the existing Alaska law on standing. I support the "private attorney general" theory of standing which has been endorsed by the Alaska Supreme Court. Finally, there may be some confusion by the simple addition of the word "appeal" on p. 9, line 12. I suggest the words "administrative appeal" be added so that it is not confused with an appeal to Superior Court.

Clarification of "Economic Feasibility"

Section 4 of the bill states that the director may not be required to speculate about the "economic feasibility" of ultimate development. That phrase is troubling because it is not defined, and it has implications for disposals which affect coastal

districts. In discussions with DNR it was suggested that this phrase is directed toward the economic feasibility of the applicant's ultimate development project. I believe that clarifying language should be added to state that the best interest finding shall consider the potential economic benefits and potential economic detriments from a disposal, but may not be required to speculate about future effects subject to future permitting which relate to economic feasibility, if there is no known information which can be reasonably determined.

Changing the words "may address only" to "shall address"

The language in Section 2 states that the scope of review and finding of the Director "may address only" reasonably foreseeable significant effects. The use of the word "may" means that the director is not obligated to address those effects. The addition of the word "may ...only" implies that there is no ability to look further, if, in the Director's discretion, there are effects which should be analyzed. We suggest the changing of the language to read: "The Director shall address reasonably foreseeable....". This will make this requirement mandatory, but will also allow the flexibility to the Director to consider other effects.

Conclusion

I am encouraged by the progress which has been made on this bill. While every interest may not have been fully satisfied, I believe that the overall result of this bill will be better public policy decision-making, which will successfully withstand legal challenges. I look forward to working with DNR, fishing groups, environmental groups, and all other interests to resolve the few remaining issues and to develop a process which will implement this legislation successfully.

Very truly yours,

Nancy S. Wainwright

NANCY S. WAINWRIGHT