

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8073 HOUSE RESOURCES

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in a sale that was held within the previous five years if the sale was subject to a best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding.

* Sec. 2. AS 38.05.035(g) is amended to read:

(g) When the director prepares a written finding required under (e) of this section for an oil and gas lease sale scheduled under AS 38.05.180, the director shall consider and discuss in the finding

(1) facts that are known to the director at the time of preparation of the finding and that are

(A) material to [THE FOLLOWING MATTERS OR TO] issues that were raised during the period allowed for receipt of public comment, whether or not material to a matter set out in (B) of this paragraph, and within the scope of the administrative review established by the director under (e)(I) of this section; or

(B) material to the following matters:

(i) [(A)] property descriptions and locations;

(ii) [(B)] the petroleum potential of the sale area, in general terms;

(iii) [(C)] fish and wildlife species and their habitats within [IN] the lease sale area;

(iv) [(D)] the current and projected uses in the area, including uses and value of fish and wildlife;

(v) [(E)] the governmental powers to regulate oil and gas exploration, development, production, and transportation;

(vi) [(F)] the reasonably foreseeable cumulative effects of oil and gas exploration, development, production, and transportation on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;

(vii) [(G)] lease stipulations and mitigation measures,

1 including any measures to prevent and mitigate releases of oil and
 2 hazardous substances, to be included in the leases, and a discussion of
 3 the protections offered by these measures;

4 (viii) [(H)] the method or methods most likely to be
 5 used to transport oil or gas from the lease sale area, and the advantages,
 6 disadvantages, and relative risks of each;

7 (ix) [(I)] the reasonably foreseeable fiscal effects of the
 8 lease sale and the subsequent activity on the state and affected
 9 municipalities and communities, including the explicit and implicit
 10 subsidies associated with the lease sale, if any;

11 (x) [(J)] the reasonably foreseeable effects of oil and gas
 12 exploration, development, production, and transportation on
 13 municipalities and communities within or adjacent to the lease sale area;
 14 and

15 (xi) [(K)] the bidding method or methods adopted by the
 16 commissioner under AS 38.05.180;

17 (2) a summary of agency and public comments received and the
 18 department's responses to those comments; and

19 (3) the basis for the director's determination that, on balance, leasing
 20 the area would be in the state's best interest.

21 * Sec. 3. AS 46.40 is amended by adding a new section to read:

22 Sec. 46.40.094. CONSISTENCY DETERMINATIONS FOR USES AND
 23 ACTIVITIES. (a) When a use or activity is authorized or developed in discrete
 24 phases, and each phase will require decisions relating to a permit, lease, or
 25 authorization for that particular phase, the agency responsible for the consistency
 26 determination for the particular phase

27 (1) may, in its discretion, limit the consistency review to that particular
 28 phase if, but only if,

29 (A) the agency or another state agency must carry out a
 30 subsequent consistency review and make a consistency determination before a
 31 later phase may proceed; and

- 1 (B) the agency responsible conditions its consistency
2 determination for that phase on a requirement that a use or activity authorized
3 in a subsequent phase be consistent with the Alaska coastal management
4 program; and
- 5 (2) shall, when the consistency review is limited under (1) of this
6 subsection, conduct the consistency review for the particular phase and make the
7 consistency determination based on
- 8 (A) applicable statutes and regulations;
- 9 (B) the facts pertaining to a use or activity proposed for that
10 phase that are
- 11 (i) known to the state agency responsible or made a part
12 of the record during the consistency review; and
- 13 (ii) material to the consistency determination; and
- 14 (C) the reasonably foreseeable, significant, direct effects of the
15 use or activity proposed for that phase.
- 16 (b) In this section,
- 17 (1) "agency responsible for the consistency determination" means
- 18 (A) the office of management and budget, for a consistency
19 determination required to be made under AS 44.19.145(a)(11); and
- 20 (B) the commissioner of the resource agency that coordinates
21 a consistency review for a proposed use or activity, or for a proposed phase of
22 a use or activity, when required by this chapter for which a permit, lease, or
23 authorization is required to be approved or issued only by that resource agency;
- 24 (2) "resource agency" has the meaning given in AS 44.19.152.
- 25 * Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

WALTER J. HICKEL
GOVERNOR



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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 15, 1994

*The Honorable Joe Green
Chairman
House Oil and Gas Committee
Capitol Building, Room 114
Juneau, AK 99811*

Dear Representative Green:

As a result of several unfavorable court decisions, the Administration simply cannot guarantee the continued efficacy of the state's oil and gas leasing program. Each of the decisions has had the effect of expanding the scope of best interest findings and coastal zone consistency determinations well beyond the letter of the law, and, we believe, beyond the intent of the Legislature. The court has made clear that, in the absence of specific legislative intent to the contrary, it will set oil and gas leasing policy by imposing its own standards on the scope and content of best interest findings and coastal zone consistency determinations related to lease sales.

Following the most recent adverse decision, the Superior Court's injunction of Lease Sale 78, Governor Hickel asked that I coordinate the Administration's review of statutory amendments necessary to address this problem. Participants in that review included the Commissioners of Commerce and Economic Development, Environmental Conservation, Fish and Game, and Natural Resources, as well as the Director of the Division of Governmental Coordination, other representatives of the Governor's Office and me.

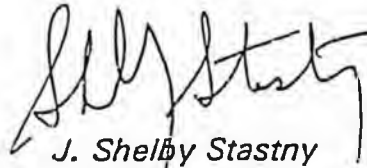
We have carefully reviewed the language of H.B. 474 and are convinced that it represents a realistic common-sense approach toward resolving the growing threat to the state's leasing program. We believe that its careful definition of the scope of best interest finding and CZM determinations, coupled with an explicit acceptance of phased determinations when the agency has the authority to further condition subsequent project approvals, will discourage litigation based upon speculation and better serve the public interest.

*The Honorable Joe Green
February 15, 1994
Page 2*

Your committee's bill will also further several other goals to which the Administration is committed. It will ensure a best interest finding and CZM consistency procedure that is factual, fair and timely. It will also reduce litigation risks substantially, and, therefore, reduce litigation costs. We believe that H.B. 474 will accomplish these worthwhile goals while providing for meaningful and undiminished public review and participation in the leasing program.

On behalf of the Administration, I appreciate the willingness of you and your committee to promptly address this difficult issue. I pledge our full and undivided support in working to assure passage of H.B. 474.

Sincerely,



J. Shelby Stastny

*J. Shelby Stastny
Director of Management and Budget*

THEY SAY OIL & GAS LEASING IS BROKEN

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

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

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

Superior Court order staying Lease Sale 78

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

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

Brief to the Supreme Court by:

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

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

Brief to the Superior Court on Sale 78 by:

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

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

Alaska Supreme Court

YOU CAN FIX IT

IT'S A FACT

Since The Inception Of Competitive Leasing in 1959:

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

AFTER 35 YEARS OF OIL & GAS LEASING

- The courts—and not the Legislature or the Executive Branch—are setting the state's leasing policy
- The Supreme Court says the Best Interest Findings under Title 38 are insufficient
- The Superior Court cannot determine whether lease sales are consistent with ACMP unless all potential future development can be described
- The Superior Court is unable to determine that there is a significant public need for the lease sale
- The Ombudsman finds that although we have met or exceeded all legal requirements, the process—as defined in current statute—is not “fair”

WHAT IS THE PROBLEM?

With 85% of State Revenue At Stake

HOW DO WE FIX IT?

FIRST, UNDERSTAND THE PROBLEM

- Under Title 38, the commissioner must take a "hard look" at "the salient factors" in best interest findings that an oil and gas lease sale should be held.
- However, through a series of Supreme Court decisions beginning in 1987 and continuing through this year, the court has systematically rejected the commissioner's authority both to determine what are the salient factors and "how much" analysis is "enough" before proceeding with a lease sale.
- Both the Alaska Supreme Court, and now the Superior Court, have ruled that best interest findings under Title 38 and ACMP consistency determinations for lease sales under title 46 cannot rely upon deferred consistency reviews of post-sale projects until specific exploration or development projects are proposed.
- Since no one can predict the consequences of a lease sale; litigants are encouraged to speculate on the sufficiency of the commissioner's considerations on future events, and the courts have become the arbiter of what is "proper weight" and "adequate analysis." Arguments over "how many angels might someday come to sit on the head of the pin" are disrupting the leasing program, frustrating legislative intent and threatening the state's future economic health.

TO FIX IT

THE STATUTES MUST BE CHANGED

- Modify Title 38, the oil and gas leasing statutes, and Title 46, the ACMP statutes, to clarify legislative intent
- Eliminate the opportunity for courts to substitute their judgment by providing clear guidance as to the scope of best interest findings and ACMP findings and consistency determinations for lease sales
- Regulatory "fixes" do not carry the force of law and will NOT solve the problem

IF LEGISLATION IS NOT PASSED

- Continued disruption and delay of lease sales
- Lost reliability of lease sale process
- Loss of industry participation
- Lost state revenue
- Increased litigation costs
- Increased unemployment as service industry contracts

WHAT THIS LEGISLATION DOES

- "Tightens" the scope of the best interest finding and ACMP determination for leasing
- Creates a best interest finding and ACMP procedure
 - that is factual, fair and timely
 - that is more likely to withstand judicial and public scrutiny
- Provides for meaningful public review process and directs the commissioner to determine best interest and find consistency when
 - valid, material and relevant facts are known and considered
 - required permits meet established standards

BOTTOM LINE

**This Legislation More Clearly
Defines Legislative Intent With
Respect To Oil and Gas Lease Sales**

TITLE 38 AND THE ACMP STATUTES NEED TO BE AMENDED

IF THIS LEGISLATION IS NOT ADOPTED

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

WITHOUT THIS LEGISLATION

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

THE RECORD SENDS THE FOLLOWING MESSAGES . . .

Consistency with the ACMP (Sale 78)

Trustees for Alaska:

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

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

Alaska Superior Court:

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

DNR:

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

Trustees for Alaska:

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

Best Interest Finding (Sale 78)

Trustees for Alaska:

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

Geophysical Hazards (Sale 50)

Trustees for Alaska:

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

Alaska Supreme Court:

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

DNR:

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

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

DNR's petition for rehearing was denied.

Archeological Resources (Sale 50)

Trustees for Alaska:

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

Alaska Supreme Court:

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

DNR:

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

DNR's petition for rehearing was denied.

Transportation (Sale 55)

Trustees for Alaska:

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

Alaska Supreme Court:

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

DNR:

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

The Porcupine Caribou Herd (Sale 55)

Trustees for Alaska:

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

Alaska Supreme Court:

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

DNR:

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

DNR's petition for rehearing was denied

Goodnews Bay Offshore Prospecting Permit (OPP) Disposal

Alaska Supreme Court:

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

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

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

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

Alaska Supreme Court—Goodnews Bay Decision

WHAT WOULD BE THE COST?

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

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

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

Would The Number Of Sales Decrease? YES!

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

Would EIS's Prevent Lawsuits? NO!

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

CONCLUSION:

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

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

DESPITE THE STUDIES, DESPITE THE TREMENDOUS EXPENSE

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

SALE 78 - THE PROBLEM - A CASE STUDY

TRUSTEES CREATE A CONFLICT:

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

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

REALITY:

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

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

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

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

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

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

Adopt This Legislation To Fix The System

SENATE BILL NO. 308

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act modifying administrative procedures and decisions by state agencies that
 2 relate to uses and dispositions of state land, property, and resources, and to the
 3 interests within them, and that relate to land, property, and resources, and to
 4 the interests within them, that are subject to the coastal management program;
 5 and providing for an effective date."

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

7 * Section 1. AS 38.05.035(e) is amended to read:

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

1 the director is subject to the following:

2 (1) with the consent of the commissioner and subject to the
3 director's discretion, for a specific proposed disposal of available land, resources,
4 or property, or of an interest in them, the director

5 (A) shall establish the scope of the administrative review on
6 which the director's determination is based, and the scope of the written
7 finding supporting that determination; the scope of the review and finding
8 may address only reasonably foreseeable, nonspeculative, direct effects of
9 the uses proposed to be authorized by the disposal:

10 (B) may limit the scope of an administrative review and
11 finding for a proposed disposal

12 (i) to the applicable law and the facts pertaining to
13 the land, resources, or property, or interest in them, that the
14 director finds are material to the determination and that are known
15 to the director or knowledge of which is made available to the
16 director during the administrative review; and

17 (ii) to issues that, based on the law and facts as
18 described in (i) of this subparagraph and on the nature of the uses
19 sought to be authorized, the director finds are relevant to the
20 determination of whether the proposed disposal will best serve the
21 interests of the state; and

22 (C) may, if the project for which the proposed disposal is
23 sought is a multiphased development, limit the scope of an administrative
24 review and finding for the proposed disposal to the applicable law, facts,
25 and issues identified in (B)(i) and (ii) of this paragraph that pertain solely
26 to a discrete phase of the project when the only uses to be authorized by
27 the proposed disposal are part of that discrete phase, the department's
28 approval is required before the next phase of the disposal may proceed,
29 and the department conditions its approval to ensure that any additional
30 uses or activities proposed for that or any later phase of the disposal will
31 serve the best interests of the state;

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(2) a [A] written finding for an oil and gas lease sale under AS 38.05.180 is subject to (g) of this section;

(3) a [. A] contract for the sale, lease, or other disposal of available land or an interest in land is not legally binding on the state until the commissioner approves the contract but if the appraised value is not greater than \$50,000 in the case of the sale of land or an interest in land, or \$5,000 in the case of the annual rental of land or interest in land, the director may execute the contract without the approval of the commissioner;

(4) before [. BEFORE] a public hearing, if held, or in any case no less than 21 days before the sale, lease, or other disposal of available land, property, resources, or interests in them, the director shall make available to the public a written finding that, in accordance with (1) of this subsection, sets out the material 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; however, a [. A] written finding is not required before the approval of

(A) [(1)] a contract for a negotiated sale authorized under AS 38.05.115;

(B) [(2)] a lease of land for a shore fishery site under AS 38.05.082;

(C) [(3)] a permit or other authorization revocable by the commissioner;

(D) [(4)] a mineral claim located under AS 38.05.195;

(E) [(5)] a mineral lease issued under AS 38.05.205;

(F) [(6)] a production license issued under AS 38.05.207;

(G) [(7)] an exempt oil and gas sale under AS 38.05.180(d) of acreage offered in a sale that was held within the previous five years if the sale was subject to a written best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding; or

(H) [(8)] a lease sale under AS 38.05.180(w) of acreage offered in a sale that was held within the previous five years if the sale was subject to

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a best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding.

* Sec. 2. AS 38.05.035(g) is amended to read:

(g) When the director prepares a written finding required under (e) of this section for an oil and gas lease sale scheduled under AS 38.05.180, the director shall consider and discuss in the finding

(1) facts that are known to the director at the time of preparation of the finding and that are material to the following matters or to the issues that are within the scope of the administrative review that was established by the director under (e)(1) of this section and that were raised during the period allowed for receipt of public comment;

- (A) property descriptions and locations;
- (B) the petroleum potential of the sale area, in general terms;
- (C) fish and wildlife species and their habitats within [IN] the lease sale area;
- (D) the current and nonspeculative projected uses in the area, including uses and value of fish and wildlife;
- (E) the governmental powers to regulate oil and gas exploration, development, production, and transportation;
- (F) the reasonably foreseeable cumulative effects of oil and gas exploration, development, production, and transportation on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;
- (G) lease stipulations and mitigation measures, including any measures to prevent and mitigate releases of oil and hazardous substances, to be included in the leases, and a discussion of the protections offered by these measures;
- (H) the method or methods most likely to be used to transport oil or gas from the lease sale area, and the advantages, disadvantages, and relative risks of each;

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(I) the reasonably foreseeable, nonspeculative fiscal effects of the lease sale and the subsequent activity on the state and affected municipalities and communities, including the explicit and implicit subsidies associated with the lease sale, if any;

(J) the reasonably foreseeable, nonspeculative effects of oil and gas exploration, development, production, and transportation on municipalities and communities within or adjacent to the lease sale area; and

(K) the bidding method or methods adopted by the commissioner under AS 38.05.180;

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

(3) the basis for the director's determination that, on balance, leasing the area would be in the state's best interest.

Sec. 3. AS 46.40 is amended by adding a new section to read:

Sec. 46.40.094. CONSISTENCY DETERMINATIONS. (a) When a consistency determination is required for a project, the party responsible for the consistency determination shall conduct the consistency review of the project and make a consistency determination based only on

(1) applicable law;

(2) the facts pertaining to the project that are

(A) known to the party responsible or made a part of the record during the project's consistency review; and

(B) material to the project's consistency determination; and

(3) the reasonably foreseeable, nonspeculative, direct effects of the project.

(b) If a consistency determination is required for a project that is a discrete phase of a multiphased development project, in addition to the requirements of (a) of this section, the party responsible for the consistency determination may, in its discretion,

(1) limit the consistency determination for the proposed project to that discrete phase if each later phase of the project requires the party responsible to review

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and make a consistency determination before that later phase of the project may proceed; and

(2) condition the consistency determination for that phase of the project on a requirement that an additional use or activity proposed for that or any later phase of the project be consistent with the Alaska coastal management program.

(c) In this section,

(1) "party responsible for the consistency determination" or "party responsible" means

(A) the office of management and budget, for a consistency determination required to be made under AS 44.19.145(a)(11); and

(B) the commissioner of the resource agency that coordinates a consistency review for a proposed project when required by this chapter for which a permit, lease, or authorization is required to be approved or issued only by that resource agency;

(2) "resource agency" has the meaning given in AS 44.19.152.

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

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 Bill Williams
Alaska State Legislature
Room 128
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Williams:

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.

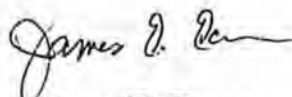
Re HB 474
April 21, 1994
Page 2

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

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

DIVISION OF OIL AND GAS

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

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

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

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

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

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

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.

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 (DEMARCATON 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.

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

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 (LOW...P 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

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

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:

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 MSECMP 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.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 308(FIN)

Page 2, line 22:

Delete "necessary"

Insert "required by the state"

Page 3, line 2, after "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 "department":

Insert "describes its reasons for a decision to phase and"

Page 6, line 29, after "finding":

Insert ". if required."

Page 7, line 11, after "a":

Insert "preliminary or"

Page 8, line 18, after ",":

Insert "and"

Page 8, lines 19 - 29:

Delete "in a preliminary written finding, facts that are known to the director at the time of preparation of the finding and that are

(A) material to issues that the department identifies.

whether or not material to a matter set out in (B) of this paragraph, and within the scope of the administrative review established by the director under (e)(1) of this section or

(B) material to a matter described in (1)(B) of this subsection [A SUMMARY OF AGENCY AND PUBLIC COMMENTS RECEIVED AND THE DEPARTMENT'S RESPONSES TO THOSE COMMENTS]; and

(3)"

Insert "[A SUMMARY OF AGENCY AND PUBLIC COMMENTS RECEIVED AND THE DEPARTMENT'S RESPONSES TO THOSE COMMENTS; AND

(3)]"

Page 9, line 7:

Delete all material.

Renumber the following paragraphs accordingly.

Page 9, line 9, before "the economic":

Insert "except as otherwise provided in AS 38.05.073 for land suitable for recreational facilities development leasing,"

Page 9, line 12:

After "file"

Insert "an administrative appeal or"

After "reconsideration"

Insert ", as appropriate,"

Page 9, line 15, after "finding,":

Insert "file an administrative appeal or"

Page 9, line 16, after "file":

Insert "an administrative appeal or"

Page 9, line 20, after "comment;":

Insert "or"

Page 9, line 22:

Delete "or"

Insert "and".

Page 9, lines 23 - 26:

Delete

"(C) adopting as the person's own testimony concerns that were expressed by another, either by submitting a written statement to that effect during the period for receipt of public comment or by so declaring during a public hearing; and"

Page 9, line 28:

Delete "A"

Insert "An administrative appeal or a"

Page 9, line 30, after "deny the":

Insert "administrative appeal or reconsideration"

Page 10, line 3, after "If":

Insert "an administrative appeal or"

Page 10, line 4:

Delete "after reconsideration"

Page 10, line 8, after "request,":

Insert "an administrative appeal or"

Page 10, line 9, after "on":

Insert "administrative appeal or"

Page 10, line 13, after "person's":

Insert "administrative appeal or"

Page 13, lines 18 - 19:

Delete "proposed for that phase"

Insert "for which the consistency determination is sought"

Page 13, line 24:

Delete "proposed for that phase"

Insert "for which the consistency determination is sought"

Page 13, line 26:

Delete "prepare and issue a written statement describing"

Insert "describe in the consistency determination"

ADDITIONS/CORRECTIONS TO SENATE AMENDMENT OF CSSB 308
APRIL 20, 1994

- o Page 3, Line 2
Purpose: Fixes glitch - language was adopted in the wrong place.

- o Page 8, Line 18
Purpose: Chenowith rewrite for clarity.

- o Page 8, Line 19 - 29
Purpose: Chenowith rewrite for clarity.

- o Page 9, Line 7
Purpose: Chenowith rewrite for clarity.

- o Page 9, Line 9
Purpose: Chenowith rewrite for clarity.

- o 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.

- o 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 written 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 4**
Purpose: Technical amendment to conform language to changes made at page 9, line 12.

- o Page 10, Line 8

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

- o Page 10, Line 9

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

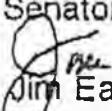
- o Page 10, Line 13

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

- o Page 13, Line 26

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

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

STATE OF ALASKA

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

file
WALTER J. HICKEL, GOVERNOR

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ANCHORAGE, ALASKA 99510-7036
PHONE: (907) 762-2653
(907)762-2547

April 12, 1994

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

via fax 465-3872 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.

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

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APR 12 1994

FAX NO. 9076623852

DIV OF OIL AND GAS

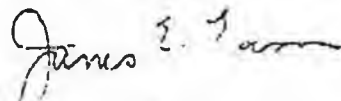
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The Honorable Drue Pearce
April 12, 1994
Page 2

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

041294pjr



Kodiak Island Borough

710 MILL BAY ROAD
KODIAK, ALASKA 99615-6340
PHONE (907) ~~451-1111~~

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

Senator Drue Pearce

Page 2 of 2

April 15, 1994

"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,

A handwritten signature in cursive script, appearing to read "Linda L. Freed".

Linda L. Freed, Director
Community Development Director

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

Jon Isaacs and associates . 2416 forest park drive . Anchorage, Alaska . 99517 . (907)274-5719 . 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 and 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 revisions 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 46 portions of the statute.

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

Phasing of all land disposals under Title 38

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.

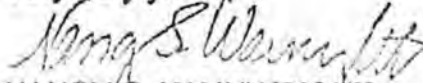
Changing the words "may address only" to "shall address"

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

April 17, 1994

Honorable Senator Drua Pearce
Chair, Senate Finance Committee

Dear Senator Pearce:

Linda Freed and I would like to express our sincere thanks for your efforts in making possible the process for developing a sound version of Senate Bill 308. Without your support and direction for consensus based legislation, it would not have been possible to come as far as we have. Given that the bill is a priority of the Senate, and there are many other pieces of important legislation that require your attention, we appreciate your patience with us while we attempted to come up with language that addresses the concerns of the Department of Natural Resources without creating significant problems for the coastal districts and other municipalities.

David Roger's participation was invaluable in reaching a compromise over language; he was able to facilitate from a neutral position and encourage cooperation. We also appreciate the suggestions and compromises made by Mr. Eason and the administration during the course of discussion; our understanding of his concerns initiated our working group approach to finding appropriate solutions.

Over the weekend, Linda and I have contacted several of the coastal districts who have been involved with SB 308 and urged that they support the amendments introduced last Friday. We expect that some of them will contact their Senators to request support of the amendments during reconsideration. Because not everyone has seen the amended language, it remains problematic for us to speak on behalf of all coastal districts; however, we feel most of the major issues have been addressed and have expressed our position to others.

In closing, again thank you for your invaluable assistance, and we hope that you will continue to support the amendments.

Sincerely,

Jon Isaacs
Linda Freed

**MATANUSKA-SUSITNA BOROUGH
RESOLUTION SERIAL NO. 94-046**

**A RESOLUTION OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY REVISING
THE BOROUGES 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, Borough Mayor

ATTEST:

Linda A. Dahl

LINDA A. DAHL, Borough Clerk

HB

496

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 496

Revision Date: March 7, 1994
 Title: Sport Fish Guide Licensing
 Sponsor: Representative Bill Williams
 Requestor: (H) Resources Committee

Dept. Affected: Fish and Game
 BRU: Sport Fish
 Component: Sport Fisheries
 COMPONENT SERIAL NO. 464

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	140.7	140.7	187.0	187.0	187.0	187.0
TRAVEL						
CONTRACTUAL	21.0	21.0	21.0	21.0	21.0	21.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	161.7	161.7	208.0	208.0	208.0	208.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()	494.0	508.0	524.1	539.8	556.0	572.7

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	161.7	161.7	208.0	208.0	208.0	208.0
1006 GF/MHTIA						
Other 1024						
TOTAL	161.7	161.7	208.0	208.0	208.0	208.0

Estimate of any current year (FY 94) cost: \$ None

POSITIONS

FULL-TIME						
PART-TIME	5	5	6	6	6	6
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) The ADF&G estimates that there are presently 2,100 guides and charter operators in Alaska. It is believed that about 15 percent are nonresidents. It is assumed that 10 percent of the guides and charter operators do not conduct a significant amount of business and would choose not to be licensed in the future. Therefore, we assume 1,890 licenses would be sold; 85 percent (approximately 1,600) of which would be resident; 290 would be nonresident. A three percent per year growth rate is assumed. Department expenditures to administer the program and analyze required log books and reports in attached.

Prepared By: Paul Krasnowski, Director Phone: 465-6184
 Division: Sport Fish Date: March 14, 1994
 Approved by Commissioner: [Signature]
 Agency: Alaska Department of Fish and Game Date: March 14, 1994

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Guide Licensing and Reporting Department Expenditures

FY 95, FY 96

Line 100	Cartographer II (4 months @ 5.0)	2.0	
	(Design logbooks, maps)		
	Analyst/Programmer III (6 months @ 4.8)	29.8	
	(Design software for reporting and data summary)		
	Two Data Processing Clerks II (6 months each @ 3.2)	38.1	
	(Enter logbook data, produce summaries)		
	Two Fishery Biologist II (6 months each @ 4.4)	52.8	
	(project managers, distribute and collect logbooks, analyze data, produce reports)		
	Line 100 Total		\$140.7
Line 300	Printing of logbooks, licenses	20.0	
	Postage	1.0	
	Line 300 Total		\$21.0
	Estimated Annual Cost		\$161.7

FY 97, FY 98, FY 99, FY 100

Line 100	Cartographer II (2 months)	10.0	
	Analyst/Programmer (2 months)	9.6	
	Four Data Processing Clerks (6 months each)	76.2	
	Two Fishery Biologist II (6 months each)	52.8	
	Two Fishery Technician III (6 months each)	38.4	
	Line 100 Total		\$187.0
Line 300	Printing and Postage		\$21.0
	Estimated Annual Cost		\$208.0

Note: It is assumed that by FY 97 the reporting system will be sufficiently refined to provide in-season fishery management data. This will require additional line 100 support to provide more immediate turnaround of data. For example, whereas FY 95 and 96 operations might provide monthly reports with a two- to four-week delay, FY 97 operations may allow weekly summaries with a one- to two-week delay.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 496

Revision Date: _____
 Title: Sport Fish Guide Licensing
 Sponsor: Representative Bill Williams
 Requestor: (H) Special Committee on Fisheries

Dept. Affected: Fish and Game
 BRU: Sport Fish
 Component: _____
 COMPONENT SERIAL NO. _____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	140.7	140.7	187.0	187.0	187.0	187.0
TRAVEL						
CONTRACTUAL	21.0	21.0	21.0	21.0	21.0	21.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	161.7	161.7	208.0	208.0	208.0	208.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()	494.0	508.0	524.1	539.8	556.0	572.7

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
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1006 GF/MHTIA						
Other 1024	161.7	161.7	208.0	2.08	208.0	208.0
TOTAL	161.7	161.7	208.0	208.0	208.0	208.0

Estimate of any current year (FY 94) cost: \$ None

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) The ADF&G estimates that there are presently 2,100 guides and charter operators in Alaska. It is believed that about 15 percent are nonresidents. It is assumed that 10 percent of the guides and charter operators do not conduct a significant amount of business and would chose not to be licensed in the future. Therefore, we assume 1,890 licenses would be sold; 85 percent (approximately 1,600) of which would be resident; 290 would be nonresident. A three percent per year growth rate is assumed. Department expenditures to administer the program and analyze required log books and reports in attached.

Prepared By: Paul Krasnowski, Director Phone: 465-6184
 Division: Sport Fish Date: February 18, 1994
 Approved by Commissioner: [Signature]
 Agency: Alaska Department of Fish and Game Date: February 18, 1994

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In Ketchikan:
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Ketchikan, AK 99901
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Fax (907) 225-8546

Representative William K. Williams

SPONSOR STATEMENT

HOUSE BILL 496 - "ESTABLISHING A GUIDED SPORTFISHERY LICENSE"

BY REP. BILL WILLIAMS
MARCH 14, 1994

The guided sportfishery is an important and rapidly growing industry in the Alaskan economy, and will inevitably continue to grow and expand throughout the state. The ability of the state to provide for the sustainable development, and sound, fair, sensible management of the guided sportfishery, as with any industry, is dependent upon the availability of good complete information upon which to base decisions. The goal of House Bill 496 is to provide a mechanism for the on-going collection of this crucial data regarding the guided sportfishery.

In some parts of Alaska, the rapid growth in the charter industry has motivated sportfish guides themselves to request a moratorium on further expansion. That is the case in Ketchikan. In researching the feasibility of various limitation schemes for these constituents, it was discovered that nearly every approach to a moratorium or limitation in the guided sportfishery for state-managed species of fish would be unconstitutional. Furthermore, since there is room for further growth in the guided sportfishery in many areas of the state, including parts of southeastern Alaska, it may be premature to pursue limitation at this time, even on a regional basis.

There is an incredible lack of hard data available regarding the guided sportfishery in Alaska. By regulation, registration of vessels engaged in sportfish guiding activity is required in several parts of the state, but not in others. Registration of guides themselves is required in a few rivers, but not elsewhere. No uniform licensing procedure exists in Alaska. Thus, there is no complete information about who is actively engaged in sportfish guiding, how many clients are served, to what extent particular rivers, streams, and marine waters are being utilized, and so on.

Without a means for gathering dependable information, it is impossible to monitor the activity or growth of the guided sportfishery on a statewide basis, provide for the sustainable development of the industry or the sound management of the fishery resources upon which it depends, or make sound decisions about whether any sort of limitation schemes might be feasible or desirable. It is time to acknowledge this important growing industry and ensure that management decisions can be based on complete information, not on guesswork, perception, and supposition. That is what HB 496 is intended to accomplish.

The bill establishes a guided sportfishery license. Each person who plans to engage in sportfish guiding, both on fresh water and salt water, from a vessel or otherwise, will be required to purchase the license. The license holder would then be responsible for submitting reports which will be developed by the Sportfish Division of the Department of Fish and Game to enable the state to build a data bank regarding the guided sportfishery.

The costs of the guide licensing and the data gathering and analysis will be funded by the revenues generated by the license fees. Thus this program will be fiscally self-sustaining.

The bill does not impose any limitations on the number of guides or vessels in the state. Nor does it affect who can purchase the license to guide, or the activities of guides.

HB 496 is a first and imperative step towards having solid data upon which to build sound management policy for the guided sportfishery in Alaska.

DEPARTMENT OF FISH AND GAME

POSITION PAPER

Bill No.: HB 496

Sponsor: Representative Williams

Division: Sport Fish

Bill Title: "An act relating to sport fish guides, and providing for an effective date."

Department Position: Support

This bill would amend AS 16.05.330(a) to establish a license for sport fish guiding. It would amend AS 16.05.340(a) to establish a fee for such a license, specifically, \$200 for a resident, and \$600 for a nonresident. Further, it adds a new section of AS 16.05.448 which requires licensed guides to provide reports to the department. It authorizes the department to require reports regarding "time and specific location of guiding activities, the number of clients guided, the species and number of fish taken, the owner and identity of a vessel used in sport fishing. . ." et al.

Sport fish guiding is an important, growing business in Alaska. It is an industry essentially linked to tourism, travel and, most importantly, our fishery resources. A recent federal report estimated that direct expenditures from recreational fishermen in Alaska exceeds \$300 million per year. Department staff believe that estimate is conservative. More than half of those expenditures are from nonresidents, many of whom employ fishing guides and charter boat operators.

At this time, guides and charter boat operators are not regulated in Alaska except for Board of Fisheries regulations requiring registration with the Department of Fish and Game for those conducting business in upper Cook Inlet and Southeast Alaska.

While the fishery resources of the state can be managed in future years as they have in the past without licensing or limitation, the viability of the industry itself may be at risk. Charter boat operations in some parts of the state are increasing numerically and are becoming increasingly competitive. Guides and charter businesses are often high-profile operations and may be viewed as competing user groups by resident or unguided anglers.

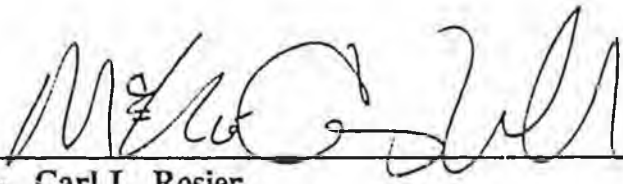
Information describing numbers of guides and charter operators, numbers of clients, numbers of trips and areas fished is unavailable. The legislature and the Alaskan Board of Fisheries, therefore, lack adequate data upon which to base decisions regulating this industry and managing the fishery resources that it depends upon.

POSITION PAPER
HB 496

This bill will require all freshwater guides and charter operators to obtain a new sport fish guiding license. Fees are set and the revenue would accrue to the Fish and Game Fund. The department will be empowered to require reporting which will detail needed information. The department would utilize the revenues from the license fee to support the licensing program, collect and analyze data, and prepare reports for public use as well as legislative and fisheries board deliberations.

The department supports this bill because it will provide a mechanism to collect, process, analyze, and utilize necessary data on sport fish guiding. In the long run, it will improve resource management and may assist in providing stability and controlled growth in this important industry.

Commissioner's Signature


for Carl L. Rosier

Date 2/22/94

Guide Licensing and Reporting Department Expenditures

FY 95, FY 96

Line 100	Cartographer II (4 months @ 5.0)	2.0	
	(Design logbooks, maps)		
	Analyst/Programmer III (6 months @ 4.8)	29.8	
	(Design software for reporting and data summary)		
	Two Data Processing Clerks II (6 months each @ 3.2)	38.1	
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FY 97, FY 98, FY 99, FY 100

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OREGON ALASKA SPORTFISHING

PO BOX 696 TILLAMOOK, OREGON 97141

(503) 842-5171

Honorable William K. Williams
State Capitol Building #128
Juneau, Alaska 99801-1182

February 25, 1994

Honorable Representative Bill Williams,

I am writing in reference to House Bill #496.

I am a professional full-time Sportfishing Guide and for the past five years I've worked in Southeast Alaska during the summer season.

There is no doubt that the Sportfishing Industry is growing rapidly. I'm pleased to see that the Commission recognized the importance of this and allocated more chinook for the sportsman. I applaud your effort to officially recognize the Guided Sportfishing Industry as a growing, important part of Alaska's economy.

There is a need to set high professional standards for the Guided Industry. The people in this business are acting as ambassadors for the State of Alaska. Requiring all fishing guides to register with the state will provide valuable information. However, the proposed license fees to out of state guides is unfair. It is not just to penalize a businessman who brings millions of dollars into the Alaskan economy every year. A portion of the tourist dollar does leave the state, but all of the support industries benefit.

We are sharing a resource. Oregon, Washington, and Canada all contribute to Alaska's bounty of Salmon.

The state of Oregon has a reciprocity Act (for Sportfishing Guides) in place. This Act requires out of state guides to pay a registration fee equal to what the Oregon guides would pay while working in their state. Also, it requires that the out of state guide meets with Oregon's requirements for insurance and First-Aid training. The state of Washington now has a Bill in legislation which mirrors Oregon's law. The bill has passed the House and is in the Senate committee at this time.

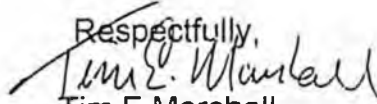
I am in favor of registering all guides in the state of Alaska.

I am opposed to the biased fees that would be charged to the non-resident guide.

United States Coast Guard Licensed • State Licensed • Fully Insured
President-Tillamook Guides Association • Board of Directors-Oregon Guides & Packers

The intent to gather accurate information for the management decision is sound.

Respectfully,



Tim E Marshall

cc: Carl E. Moses

March 14, 1994

Dear,

Representative Williams, Chairman of the House Resources Committee
and members of the House Resources Committee:

I would like you to consider these comments and views concerning House Bill No. 496.

My wife and I have been chartering in southeast Alaska on a part time basis for the last 6 years. We believe in "user pay" systems.

First I would like to say that a "fish guide" bill is long over due. but I also agree with Representative Bunde that this bill does not go far enough.

This bill is not "foreward looking" legislation as some have called it. For instance; the licensing of fish guides should not fall under the Department of Fish and Game, but under the rules and regulations of the Department of Commerce, Division of Occupational Licensing. ADF&G has all that they can do in the biological and technical aspects of game and fish management, they are not qualified in the aspects of managing or regulating guides.

Regulations should be set up defining the qualifications of a fish guide ie, minimum age, field experience, passing marks on qualification exams, no fish and game violations, can demonstrate current knowledge of fishing regulations, etc.

A code of ethics should be set in regulation, simular to that of big game guiding.

Second, the fee structure should be permanent, not just a means to fund ADF&G "studies". The sportfish division of ADF&G has been touting itself (in public meetings) as being totally financed by Federal funds (Dingall-Johnson) and the recent King Salmon Stamp has generated hundreds of thousands of dollars. The Department recently restructured to place the FRED division hatcheries under sportfish division to utilize these Federal funds. If funding is needed to finance saltwater guiding impacts on fisheries resources then perhaps a "saltwater sportfish stamp" should be considered, replacing the King salmon stamp. Or if information is needed on interior Alaska's freshwater fishing impacts, then a "sportfish stamp" there may generate the needed revenue. The fees from fish guide licensing should go towards the administrative costs of licensing and regulating, preferably to the Dept. of Commerce.

We have heard that a 5 to 1 ratio between resident and non-resident fees are acceptable. Whatever the ratio, charge the max. I now pay \$250 a year to be able to use my boat for transporting big game hunters. Three hundred doesn't seem to be an unreasonable fee for a fishing guides license.

Third, we are not in favor of regulation for regulation's sake, but we think that the fish guiding business in southeast needs to be regulated for its own sake if it is to survive as a worthy occupation. There is an abundance of unscrupulous fish guiding activities going on.

Fourth, don't be swayed by the big game guide from Fairbanks that only fishes interior freshwater. He testified that he had been a guide since 1959 and they have nightmare regulations concerning their activities. Well, there is a very good reason for those regulations and that was to try and cut down on all the unscrupulous and illegal guiding that was and is going on. Why do suppose the legislature "canned" the last guide board and restructured it? There are impacts to those interior freshwater systems as well.

Sincerely,

Dave Helmick
P.O. Box 913
Petersburg, AK 99833

Oregon

March 1, 1994

Representative Carl E. Moses, Chair
House Fisheries Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

STATE
MARINE
BOARD

Dear Representative Moses,

I understand the Alaska Legislature is considering a bill, HB-496, to establish a license requirement for guides. I've received and reviewed a copy of the bill and the sponsor statement by Rep. Bill Williams.

In Oregon, the Marine Board is the responsible agency for the registration of outdoor outfitters and guides. We've been in the business of registering guides for the past 10 years, and currently have over 1,000 individual registrations.

If my reading of the sponsor's statement is correct, the primary goal of this bill is to collect and gather data on the number of guides, clients served, areas of operation, and so forth. I think this is a reasonable means of gathering factual data which can be used to monitor growth and provide future management.

The sponsor's statement also indicates that the goal of the program is that it be "fiscally self-sustaining", ie: pay for itself. As an agency that functions entirely on user fees, I can also support this goal. However, I note the bill proposes a significant fee differential for residents (\$200) versus nonresidents (\$600).

We are sensitive to this differential as a result of recent legislation in 1993 that sought to level the playing field with border states that were charging significant differences between residents and nonresidents. Oregon's registration fee (\$50 a year) covers the cost of our program.

Our fee is the same for residents and nonresidents, provided the nonresident comes from a state that does not charge a differential fee. For residents of states that charge a differential fee, we are obligated to likewise charge them the same fee that state charges an Oregon resident.

As Alaska considers a new guide registration program, I would encourage you to charge one uniform fee, since this is in effect a business license. If the goal is a self sufficient "user fee" program aimed at gathering data, then it would seem appropriate to charge a uniform fee and spread the cost fairly among all registrants since there is no higher cost associated with processing a nonresident application than one from a resident guide.



435 Commercial St. NE
Salem, OR 97310-0650
(503) 378-8587
FAX (503) 378-4597

Rep. Carl Moses
page 2

The seasonal nature of guiding makes it a mobile business, and we have many Oregon guides that provide services in other western states, including Alaska. While I believe they would support a licensing requirement, I know from our experience that they'll want a level playing field.

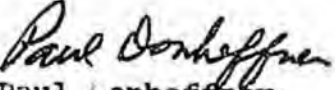
I'm enclosing a copy of Oregon's guide registration program statute for your information. The Washington Legislature recently adopted a similar guide registration law, which requires proof of first aid training and \$300,000 liability insurance. Washington eliminated the fee differential between residents and non-residents. Idaho also has a comprehensive guide licensing program, and does not discriminate with higher non-resident fees.

In summary, HB-496 seems like a reasonable approach to gathering data on the nature of the guiding industry in Alaska. However, I hope you will consider a level fee structure that reflects the actual cost of the program spread fairly among all licensees.

If I can answer any questions or provide any assistance to you, your committee staff or the Department of Fish and Game regarding our program, please let me know.

Thank you for your consideration.

Sincerely,


Paul Donheffner
Director

cc: Representative Bill Williams

WASHINGTON STATE DEPARTMENT OF FISHERIES

COMMERCIAL LICENSE FEES FOR 1994 LICENSE YEAR

SALMON GEAR	RESIDENT	NON-RES.	SHELLFISH GEAR	RESIDENT	NON-RES.
PURSE SEINE (L)	630.00	1085.00	CRAB POTS (Non-Puget Sound/Includes Delivery License)	295.00	520.00
GILL NET (L)	480.00	785.00	CRAB POTS (Puget Sound)	130.00	185.00
TROLL (L)	480.00	785.00	CRAB RING NET (Non-Puget Sound)	130.00	185.00
REEF NET (L)	480.00	785.00	CRAB RING NET (Puget Sound)	130.00	185.00
SALMON DELIVERY (L)	480.00	785.00	DUNGENESS CRAB (Puget Sound) (L) ...	130.00	185.00
			HARD SHELL CLAM		
			MECHANICAL HARVESTER	530.00	985.00
			RAZOR CLAM	130.00	185.00
			GEODUCK DIVE	185.00	295.00
			SEA CUCUMBER DIVE (L)	130.00	185.00
			SEA URCHIN DIVE (L)	130.00	185.00
			SHELLFISH DIVE	525.00	1045.00
			SHELLFISH POTS	130.00	185.00
			BURROWING SHRIMP	185.00	295.00
			HOOD CANAL SHRIMP	325.00	575.00
			SHRIMP TRAWL (Non-Puget Sound)	240.00	405.00
			SHRIMP TRAWL (Puget Sound)	185.00	295.00
			SQUID GEAR	185.00	295.00
			OFFSHORE WATER—NON-SALMON		
			DELIVERY OTHER THAN SALMON	110.00	200.00
			OCEAN PINK SHRIMP DELIVERY (L)	150.00	300.00
			MISCELLANEOUS FEES**		
			ALTERNATE OPERATOR	35.00	35.00
			ANGLER TRANSFER FEE	20.00	20.00
			CHANGE IN OPERATOR DESIGNATION	22.00	22.00
			CHANGE IN VESSEL DESIGNATION	35.00	35.00
			DUPLICATE LICENSE CARD	20.00	20.00
			DUPLICATE LICENSE DECAL	20.00	20.00
			EMERGING COMMERCIAL FISHERY	185.00	295.00
			OYSTER RESERVE	130.00	185.00
			SALMON ROE	95.00	95.00
			SALMON GUIDE***	150.00	730.00
			SINGLE SALMON DELIVERY	325.00	475.00
			SPAWN ON KELP	Awarded by auction to valid herring license holders	
			OCEAN PINK SHRIMP SINGLE DELIVERY	100.00	100.00
			WHOLESALE DEALERS		
			WHOLESALE DEALER	250.00	
			FISH BUYER	95.00	
			(L) Limited Entry License		
			** Must use forms available from the Department of Fisheries		

AN ADDITIONAL \$100.00 SURCHARGE HAS BEEN INCLUDED FOR ALL OF THE ABOVE SALMON LICENSES*

CHARTER LICENSES

SALMON CHARTER* (L)	480.00	785.00
NON-SALMON CHARTER	225.00	375.00

OTHER FOOD FISH GEAR

BAITFISH LAMPARA	185.00	295.00
BAITFISH PURSE SEINE	530.00	985.00
BOTTOMFISH JIG	130.00	185.00
BOTTOMFISH POTS	130.00	185.00
BOTTOMFISH TROLL	130.00	185.00
CARP	130.00	185.00
DGGFISH SET NET	130.00	185.00
FOOD FISH DRAG SEINE	130.00	185.00
FOOD FISH SET LINE	130.00	185.00
FOOD FISH TRAWL (Puget Sound)	185.00	295.00
FOOD FISH TRAWL (Non-Puget Sound/Includes Delivery License)	240.00	405.00
HERRING DIP BAG NET (L)	175.00	275.00
HERRING DRAG SEINE (L)	175.00	275.00
HERRING GILL NET (L)	175.00	275.00
HERRING LAMPARA (L)	175.00	275.00
HERRING PURSE SEINE (L)	175.00	275.00
COLUMBIA RIVER SMELT	380.00	685.00
SMELT DIP BAG NET	130.00	185.00
SMELT GILL NET	380.00	685.00
WHITING (Puget Sound) (L)	295.00	520.00
OTHER GEAR	185.00	295.00

TRANSFER OF OWNERSHIP

LIMITED ENTRY LICENSES Equal to three and one half times the annual renewal fee plus additional non-resident fee if applicable. See back of fee sheet.

NON-LIMITED ENTRY LICENSES Equal to the annual renewal fee plus additional non-resident fee if applicable. See back of fee sheet.

* RCW 75.50 REQUIRES A \$100.00 SURCHARGE ON ALL COMMERCIAL SALMON LICENSES SOLD IN THE STATE OF WASHINGTON. THE SURCHARGE WILL BE DEPOSITED IN THE REGIONAL FISHERIES ENHANCEMENT GROUP ACCOUNT AND USED FOR REGIONAL FISHERIES ENHANCEMENT PROJECTS.

*** RCW 75.28 REQUIRES A \$20.00 RESIDENT AND A \$100.00 NON-RES SURCHARGE ON ALL SALMON GUIDE LICENSES SOLD IN THE STATE OF WASHINGTON. THE SURCHARGE WILL BE DEPOSITED IN THE REGIONAL FISHERIES ENHANCEMENT GROUP ACCOUNT AND USED FOR REGIONAL FISHERIES ENHANCEMENT PROJECTS.

Mailing Address
 Department of Fisheries
 License Division
 P.O. Box 43141
 Olympia, WA 98504-3141

Office Location
 Department of Fisheries
 License Division
 1111 Washington Street S.E.
 Olympia, WA 98504

PHONE #: 902-2488
 FAX #: 902-2942

LHM100-R01
03/14/94

LEGISLATIVE TELECONFERENCE NETWORK

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15:21:05

CALL: 40480 DATE & TIME: 03/14/94 08:15 TO 10:00 STATUS:7 STAIR, IV

**** ORDER SUMMARY ****

SPONSOR: HRES HOUSE RESOURCES CHAIRS: WILLIAMS
PURPOSE: PUB PUBLIC HEARING LEGISLATIVE
CONTACT: MARY McDOWELL TEL#: (907)465-3715
CHAIRING SITE: JUNEAU CAPITOL CAP124

SPONSOR REMARKS(PUB): TESTIMONY:Y ALLOWED 5 MINUTE LIMIT
TESTIMONY WILL BE TAKEN WITH A 5 MINUTE LIMIT.
ICM REQUESTED ON 03/14/94 AND HAS 5 UPDATES

**** AGENDA ****

- 1 HJR 59 WANTON WASTE OF FISH N. PACIFIC/BERING SEA
- 2 HB 496 SPORT FISH GUIDE LICENSING

**** PARTICIPATING SITES ****

FBX FAIRBANKS	119 N CUSHMAN ST	LOCATION STAFF
HOM HOMER LTC	126 W PIONEER #4	LOCATION STAFF
JNU JUNEAU	CAPITOL	LOCATION STAFF CAP124
KTU KETCHIKAN	352 FRONT STREET	LOCATION STAFF
PSB PETERSBURG	101 GJOA STREET	LOCATION STAFF
SEB SEWARD	2001 SEWARD HWY	LOCATION STAFF
SIT SITKA	210 LAKE STREET	LOCATION STAFF
SOL KEN/SOL	34824 KALIFONSKY	LOCATION STAFF
VAL VALDEZ	STATE BLDG. #13	LOCATION STAFF

**** VOLUNTEER & OFFICE SITES ****

PSB BRG BRANGELL, LTC LONGSHOREMEN'S LABEL FENNINGORE (907)874-3013

PARTICIPANTS IN FAIRBANKS FBX

1 MR. DENNIS PETRE	TSFY, HB 496
5901 BOONDOX DR.	SALCHA AK 99714 (907)488-4589
2 MR. BOB ELLIOTT	TSFY, HB 496
4582 ELLIOTT LN.	FAIRBANKS AK 99709 (907)479-6323
3 MR. FLOYD(FRED) BOUSE	OBSV, HB 496
4020 DUNLAP AVE.	FAIRBANKS AK 99709 (907)479-2122

PARTICIPANTS IN HOMER LTC HOM

1 MR. SEAN MARTIN	HOMER CHARTER AS TSFY, ALL ITEMS
PO BOX 889	HOMER AK 99603 (907)235-5130
2 MR. PAUL SEATON	AK MARINE COUNCIL TSFY, HJR 59
BR126 BRUCE DR	HOMER AK 99603 (907)235-1740