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February 28, 2003

Hon. Lesil McGuire
Chair – Judiciary Committee
Alaska House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

RE: HB 83 – Revised Uniform Arbitration Act

Dear Representative McGuire:

I write to respectfully offer the House Judiciary Committee my support for HB 83, which embodies in essence the Revised Uniform Arbitration Act of the National Conference of Commissioners on Uniform State Laws (NCCUSL). I am one of the Alaska commissioners of the NCCUSL. The other Alaska commissioners are Alaska Supreme Court Justice Alexander O. Bryner; Asst. Alaska Attorney General Deborah Behr; attorney L.S. Kurtz, Jr. of Anchorage; attorney Arthur H. Peterson of Juneau; and attorney Tamara B. Cook, Director of the Alaska Legislative Affairs Agency.

I would like to provide the House Judiciary Committee with the following information concerning the background of the Revised Uniform Arbitration Act and the principal purposes it is intended to serve.

Background – The Uniform Arbitration Act (adopted in Alaska – 1968)

The NCCUSL promulgated the original Uniform Arbitration Act in 1955. It subsequently was adopted as law in 49 jurisdictions, including Alaska, and together with the Federal Arbitration Act has provided the fundamental substance of the law governing agreements to arbitrate in the United States.

The 1955 Uniform Arbitration Act accomplished two fundamental things. First, it reversed the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there an actual dispute arose. Historically at common law the parties were able to agree to arbitrate only after an actual dispute arose. The common law prohibited agreements to arbitrate made in anticipation of possible disputes. Second, the 1955 Uniform Arbitration Act provided some basic procedures for the conduct of an arbitration. The Uniform Act has not mandated the arbitration of any dispute. Its function has been to let persons determine whether or not they want to use arbitration by agreement.

Arbitration is the original alternative dispute resolution (ADR) mechanism made legitimate under American law. It is an alternative to a judicial proceeding to resolve a dispute. Arbitration has traditionally been a means of resolving disputes when issues are specialized and technical. These kinds of disputes require specialist resolution and there is no desire for damage awards like those awarded by a court of law. A typical example is an arbitration that allocates costs of defects in a building project between architects, contractors and property owners. Arbitrators are chosen by the parties with construction expertise to determine responsibility for defects. The arbitration is conducted quickly. It is free of the constraints of court-room procedure, and may be tailored to adducing evidence for the specific kind of dispute. The parties all have a strong desire to avoid litigation and are normally satisfied with the results of arbitration. Construction disputes have been regularly resolved by arbitration for a long period of time.

However, provisions calling for arbitration occur in all kinds of contracts as the burgeoning caseload has slowed the civil justice process in the courts and as the costs of lawsuits have risen dramatically. As the arbitration process has been more utilized for resolving disputes that have traditionally been resolved by litigation, it has become clear that the limited procedural provisions of the Uniform Arbitration Act are no longer adequate. For that reason, the NCCUSL has now promulgated a next generation state arbitration act, the Revised Uniform Arbitration Act of 2000 (RUAA).

The Revised Uniform Arbitration Act of 2000 (RUAA)

The RUAA continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. It deals with procedural issues not addressed in the 1955 Act. The effect should be more efficient and fair arbitrations as an alternative to litigation than is the case under the 1955 Act. The 1955 Act was a great advance in American law. The objective of the 2000 Act is to make the contribution of the 1955 Act even greater.

The 2000 Uniform Act has been drafted, also, against the significant and preemptive presence of the Federal Arbitration Act. The federal act applies to arbitration provisions in private contracts. The Federal Arbitration Act encourages arbitration as an alternative to litigation. Therefore, any state law that limits the availability of arbitration risks failure as a matter of federal preemption. Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Act is drafted to avoid preemption by federal law.
It is not possible to cover all the provisions in this important revision in this letter. However, the primary purposes underlying the revisions that the RUAA seeks to implement

may be fairly summarized as 1) providing more certainty in arbitration proceedings, 2) dealing with potential problems of federal preemption, and 3) addressing important issues that have arose under the original UAA as reflected in the case law throughout the country. The RUAA not only revises certain provisions of the original act, but also includes a number of new provisions.

The RUAA expressly provides that it is a default act. Most of its provisions may be varied or waived by contract. There are certain provisions that may not be waived or varied. These include the basic rule that an agreement to submit a dispute to arbitration is valid; the rules that govern disclosure of facts by a neutral arbitrator; the rules guaranteeing enforcement or appeal of the act, an arbitration agreement or an arbitration decision in a court; or, the standards for vacating an award. Declaring the RUAA a default act is important because it gives the parties an option to choose between federal or state law to govern their arbitration. Without this, the federal arbitration act is applicable by default. IN addition, restrictions on waiving or varying certain statutory requirements are important to protect parties to these agreements.

The RUAA specifically allows a court to order provisional remedies during the course of an arbitration before an arbitrator is selected. The 1955 Uniform Act has no such provision. Thus the RUAA improves upon the original act by preventing a party from delaying the selection of an arbitrator in order to delay proceedings and dissipate the effect of an arbitration award. The RUAA also gives an arbitrator, when selected, the express power to order provisional remedies, a power not expressly given in the 1955 Uniform Act. An arbitrator has the same powers as a court has in a judicial proceeding.

The RUAA allows consolidation of separate arbitration proceedings, a matter that was never contemplated in the 1955 Uniform Act. The existence of multiple parties, multiple agreements and complex litigation has made the issue of consolidation of arbitration actions very important. Courts have varied over consolidation. The RUAA expressly allows and governs consolidation.

The 1955 Uniform Act allows an award to be vacated because of an arbitrator's partiality - lack of neutrality. It does not specifically require disclosure of any interest that may give rise to a question of neutrality. The RUAA specifically addresses disclosure of known facts that give rise to questions of neutrality. Such facts include a financial or personal interest in the outcome of the arbitration proceeding or an existing or past relationship with a party. The lack of disclosure itself may be a ground for vacating an award, and there is a presumption of partiality when non-disclosure occurs. Upon disclosure, a party has the opportunity to object to the appointment of an arbitrator intended to be neutral. If there is no objection, that may affect the ability to raise partiality as a ground for vacating an award.

These provisions provide substantial express protection to parties to an arbitration proceeding that simply are not a part of the 1955 Uniform Act.

A crucial issue in arbitrations is the express immunity of arbitrators from civil liability. It is not an issue addressed in the 1955 Uniform Act, but is important to impartial and fair proceedings. An arbitrator who expects or fears a lawsuit simply because of a decision, cannot be counted upon to act fairly or competently. The RUAA provides arbitrators with immunity from civil liability "to the same extent as a judge of a court of this State acting in a judicial capacity."

An arbitrator under the RUAA may conduct the arbitration in such manner as the arbitrator considers appropriate to the fair and expeditious disposition of the proceeding. This express authority does not appear in the 1955 Uniform Act. The 1955 Uniform Act provides for subpoena of witnesses, and for depositions. Under the RUAA, an arbitrator also has the express power to make summary dispositions of claims or issues under appropriate procedures, to hold pre-arbitration proceeding meetings or to use any other discovery process (any process that adduces relevant evidence for the proceeding) applicable to resolution of the dispute. These provisions put arbitrators on the same level as judges in a judicial proceeding with respect to discovery of evidence.

The RUAA expressly permits an arbitrator to give punitive damages or other exemplary relief, "if such an award is authorized by law in a civil action involving the same claim." Attorney's fees may be awarded under the same standard. The 1955 Uniform Act does not expressly address either issue, but the case law has established the power to award punitive damages in most jurisdictions. The Federal Arbitration Act decisions also provide for punitive damages and some states have amended the 1955 Uniform Act to include attorney's fees. These new provisions put arbitrators on the same footing as judges in a court of law, and reflect the expansion of arbitration into disputes traditionally resolved in courts of law.

These are some highlights of the revision to the RUAA. The number of disputes in arbitration grows yearly. The RUAA responds to this growth with better and more complete arbitration procedures. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. This important advance in the law of arbitration should be enacted in all states as soon as feasible.

My sincere thanks to you, the sponsors of this bill, and the members of the House Judiciary Committee for taking the time to consider this important bill that if enacted with help provide Alaskans with even better alternatives for resolving disputes promptly, efficiently, and economically.

Sincerely,

W. Grant Callow

cc: Hon. Ethan Berkowitz
Hon. Bruce Weyhrauch
Hon. Carl Moses
Asst. Alaska Attorney General Deborah Behr
Tamara B. Cook, Director,
Alaska Legislative Affairs Agency
L.S. Kurtz, Jr., Attorney at Law
Arthur H Peterson, Attorney at Law

HB

86

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 8, 2003 **FURTHER REFERRALS:**

Date of Committee Action: April 28, 2003

The JUDICIARY Committee considered: **SSHB 86**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86

INJUNCTIONS AGAINST PERMITTED PROJECTS

"An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 86 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS	✓			
	Hawn			✓	
	Gara			✓	
	Ogg			✓	
	Grussendorf			—	
	McGuire	✓			
Chair:					
Chair:					

HOUSE COMMITTEE REPORT

4.8.03

(9)

Date Referred to Committee: April 2, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: 04/04/03

The RESOURCES Committee considered: **SSHB 86**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86

INJUNCTIONS AGAINST PERMITTED PROJECTS

"An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

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***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW	1			✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP (6)	DNP (1)	NR	AM
Ralph Kerthila	Kerthila		✓		
Kathie Wolf	Wolf	✓			
Beverly Masek	Masek	✓			
[illegible]	[illegible]	—			
[illegible]	GATTO	✓			
[illegible]	LYNN	X			
Chair: Stephen Foster	Foster	✓			
Chair:					

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
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Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Kathryn Kurtz, Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 28, 2003

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0349\V, SSHB 86, incorporating the attached amendments. The bill was passed out of committee today.

For clarification, delete P. 2, Line 16 entirely.
P. 2, Line 17, insert "in bad faith" before "for an end other..." and join (B) with (3).
Delete P. 2, Lines 23-25.

If you have any questions, please call me at 4990. Thank you!

23-LS0349\V
Kurtz
4/25/03

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES FATE, Wolf, Foster, Rokeberg, Holm, Kott, Lynn, Chenault, Dahlstrom, Wilson, Heinze

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for malicious claims against state permitted projects; and providing for an effective date."

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

*** Section 1.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.050. Civil liability for malicious claim against state permitted project. (a) A person who initiates or maintains a malicious claim against a state permitted project is, in addition to any other penalty or sanction provided by law, liable in a civil action to the permittee or owner of the project for all of the following:

(1) actual damages suffered by the permittee or owner of the project as a result of the malicious claim, including

(A) wages and salaries paid to employees or contractors idled or put to nonproductive labor as a result of prosecution of the malicious claim; and

(B) increased material costs caused by prosecution of the

malicious claim; and

(2) incidental or consequential damages arising under contracts associated with the project that were caused by prosecution of the malicious claim.

(b) The liability of a person for damages under this section is in addition to liability for an award of reasonable attorney fees and costs that may be made to a prevailing party under the Alaska Rules of Civil Procedure.

(c) For purposes of this section, a person "initiates or maintains a malicious claim against a state permitted project" if

(1) the person initiates or maintains a legal or administrative claim, including an original claim, a counterclaim, or a cross-claim, against a project or activity in the state requiring one or more permits, authorizations, or approvals from a state agency;

(2) the claim is rejected by a court or administrative tribunal of competent jurisdiction or otherwise terminated adverse to the person;

(3) the claim is initiated or maintained

(A) without probable cause; or

(B) for an end other than the end it was designed to accomplish;

(4) the person acts with malice in initiating or maintaining the claim; and

(5) the permittee or owner of the project is damaged by the initiation or maintenance of the claim.

(d) For purposes of this section, the advice of counsel to a person as to the probable cause for a claim is not, in and of itself, sufficient to establish probable cause to initiate or maintain a claim.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 24, 2003

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS0349\U, SSHB 86, incorporating the attached amendment. The bill will be heard again in committee tomorrow at 1:00 p.m.

If you have any questions, please call me at 4990. Thank you!

AMENDMENT

OFFERED IN THE _____

TO: SS HB 86 [23-LS0349\U]

Page 1, lines 1-2:

following **"state; and"**

Delete remainder and insert:

"providing for an effective date."

Page 1, line 4 through page 2, line 13:

Delete all material and insert new bill sections to read:

* **Sec. 1.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.050. Civil liability for malicious claim against state permitted project.

(a) A person who initiates or maintains a malicious claim against a state permitted project is, in addition to any other penalty or sanction provided by law, liable in a civil action to the permittee or owner of the project for all of the following:

(1) actual damages suffered by the permittee or owner of the project as a result of the malicious claim, including

(i) wages and salaries paid to employees or contractors idled or put to non-productive labor as a result of prosecution of the malicious claim;

(ii) increased material costs caused by prosecution of the malicious claim; and

(iii) penalties, interests and other costs caused by prosecution of the malicious claim arising under contracts associated with the project; and

(2) such further incidental or consequential damages that were caused by prosecution of the malicious claim.

(b) The liability of a person for damages under this section is in addition to liability for an award of reasonable attorney's fees and costs that may be made to a prevailing party under the Alaska Rules of Civil Procedure.

(c) For purposes of this section, a person "initiates or maintains a malicious claim against a state permitted project" if

(1) the person initiates or maintains a legal or administrative claim, be it an original claim, a counterclaim, cross-claim or otherwise, against a project or activity in the State of Alaska requiring one or more permits, authorizations or approvals from a state agency;

(2) the claim is rejected by a court or administrative tribunal of competent jurisdiction or otherwise terminated adverse to the person;

(3) the claim is initiated or maintained

(i) without probable cause; or

(ii) for an end other than that which it was designed to accomplish;

(4) the person acts with malice in initiating or maintaining the claim; and

(5) the permittee or owner of the project is damaged by the initiation or maintenance of the claim.

(d) For purposes of this section, the advice of counsel to a person as to the probable cause for a claim is not, in and of itself, sufficient to establish probable cause to initiate or maintain a claim.

* **Sec 2.** This Act takes effect immediately under AS 01.10.070(c).

n13 See *Kollodge v. State, 757 P.2d 1024, 1026 (Alaska 1988).*

Caudle's complaint fails to allege a cognizable abuse of process claim. [HN5] The tort of abuse of process consists of two elements: an ulterior purpose and a "willful act in the use of the process not proper in the regular conduct of the proceeding." n14 The second element requires "some overt act done in addition to the initiating of the suit." n15 Caudle's complaint alleges that Mendel filed the divorce interim [**13] motion for the purposes of evicting Caudle from the family home and collecting attorney's fees from Debra's father. We do not believe that either of these aims is illegitimate in the sense required by the abuse of process tort. Eviction of an abusive spouse is an acceptable objective of an interim motion in a divorce proceeding. And obtaining payment, with the consent of the client, from the client's parent for services rendered in or related to the action in question is not an invalid use of the process. n16

n14 Id. (quoting *Jenkins v. Daniels, 751 P.2d 19, 22 (Alaska 1988)).*

n15 Id.

n16 See, e.g., *Docter v. Riedel, 96 Wis. 158, 71 N.W. 119, 120 (Wis. 1897)* (holding that the test is "whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not be legally compelled to do") (emphasis added).

Caudle's claim for NIED is also flawed. In order [**14] to maintain a NIED claim there must be a breach of a duty arising out of a pre-existing contractual or fiduciary relationship. n17 Caudle did not allege such a relationship with Mendel.

n17 See *Chizmar v. Mackie, 896 P.2d 196, 203 (Alaska 1995)* (holding that a plaintiff's right to recover emotional damages caused by mere negligence is limited to those cases where the defendant owes the plaintiff a preexisting duty).

C. The Award of Full Attorney's Fees Requires Additional Findings.

The superior court awarded Mendel one hundred percent of her actual attorney's fees, finding that Caudle engaged in "unreasonable, bad faith and vexatious conduct" in bringing a case that was "legally deficient and had no chance of success." The superior court based its finding of legal deficiency on the mistaken assumption that the burden of proof for protective orders was higher than the burden of proof for divorce proceedings. However, by statute, DV protective orders are civil restraining orders [**15] that require only a preponderance of evidence before they can be issued. n18

n18 See *AS 18.66.100(b)* ("If the court finds by a preponderance of evidence that the respondent has committed a crime involving domestic violence against the petitioner, regardless of whether the respondent appears at the hearing, the court may order ... relief ....").

Because we cannot know if the superior court's finding of bad faith and vexatiousness would be the same absent its understanding of the differing burdens of proof, we vacate the award of attorney's fees and remand the issue back to the superior court for reconsideration of the attorney's fees.

V. CONCLUSION

We AFFIRM the superior court's dismissal of Caudle's complaint. We REMAND the award of attorney's fees for further findings.

[Bullets Re Amendment to SSHB 86
Proposed As a Committee Substitute]

- The proposed amendment is intended to accomplish the same objective of the current "U" version of HB 86, that of providing a private remedy to the permittee or owner of a state permitted project who is the victim of frivolous, obstructionist litigation. The private remedy provided to the permittee or owner is in addition to any other penalty or sanction otherwise provided by law.

- The proposed amendment would make a person who initiates or maintains a "malicious claim against a state permitted project" liable for damages caused by such lawsuit.

    - The bill specifies the elements of the claim that would have be established in order for a person to be liable under the proposed bill.

    - The bill also specifies the types of damages which an aggrieved person would able to seek.

- The elements of the new cause of action are based on concepts established in the law for stating a claim for unlawful civil proceeding and abuse of process. This has two key benefits:

    - One, it avoids unfamiliar, potentially ambiguous terms used in the current "U" version of the bill, which may have made the current version of the bill difficult to apply.

    - Second, if adopted, courts will be able to draw upon existing case law from Alaska and other jurisdictions to help interpret and apply the law because it incorporates concepts that currently exist in the law.

- The civil remedy provided by the bill is narrow and focused; it would apply only to egregious cases of abusive civil litigation. Thus, if adopted, the proposed amendment will not chill or deter potential litigants from bringing legitimate, meritorious cases to court.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 7, 2003

SUBJECT: Injunctions and Permits -HB 86- (Work Order No. 23-LS0349\U)

TO: Representative Les Gara

FROM: Kathryn L. Kurtz KK
Legislative Counsel

You asked for a memo evaluating the constitutionality of HB 86, and setting out Alaska's current law relating to the issuance of injunctions. Since a sponsor substitute has been introduced for the bill, this memo will be restricted to the second question. If you need anything further, please contact me.

The court can issue an injunction permanently restraining a party's action or conduct. The court can also issue a temporary restraining order or preliminary injunction to restrain the conduct of a party while the case is pending.

Generally, "[a]n injunction is an extraordinary and discretionary equitable remedy which is available when there is no adequate remedy at law, or when authorized by statute. An injunction is intended to prevent future harm. Snyder v. Sullivan, 705 P.2d 510 (Colo. 1985); American Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960); Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964)." May Department Stores v. Colorado, 863 P.2d 967 (Colo. 1993).

The court is authorized by AS 09.40.230 to issue injunctions.

> **Sec. 09.40.230. Authorization for injunction.** When it appears that (1) the plaintiff is entitled to the relief demanded, and the relief or any part of it includes restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual; or (3) the defendant threatens or is about to remove or dispose of property or a part of it with intent to delay or defraud creditors, an injunction may be allowed to restrain such act, removal, or disposition.

In deciding whether to grant a permanent injunction, the court will focus on the facts and the merits of the case. *See for example* Acevedo v . Burley, 994 P.2d 389 (Alaska 1999) and Municipality of Anchorage v. Gentile, 922 P.2d 248 (Alaska 1996).

Civil Rule 65 explains the general procedure governing the issuance of preliminary injunctions and temporary restraining orders:

> Rule 65. Injunctions.
>
> (a) Preliminary Injunction.
>
> (1) Notice. No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.
>
> (b) Temporary Restraining Order — Notice — Hearing — Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party

> who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.
>
> (c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.
>
> A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.
>
> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained: and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The Alaska Supreme Court uses an abuse of discretion standard and a balance of hardships test to review preliminary and temporary injunctions.

> This court applies an abuse of discretion standard when reviewing an order granting a temporary injunction. State v. Kluti Kaah Native Village, 831 P.2d 1270, 1272 n.4 (Alaska 1992). The same standard applies when reviewing an order denying a preliminary injunction.
>
> We apply to preliminary injunctions a "balance of hardships" approach which entails a three part test: 1) the plaintiff must be faced with irreparable harm; 2) the opposing party must be adequately protected; and 3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be "frivolous or obviously without merit." Kluti Kaah, 831 P.2d at 1273; Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549, 554

> (Alaska 1975). The "serious and substantial question" standard applies only where the injury which will result from the preliminary injunction is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted. State v. United Cook Inlet Drift Ass'n, 815 P.2d 378, 378-79 (Alaska 1991). Where the injury from the preliminary injunction is "not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required before a temporary restraining order or a preliminary injunction can be issued." Id. at 379.

North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough, 850 P.2d 636, 639 (Alaska 1993).

KLK:med
03-361.med

Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference — Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) **Title of Pleading — Citation of Statute.** A party filing a complaint, counterclaim, or cross-claim seeking relief under any specific statute is required to cite the statute relied upon in parentheses following the title of the pleading or in the heading for the section asserting the statutory claim.

(e) **Conformity With Rule 76.** All pleadings shall be prepared and filed in conformity with the provisions of Rule 76 as well as this rule.

(Adopted by SCO 5 October 9, 1959; amended by SCO 1415 effective October 15, 2000)

Note: AS 10.06.915, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 10 by requiring that certain documents be attached to a complaint that appeals the disapproval of a writing under AS 10.06.915 by the commissioner of commerce and economic development.

Annotations

Cases

A complaint for additional payment of work done under a construction contract was skillfully and artfully drawn where plaintiff pleaded the contract, its own performance, acceptance by defendant of what it claimed to be tender of part payment, and then in separate paragraphs for each item for which additional compensation was claimed set out (a) that a certain amount of work was performed under pertinent terms of contract each pertinent item pleaded as separate exhibit, (b) that defendant had received payment for specific portion of the work performed, (c) that plaintiff's claim for payment of the balance had been rejected. **Stock & Grove, Inc. v. City of Juneau**, Op. No. 292, 403 P2d 171 (Alaska 1965).

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(Adopted by SCO 5 October 9, 1959; amended by SCO 743 effective December 15, 1986; by SCO 1009 effective January 15, 1990; and by SCO 1153 effective July 15, 1994)

Note: AS 10.06.628, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 11 by requiring that a complaint for an involuntary dissolution of a corporation under AS 10.06.628 be verified.

Annotations

Cases

Sanctions for failure to sign a pleading are a matter in the discretion of the trial court. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Where appellants did not draw the trial court's attention to the failure of counsel to sign the complaint and made no motion to strike under this rule, and it was not contended that counsel's failure to sign was anything other than an oversight, the trial court had no opportunity to pass on the matter and failure to comply with this rule was not considered the first time on appeal. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

The purpose of this rule requiring signature of counsel as plainly set out in its present wording has been to insure the good faith of counsel by holding them strictly accountable for all the allegations contained in the complaint. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Imposition of attorney fees and monetary sanctions against defense attorney in criminal case for filing frivolous, unnecessary and legally deficient pleadings was error requiring remand where attorney was not given notice of the charges against him nor a hearing on the issue of sanctions. **Weidner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney had no right to jury trial on issue of whether sanctions should be imposed against him for filing frivolous, unnecessary and legally deficient pleadings in a criminal case.

ALASKA STATE LEGISLATURE

House of Representatives

Representative Hugh (Bud) Fate

State Capitol, Room 128
Juneau, AK 99801
Phone: (907) 465-4976
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Co-Chair Resources
Member:
Military & Veterans Affairs
Oil & Gas
Transportation

Memorandum

To: Representative Lesil McGuire, Chair House Judiciary Committee
Fm: Jim Pound, Chief of Staff
Cc:
Date: April 14, 2003
Re: SS for HB 86 "INJUNCTIONS AGAINST PERMITTED PROJECTS"

Please accept this memo and attached documents as a request for the House Judiciary Committee to schedule for hearing SS for House Bill 86, "INJUNCTIONS AGAINST PERMITTED PROJECTS". This legislation will provide protection for businesses trying to start permitted projects from the costs associated with unjust injunctions.

Thank you for your consideration in this matter.

Attached: Sponsor Statement, SS for HB 86, HB 86, Committee Action, Support Documents, Referenced Court Rules, Fiscal Note

Chair-Resources Committee
Energy Council
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
(907) 452-6084
Fax: (907) 452-6096

Alaska State Legislature

House of Representatives

Representative Hugh "Bud" Fate

While in Session
State Capitol, Room 128
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Sponsor Statement

SS for House Bill 86

"An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

Sponsor Substitute for House Bill 86 will be a major step in getting Alaska going. For too long properly permitted projects end up being delayed before ground is ever broken. These projects are on hold because our current system allows individuals or entities to stop a project without a truly legitimate reason and without any serious consequences.

Adding this section to the Special Actions and Proceedings of Civil Procedure language means that those who wish to stop projects will have to consider the economic effects of their actions. The bill is specifically written to give the courts latitude when determining damages because of improper action by a plaintiff.

In most cases once a project is permitted the contractor begins the process by purchasing materials, hiring sub-contractors, and individuals, essentially making commitments for them to go to work. This process affects the lives of many people and businesses. Even a temporary forced work stoppage means the economic damages far exceed just attorney and court fees. SSHB 86 causes the responsible party to assume responsibility for their actions, if the court determines the action was improper.

For Alaska to move forward we must have the ability to get projects started and completed. In many cases once permits are issued, the talk is over and it is time for the work to begin. SSHB 86 gives the courts an additional tool to help keep those projects on track.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SSHB 86
(h) Publish Date: 4/8/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil . . ."
BRU Civil Division
Component Environmental Law
Natural Resources
Sponsor Representative Fate
Requester House Resources Committee
Component No. 2211; 2212

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Under this bill, a person who obtains an injunction in the course of a bad-faith legal challenge to a state-permitted project would be civilly liable for damages caused by the injunction. The liability extends to any materially damaged party, rather than solely to parties to the proceeding in which the injunction was issued.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/2/03 1:07 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 4/2/2003
Agency Department of Law

(Revised 9/2002 OMB)

Rule 65. Injunctions.

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) **Temporary Restraining Order -- Notice -- Hearing -- Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required

of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained: and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) **Standing Preliminary Injunctions in Domestic Relations Actions.** The presiding judge of each judicial district may issue a standing injunction which restrains the parties in all domestic relations actions, except dissolutions, domestic violence actions and uniform reciprocal enforcement actions, from:

(1) removing any child who is the subject of the action from the State of Alaska without the written consent of the other party;

(2) disposing of, encumbering or transferring any marital property without the written consent of the other party, except reasonably using funds for the parties or the parties' children's personal and necessary expenses; and

(3) threatening, harassing, or harming the other party.

Such a standing injunction shall be effective against a party upon receipt of a copy of the standing injunction by the party or the party's attorney.

(Adopted by SCO 5 October 9, 1959; amended by SCO 30 effective February 1, 1961; by SCO 223 effective January 1, 1976; by SCO 258 effective November 15, 1976; by Section 2, Chapter 82, Session Laws of Alaska 1977 effective September 1, 1977; by SCO 708 effective July 15, 1986; by SCO 1153 effective July 15, 1994; and by SCO 1269 effective July 15, 1997)

Note: In 1996, the legislature enacted AS 18.66.110 -- 18.66.130 relating to domestic violence protective orders. According to 78 ch. 64 SLA 1996, these statutes have the effect of amending Civil Rule 65 relating to temporary restraining orders, the method of obtaining those orders, and the timing of those orders.

Note: Chapter 42 § 2 SLA 1999 enacts AS 09.19.200 which governs the remedies available in civil litigation involving conditions in correctional facilities. According to § 3 of the act, the enactment of AS 09.19.200 has the effect of amending Civil Rules 59(f), 60(b), 62, and 65 by altering the remedies available and the procedure to be used in litigation involving correctional facilities.

Cross References

CROSS REFERENCE: AS 09.40.230

Note: AS 10.06.630, as enacted by ch. 166, 1, SLA 1988, amended Civil Rule 65 by changing the procedure for enjoining dissolution proceedings under AS 10.06.630.

Rule 79. Costs--Taxation and Review.

(a) **Allowance to Prevailing Party.** Unless the court otherwise directs, the prevailing party is entitled to recover costs allowable under paragraph (f) that were necessarily incurred in the action. The amount awarded for each item will be the amount specified in this rule or, if no amount is specified, the cost actually incurred by the party to the extent this cost is reasonable.

(b) **Cost Bill.** To recover costs, the prevailing party must file and serve an itemized and verified cost bill, showing the date costs were incurred, within 10 days after the date shown in the clerk's certificate of distribution on the judgment. Failure of a party to file and serve a cost bill within 10 days, or such additional time as the court may allow, will be construed as a waiver of the party's right to recover costs. The prevailing party must have receipts, invoices, or other supporting documentation for each item claimed. This documentation must be available to other parties for inspection and copying upon request and must be presented to the clerk upon request. Documentation may be filed only if requested by the clerk or in response to an objection.

(c) **Objection and Reply.** A party may object to a cost bill by filing and serving an objection within 7 days after service of the cost bill. The prevailing party may respond to an objection by filing and serving a reply within 5 days after service of the objection.

(d) **Taxing of Costs by Clerk.** Promptly upon expiration of the time for filing objections, or if an objection is filed, the time for filing a reply, the clerk shall issue an itemized award of costs allowable under this rule. No cost bill hearing will be held unless requested by the clerk. If a hearing is held, it will be limited to issues identified by the clerk in the notice of hearing. The clerk may deny costs requested by the prevailing party on grounds that

(1) the cost is not allowed under paragraph (f);

(2) the party failed to provide an adequate description or adequate supporting documentation following a request by the clerk or another party; or

(3) the amount claimed by the prevailing party is unreasonable.

The clerk may not deny costs on grounds that the costs were not necessarily incurred in the action. If a party objects on this basis, the party must seek review under paragraph (e) of the clerk's action in awarding the cost.

(e) **Review by Court.** A party aggrieved by the clerk's action in awarding costs may file a motion for review of the clerk's award. The motion must be filed and served within five days after the date shown on the clerk's certificate of distribution on the award. The motion must particularly designate each ruling of the clerk to which objection is made. Matters not so designated will not be considered by the court. Costs awarded by the clerk are presumed to be reasonable.

(f) **Allowable Costs.** The following items are the only items that will be allowed as costs:

(1) the filing fee;

(2) fees for service of process allowable under Administrative Rule 11 or postage when process is served by mail;

(3) other process server fees allowable under Administrative Rule 11;

(4) the cost of publishing notices required by law or by these rules;

(5) premiums paid on undertakings, bonds, or security stipulations where required by law, ordered by the court, or necessary to secure some right accorded in the action;

(6) the cost of taking and transcribing a deposition allowed by Civil Rule 30(a) or 31(a) (including a deposition that is ordered by the court or agreed to by the parties under those rules), as follows:

(A) the court reporter's fee and travel expenses to communities where a local court reporter is not available;

(B) expenses allowed by Civil Rule 30.1(e) for recording, editing, or using an audio or audio-visual deposition; and

(C) the cost of the original plus one copy of the transcript;

(7) witness fees allowed under Administrative Rule 7;

(8) the fee of an interpreter or translator for a witness when that witness is entitled to a fee under Administrative Rule 7;

(9) travel costs allowed under paragraph (g) of this rule;

(10) long distance telephone charges for telephonic participation by an attorney or party at court proceedings, depositions, the meeting of the parties required by Civil Rule 26(f), and interviews of witnesses other than the party;

(11) charges paid by the prevailing party's attorney for computerized legal research;

(12) copying costs for paper copies, photographs, and microfilm, the cost of scanning, imaging, coding, and creating electronic media files, such as computer diskettes or tapes, and the cost of duplicating text files or otherwise copying documents or data in an electronic medium, as follows:

(A) for copies from the court, a copy center, or a person or entity other than the prevailing party's attorney, the amount charged for the copies; and

(B) for copies from the prevailing party's attorney, the amount charged by the attorney or $.15 per copy, whichever is less.

(13) exhibit preparation costs;

(14) the cost of transcripts ordered by the court; and

(15) other costs allowed by statute.

(g) **Travel Costs.** (1) Travel costs will be allowed for

(A) one attorney to attend trial, hearings on dispositive motions, settlement conferences, and the meeting of the parties required by Civil Rule 26(f), but only if no local attorney is present; if more than one out-of- town attorney attends a proceeding at which no local attorney is present, travel costs will be allowed for the attorney who traveled the shortest distance to the trial site;

(B) one attorney to attend depositions, interviews of witnesses who are not deposed, and meetings to review documents produced in the course of discovery;

(C) one legal assistant or investigator to interview witnesses who are not deposed or to review documents produced in the course of discovery; and

(D) witnesses to the extent permitted by Administrative Rule 7.

(2) Travel costs are subject to the following limitations:

(A) air fare is allowed at the coach class fare or the actual fare, whichever is less;

(B) ground transportation, including car rental, is allowed outside the traveler's home city; and

(C) food and lodging is allowed at the same per diem rate allowed for court employees.

(3) In unusually complex cases, the court may allow a prevailing party to recover travel costs for more than one attorney to participate in the activities described in section (g)(1)(A) of this rule. To request travel costs for more than one attorney, the prevailing party must file a motion for court review of the clerk's award as provided in paragraph (e) and must include supporting documentation for each item claimed. These costs should not be included in the cost bill filed with the clerk.

(4) To recover travel costs, the prevailing party must include the following information for each trip: the name of the traveler, whether the traveler is an attorney, legal assistant, or investigator, the reasons for the travel, and the travel dates.

(h) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, costs must be apportioned and awarded according to the provisions of Civil Rule 82(e).

(Adopted by SCO 5 October 9, 1959; amended by SCO 56 effective November 1, 1963; by SCO 258 effective November 15, 1976; by SCO 554 effective April 4, 1983; by SCO 1085 effective January 15, 1992; by SCO 1118 effective July 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1200 effective July 15, 1995; and by SCO 1279 effective July 31, 1997; rescinded and readopted by SCO 1306 effective January 15, 1998; amended by SCO 1340 effective January 15, 1999)

Note: AS 25.25.313(c), added by § 6 of ch. 57 SLA 1995 (the Uniform Interstate Family Support Act), has the effect of amending Civil Rule 79 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a support proceeding listed in AS 25.25.301.

NOTE: In 1997 the legislature enacted AS 18.16.030(m), which provides that a filing fee may not be required of, and court costs may not be assessed against, a minor in a proceeding to bypass parental consent to an abortion. According to ch. 14, § 10 SLA 1997, AS 18.16.030(m) has the effect of amending Administrative Rule 9, Civil Rule 79, and Appellate Rule 508 by prohibiting filing fees and assessment of court costs in certain actions. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass proceedings in the superior court and a separate rule on judicial bypass appeals. See Probate Rule 20 & Appellate Rule 220.

Note: Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this ruie.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	**Contested With Trial**	**Contested Without Trial**	**Non-Contested**
First $ 25,000	20%	18%	10%
Next $ 75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting

(f) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; and by SCO 1281 effective August 7, 1997; and by SCO 1340 effective January 15, 1998)

NOTE to SCO 1118am: By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, **see, e.g., Anchorage Daily News v. Anchorage School Dist.,** 803 P.2d 402, 404 (Alaska 1990); **City of Anchorage v. McCabe,** 568 P.2d 986, 993-94 (Alaska 1977); **Gilbert v. State,** 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. **See, e.g., Malvo v. J.C. Penney Co.,** 512 P.2d 575, 588 (Alaska 1973); **Demorski v. New,** 737 P.2d 780, 788 (Alaska 1987).

NOTE: AS 25.25.313(c), added by § 6 of ch. 57 SLA 1995 (the Uniform Interstate Family Support Act), has the effect of amending Civil Rule 82 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a support proceeding listed in AS 25.25.301.

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in [SCO 1118am.] In my view no compelling case has been made demonstrating the need for these changes.[FN1] Further, my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court. [FN2] [1] In this regard I note that the Alaska Judicial Council is scheduled to conduct an in depth empirical study of the workings of Civil Rule 82. My preference is to await the results of the Council's study before deciding whether any of the current provisions of Rule 82 should be amended. Such a study should position this court to make a more informed assessment as to whether the current rule operates in a fashion which unjustly denies access to our courts. I further note that our Civil Rules

Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's questionnaire indicated: that Civil Rule 82 does not deter people of moderate means from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that the rule is needed to discourage frivolous litigation. [2] Any attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K), request variations from the attorney's fees awards called for under either the monetary recovery schedule provisions of (b)(1), or the provisions of (b)(2) which apply where no money judgment is recovered by the prevailing party. **Note to SCO 1281:** In 1997 the legislature amended AS 09.30.065 concerning offers of judgment. According to ch. 26, § 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rules 68 and 82 by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by changing provisions relating to attorney fee awards. According to § 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases **filed** on or after August 7, 1997. See paragraph 17 of this order.

Note: Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

While I remain open to other suggestions for improving the Board system, I ask that you remain open to this idea. Bear in mind that since the last time the regional board concept was discussed the salmon crisis has only grown in complexity and intensity.

4) **Balance between sustainable fisheries and environmental lock up of the resource? How will you deal with competing points of view? What about Marine Protected areas?**

Alaska has the best sustainable fisheries management in the United States, perhaps in the world, and we should be proud advocates of our strong record of protecting water quality and essential fish habitat. We should never forget that or let outside interest with extreme viewpoints misrepresent our management accomplishments. That doesn't mean we cannot improve. Indeed, it is the innovative drive of Alaskans that has constantly looked to strengthen and improve our management that has brought us to where we are today.

Sustainable fisheries and environmental protection go hand in hand. It need not be an either/or situation. As your Governor, I can credibly deliver this message to well meaning but misinformed environmental groups who may not know how responsibly we've managed our resources. The first part of delivering this message would be to ensure that Alaska gets credit for all the protective measures enacted since statehood. Many of these measures, such as stream buffers, reduced harvest levels, and no-trawl zones were initiated by fishermen. Just because we didn't call them marine protected areas does not mean that we should not get credit for being proactive and environmentally responsible. We've been doing it right all along and we will continue to do so.

There are some today who advocate setting aside certain waters as the preferred tool for protecting the marine environment, but I don't see it that way. We have many tools to protect the health of Alaska's fish and their habitat. Marine protected areas are only one tool, and often the last, that should be used. Given Alaska's strong environmental track record and sustainable fishery management techniques, it is rarely warranted here.

Anyone advocating more marine protected areas in Alaska must be able to demonstrate convincing scientific evidence that such an extreme action is necessary and not be driven by a simplistic desire to limit commercial fishing.

My experience has shown that if we can foster dialogue away from issue positions and toward goals and objectives, the competing points of view begin to fade. Protecting unique ecosystems vital to the productivity of multiple species, such as the Sitka pinnacles, is a goal we share. Sound science and coordinated research can point us in the right direction toward this goal.

We have the best-run commercial fisheries in the world. In fact, our salmon management is certified as sustainable. We should listen to competing points of view, of course, but we don't need to apologize or suffer from wrongheaded lawsuits. Alaska fishermen can be proud of their record as stewards of the resource, and I will work with you to continue to build on that record for the good of the fishery.

5) **What will you do to continue the contribution of hatcheries to the Alaska economy?**

Most Alaskans probably don't realize that in the year 2000, hatcheries produced 34 percent of the statewide commercial harvest of salmon, a total of some 40 million fish.

State supported hatcheries contribute another 7 million fish to the annual sport catch. Hatcheries are particularly important to the Kodiak area, Cook Inlet, Prince William Sound and Southeast. As a Southeast sport fisher, I know about the contribution that hatcheries make to many Alaskans first hand, and I have frequently spoken in support of the hatchery program.

Alaska has learned from problems in the Northwest and elsewhere, and has in place strong scientifically tested techniques for addressing salmon disease and conserving genetic diversity and vigor. Indeed Alaska hatcheries are a model of how to do the job responsibly.

I support legislation such as SB 266 to help hatchery operators weather tight financial times. The ability to refinance loans at lower rates is a good way to free up needed cash for hatcheries and continue their viability.

ALASKA: MORE THAN JUST A PRETTY FACE?

by Paula Easley, Senior Policy Analyst, Resource Development Council for Alaska

Is there more to the 49th State than incomparable scenery? With much of Alaska federally controlled, non-residents greatly influence decisions affecting it. The U.S. senate will decide whether to tap petroleum resources in ANWR's coastal plain or declare it wilderness.

AlaskaR17;s bigness is mind-boggling. Superimposed, it would cover 20% of the 48 contiguous states. Its Alaska Range boasts 23 peaks over 10,000 feet high, with Mount McKinley reaching nearly four miles high. America's largest glaciers—the Bering and Malaspina, each bigger than Delaware—are here, plus 5,000 others. Bordered by two oceans and three seas, there's plenty of water, with 3,000,000 lakes and 3,000 rivers.

AmericaR17;s largest national forests, the Tongass and the Chugach, are also here. The state is virtually all wilderness. However, if a new state were formed with just the 58 million acres of federal Wilderness, it would be larger than Minnesota, Idaho or Utah—with no roads, structures or development. As it is, Alaska is home to 62% of all federal Wilderness, 70% of national parks, 17% of national forests, and 85% of national refuge lands.

All told, 152 million acres of the state are federal parks, preserves, forests, scenic rivers, recreation and military lands, refuges, and national monuments. Most were withdrawn in the massive 1980 land reclassification. Millions more acres are managed as Wilderness. The legislature withdrew another 8.5 million acres, reflecting Alaskans' concerns for special places. Much remaining land is mountains, icefields or wetlands, unsuitable for development

Roads access but 12,000 of the state's 586,412 square miles, a railroad crosses 500 miles, and state ferries link primarily Southeastern communities. It has more coastline than all the other states combined, and 80% of the people live on the coasts. Individuals own far less than one percent of the land.

AlaskaR17;s tiny population (620,000) discourages instate manufacturing. Most materials, food and equipment come from other states or countries.

Development is hard to come by. Distances from markets, limited infrastructure, high operating costs and other roadblocks daunt most ventures. To be economic, projects must generally be world-class, like Prudhoe Bay. Others are ruled out because they are in, near, or blocked by federal conservation units. Transportation routes affecting key conservation units are forbidden without an Act of Congress.

Natural resources are bountiful: 29% of the nation's proved oil reserves; 20% of natural gas reserves, (excluding ANWR and NPR-A). Possibly half the nation's coal resources, some six trillion tons, are in Alaska. There's gold, silver, zinc, copper, lead, barite, iron, platinum, nickel, uranium, antimony, titanium, chromium, etc., but only the very wealthy

can outlive the "process" of trying to extract them. Many valuable deposits are in areas closed to development.

Through the efforts of countless "Save Alaska" fundraising groups, traditional fishing, forestry and mining opportunities have radically declined. New proposals, even recreation facilities, attract national opposition and environmental lawsuits. With little success diversifying Alaska's economy, unemployment rates remain higher than national averages. High-paying resource industry jobs are replaced with low-paying service jobs, ranking Alaska second-from-last in state growth rates.

Two projects could jumpstart the national and Alaska economies–(1) a natural gas pipeline from Prudhoe Bay to the Midwest, and (2) ANWR development. Yet preliminary studies of a gas line indicate its $15-20 billion cost is too high. That leaves ANWR.

Prohibiting ANWR development means denying huge economic benefits and jobs to every state. It means more imports, a growing trade deficit, and a major blow to national security. It means putting un-elected special interest groups in charge of Alaska's economy.

Three-fourths of Alaska residents say they live here because of its pristine environment. Three-fourths of its residents also support opening ANWR. They know that, using 21st century arctic technology and great caution, ANWR's resource treasures and a pristine environment are compatible. More than 60% of Americans have now reached the same conclusion.

HereR17;s the situation: Unless Americans convince the U.S. Senate to open ANWR, it will become Wilderness, and the greens will have seized control over national energy policy.

If special interests can gang up to prevent development of America's single-most promising oil and gas prospect, in remote Alaska, imagine how difficult it will be to develop energy projects in any other state.

Word count: approx. 700 ###

Easley Associates, January 2002

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Web posted Thursday, February 14, 2002

Eight timber sales focus of possible injunction

By JOANNA MARKELL
THE JUNEAU EMPIRE

Eight Southeast Alaska timber sales are getting much of the attention in federal courtroom this week.

U.S. Forest Service officials, timber industry advocates, conservationists Southeast community leaders were in court today for the second of thre testimony about a possible Tongass logging injunction.

U.S. District Judge James Singleton ruled last year that the Forest Servi violated federal law when it failed to consider some areas for wilderness designation when it issued its 1997 Tongass Land Management Plan. He two-month injunction last year and is presiding over this week's hearing determine the need for and possible scope of a new logging ban.

So far, much of the discussion has focused o timber sales in southern and central Southea Alaska. Viking Lumber and Silver Bay Loggin use five of the sales to fuel sawmills in Wran on Prince of Wales Island this year. Conserva argue the sale areas are better off left alone.

The Forest Service is working on a supplemental environmental impact s to evaluate areas for wilderness designation, as required by the court. T should be complete this fall, according to Department of Justice attorney Landon, who is representing the Forest Service.

The timber industry hopes to cut wood at Upper Carroll near Ketchikan, George on Etolin Island near Wrangell, South Arm on Prince of Wales Isl South Lindy near Petersburg and Four Leaf on southern Kupreanof Islan year. Testimony also has focused on the Crystal timber sale near Peters Saook Bay on north Baranof Island and Canal Hoya near Wrangell.

Sitka Conservation Society Executive Director Pat Veesart testified Wedr that timber harvest and road building would hurt wilderness values in th areas. The isolated sites provide wildlife habitat and opportunities for pri recreation, he said.

"To me, wilderness is a place where one can experience a high degree o solitude," he said. "A place where one can see the Earth as created by it

Alaska Forest Association attorney Jim Clark said the sites don't have th attributes required to be classified as wilderness. Roads already have be and timber harvest has already occurred, he said.

"Each is a work in progress," he said. "None of the drainages is undevelc

Whether the Forest Service should continue planning timber sales as the wilderness review occurs also is an issue of dispute in the case. So is the Lake-Lake Tyee electric intertie. The 57-mile power line would link Ketch Wrangell.

The hearing continues Friday in Juneau.

Joanna Markell can be reached at joannam@juneauempire.com.

Forest Oil's Gary Carlson, on inlet's prospects

With pipeline to Redoubt Shoal now complete, Forest looks to begin production

Q&A on O&G Editor's Note: Gary Carlson, Alaska senior vice president for Forest Oil Corp., is interviewed by the Alaska Oil and Gas Reporter on the status of Forest's development of the Redoubt Shoal, the first new Cook Inlet oil field in years, and other issues.

Forest's Osprey platform was fabricated and put in place in the inlet to support exploration drilling into the Redoubt Shoal prospect. The platform is now being converted to a production facility. Pipelines to the platform from shore-based oil processing facilities have just been completed.

Forest has recently been the target of environmental lawsuits aimed at stopping drilling on Redoubt Shoal. The first suit involved the state's interpretation of Best Available Technology requirements in oil spill contingency plans. The Legislature passed a law last spring mooting the litigation.

In a second lawsuit, environmental groups challenged a state decision to rely on approval of a federal permit for discharges, instead of following a duplicate state procedure. For the second time last spring, the Legislature passed a law to moot the lawsuit.

Q What's the status of the lawsuits affecting the project?

A With the completion of the work on the remand from the Supreme Court, the ruling of the objection against our exploratory drilling is no longer in effect. We're drilling our fifth exploration well now. It's at 12,000 feet today, scheduled to go to 16,000 feet.

What is ironic is that at the time the injunction was granted to Cook Inlet Keeper (litigants), we were not disposing of the water-based cuttings overboard. We were grinding and injecting the drilling cuttings into our disposal well on the Osprey. Forest Oil had already agreed to inject all the drill cuttings during the development phase of Redoubt Shoal, and we were testing the system in the last exploratory well. This court action was not about the environment but legal process. But the injunction caused us to lay people off and send them home. It caused some real hardships.

Q Are they going to stop suing?

A We eventually reached an agreement with Cook Inlet Keeper on future

litigation on the exploration program. They asked us to inject our rainwater runoff rather than let that go overboard. Their concern, they said, was that there might be some toxins in the rainwater runoff. So, we applied for a permit and installed the necessary equipment, and we are set up to inject rainwater. However, they have already filed suit against the state for granting the permits to develop the field.

Q Do other Inlet operators do these things?

A The other operators are held to high standards by federal and state agencies' permits, which allow water-base cutting to be disposed overboard, along with produced water, once it had been conditioned. Forest decided early on, however, to design our facilities to inject our produced water. We're quite willing to spend money to deal with the real environmental issues, but we would also like to be treated like the rest of the industry. It may be because we're doing the newest development that we're attracting this attention.

Q What's the status of construction?

A We're working on final installation of the pipeline now. It was a challenge to drill the boreholes through the bluff, but the pipelines have been pulled through the boreholes and on to the platform.

Q How was this done?

A We used a large barge that was well anchored. The pipe string, which was previously welded, was pulled with winches on the barge. It took three long pulls to get the pipe to the platform. It was then jacked up to the platform itself. The contractors Conam Construction and Crowley Maritime, its subcontractor -- have done a superb job on it.

Q What are the dimensions of the pipe?

A There are three pipelines, two eight-inch diameter and one six-inch diameter. This is very heavy steel. Of the eight-inch pipelines, one has a wall thickness of 7/8 of an inch and the other is 3/4 of an inch. The pipe is intended to be heavy enough to remain stable on the inlet floor. Previous Cook Inlet pipelines, built in the 1960s and 1970s, had a concrete coating to keep them stable. We felt in this case, a concrete coating would have created a wider cross-section for the current to act against. Heavier steel is more expensive but creates a lower profile for the current to act against. We think

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Environmental Law

Alaska Oil & Gas Association
We represented Alaska Oil & Gas Association (AOGA), a consortium of national and multi-national companies involved in the exploration and development of oil and gas resources in Alaska, in the drafting and submission of comments to the National Marine Fisheries Service (NMFS) opposing designation of critical habitat in the Alaskan Beaufort Sea for the Western Arctic stock of the bowhead whale.

We represent AOGA in connection with an ongoing effort to comprehensively reform the Alaska Coastal Management Program (ACMP). The ACMP implements the provisions of the federal Coastal Zone Management Act (CZMA) and plays a direct and significant role in permitting processes throughout Alaska. We have drafted extensive comments to proposed revised regulations, facilitated related discussions with key state agencies and participated in development of legislative initiatives.

We represent AOGA and the Resource Development Council of Alaska, two consortiums of businesses active in the development of natural resources in Alaska, as intervenors in federal court litigation brought by environmental advocacy groups seeking to reverse the decision of NMFS that a listing of the Cook Inlet, Alaska population of beluga whales under the Endangered Species Act (ESA) is not warranted. Consistent with the intervenors' position, the Washington, D.C. federal court sustained NMFS' decision, and the litigation is now on appeal to the federal Court of Appeals for D.C. Circuit. This case is the first to consider the statutory exemptions in the ESA and in the Marine Mammal Protection Act that address Native Alaskan subsistence hunting. The district court's decision is also the first time NMFS' decision not to list a species has been sustained under challenge.

Blue Heron Paper Company
We defended Blue Heron Paper Company against two citizen suits under the Clean Water Act and the Endangered Species Act regarding the temperature and turbidity of the mill's wastewater discharge. At the same time, we negotiated with the Oregon Department of Environmental Quality (DEQ) the terms of a new National Pollutant Discharge Elimination System permit that is the first in Oregon to use a temperature management plan and the first to comprehensively regulate turbidity. This case shaped DEQ's current policies on temperature and turbidity and was closely watched throughout the Northwest. Blue Heron Paper Company is an integrated producer of newsprint and specialty papers using more than 50% recovered fiber and is located in Oregon City, Oregon.

Dry Creek Rancheria Band of Pomo Indians
We advised the Dry Creek Rancheria Band of Pomo Indians on their economic development and litigation strategies, primarily concerning their rights to use an easement for purposes of developing a casino. The Dry Creek Rancheria Band of Pomo Indians is a federally recognized tribe with tribal lands located north of San Francisco Bay in Sonoma County.

Gate-King Properties
We represent the owner of a proposed 500-acre industrial park development in Santa Clarita, California. The project involves the preparation of an environmental impact report, a development agreement, subdivision approval, conditional use permits, Section 404 approval and compliance with new SB 610 (water supply planning for large-scale projects).

Greenfield Monterey Park, LLC
We represent Greenfield Monterey Park, LLC, the master developer of a portion of the Oil Superfund site in Monterey Park, California, on which will be developed a 510,000 square-foot shopping center. The matter includes negotiations of agreements between our client and the landowner, the steering committee, the retail developer and the City of Monterey Park, as well as agreements and the negotiation of a 200-page consent decree with the Department of Justice and the Environmental Protection Agency.

Hawaii Longline Association
We represent the Hawaii Longline Association, a trade association representing Hawaii tuna and swordfish fisheries, in pending litigation in Washington, D.C. federal court challenging a biological opinion issued by the National Marine Fisheries Service concerning effects of these fisheries on pelagic sea turtle species. Our representation also includes nonlitigation representation in the ongoing ESA consultation processes concerning effects of the Hawaii fisheries on various species protected under the ESA.

Keenan Land Company
We provide litigation and land use counseling for Keenan Land Company, a high-end developer involved in residential and hotel development in Half Moon Bay, Scotts Valley and Hayward, California. The issues include compliance with the California Environmental Quality Act, the Subdivision Map Act, ESA, the California Coastal Act and the Clean Water Act (CWA).

L.D. McFarland Company, Ltd.
We assisted L.D. McFarland Company, Ltd. in developing and implementing a strategy to cost-effectively clean up and redevelop a former wood treating site in Milwaukie, Oregon. Through a comprehensive risk assessment and the application of an Oregon law that we helped develop, we were able to convince DEQ to accept a cost-effective remedial action. The site will be redeveloped for commercial and multifamily residential use. L.D. McFarland Company is a wood treatment and preservation company with operations throughout the Northwest.

The Newland Group
We represented The Newland Group in obtaining a Section 404 authorization from the U.S. Army Corps of Engineers for fill-in wetlands associated with a residential development. We also obtained approval from the Washington Department of Ecology and the local government, as well as concurrence from the federal government of compliance with ESA. The Newland Group is a developer of residential communities and is based in Vancouver, Washington.

Oregon Water Resources Congress
We worked with Oregon Water Resources Congress, a trade organization representing irrigation districts and water-delivery organizations throughout Oregon, to develop an agreement with DEQ that enabled irrigation districts to continue their use of aquatic herbicides while providing protection for natural waterways. The Ninth Circuit Court of

Appeals had issued an opinion requiring irrigation districts to obtain permits under CWA in order to use aquatic herbicides in irrigation ditches. Without the use of herbicides, many Northwest irrigation districts would have been unable to deliver water, thereby putting the irrigated agricultural users at serious risk. The groundbreaking agreement reached between Oregon Water Resources Congress and the DEQ has become a model for subsequent permits and similar agreements.

Outside In
We represented Outside In in obtaining final approvals for its youth shelter located in Portland, Oregon. The unusual architecture of the building raised many issues, including constitutional issues under the City of Portland Sign Code, that required careful discussion and negotiation with the city. The building has been identified as "one of the unique and notable buildings in Portland."

Phillips Alaska, Inc.
We represented Phillips Alaska, Inc., a subsidiary of Phillips Petroleum Company, in a successful defense against administrative petitions filed under ACMP regarding five North Slope oil development and exploration projects. Prevailing on these petitions in a quick manner was essential to allow the projects to proceed during the limited window of frozen ice/tundra winter conditions.

Portland General Electric
We represented Portland General Electric (PGE) in successfully negotiating an administrative settlement with NMFS and the Oregon Department of Fish & Wildlife arising out of the accidental killing of ESA-listed Chinook salmon at a PGE hydroelectric facility. Oregon's largest utility, PGE serves more than 730,000 customers in Portland, Salem and nearby communities.

Port of Oakland
We provide ongoing advice and consultation to the Port of Oakland, California in connection with public trust, land title and a variety of water-quality issues arising from Port operations and construction at marine terminals, real estate developments and the Oakland International Airport. The Port owns and operates the airport and the fourth largest container seaport facilities in the United States.

Port of Seattle
We successfully defended the Port of Seattle in ESA litigation brought by local organizations concerning construction of a third runway at Seattle-Tacoma International Airport. We likewise assisted the Port in obtaining federal approvals required under the ESA to permit construction of this project. The Third Runway Project is one of the largest public construction projects in the state of Washington.

Public Water District
We have advised a large public water district in Washington on developing an ESA compliance strategy. Our work has helped the district avoid potential liability under the ESA as a result of private lawsuits or governmental actions.

Sabroso, Inc.
We represented Sabroso, Inc., a Medford, Oregon fruit processor, in obtaining rights to dispose of industrial rinse water on exclusive farm use land. The process contributes to the full use of the water both for fruit processing and as irrigation for a farm crop. Approval was gained through

Jackson County and, in order to confirm the appropriateness of the process, we represented Sabroso in persuading the Oregon legislature to adopt Senate Bill 212, allowing for reuse of such water for crop irrigation.

SBA Communications Corporation
We represented SBA Communications Corporation, a leading developer of wireless communications structures, in successfully arguing that conditional land use permits could be issued to infrastructure providers with appropriate conditions. Deschutes County had consistently taken the position that conditional use permits for wireless communications facilities would be issued only to the providers of cellular service. We obtained a conditional land use permit for SBA's LaPine, Oregon site.

Snohomish River Regional Water Authority
We represent Snohomish River Regional Water Authority in a water rights appeal before the Washington Pollution Control Hearings Board. The Snohomish River Regional Water Authority is an entity consisting of the Woodinville Water District, the Northshore Utility District and the City of Everett.

Snowbird Ski and Summer Resort
On behalf of Snowbird Ski and Summer Resort, we successfully defended a citizen suit challenging the construction of a new ski lift connecting Snowbird with Alta Ski Resort. The suit was filed during the construction phase to block the installation of the interconnecting chairlift. We represented the client to the Tenth Circuit Court of Appeals, which subsequently denied the injunction. Snowbird installed the chairlift and implemented a joint-lift pass program with Alta, making the combined terrain the third largest ski area in North America. Snowbird owns and operates a ski and summer resort in the Wasatch mountain range outside of Salt Lake City, Utah.

South San Francisco Scavenger Company
We successfully represented South San Francisco Scavenger Company in zoning and environmental review matters for its development of a 100,000 square-foot solid-waste materials recycling and transfer facility to serve the communities of South San Francisco and Millbrae and the San Francisco International Airport. We were also successful in defeating a subsequent referendum raised against the project.

Trans-Alaska Pipeline System Owners
We represent the six direct operating companies of the Trans-Alaska Pipeline System (TAPS), regarding Alaska coastal zone consistency review, ESA consultation with NMFS and the U.S. Fish & Wildlife Service, and essential fish habitat consultation pertaining to a unique renewal process for the federal grant and state lease authorizing the existing TAPS right-of-way. TAPS transports approximately 17% of domestic U.S. crude oil production and 100% of Alaska North Slope crude oil to refineries via an 800-mile crude oil transportation system running from Prudhoe Bay on the North Slope of Alaska to the Port of Valdez. The TAPS owners are pipeline transportation subsidiaries of Amerada Hess, BP, ExxonMobil, Phillips Petroleum, Unocal and Williams.

Walla Walla River Irrigation District, Hudson Bay District
We assisted three irrigation districts in the Walla Walla basin in Oregon and Washington in reaching a settlement agreement with the U.S. Fish & Wildlife Service involving alleged violations of the ESA. The agreement enabled the districts to continue to deliver water to irrigators in the basin and put in place a process for ensuring long-term compliance with the

ESA.

Washington Public Utility Districts Association
We represented the Washington Public Utility Districts Association as amicus curiae in PUD No. 1 of Pend Oreille County v. Dept. of Ecology, a water rights appeal before the Washington Supreme Court. Washington PUD Association represents 28 nonprofit, community-owned utilities that provide electricity, water and sewer services and broadband telecommunications.

Client Name Withheld
We defended an undisclosed client in a federal criminal investigation involving an employee's falsification of monitoring records under a National Pollutant Discharge Elimination System permit. We conducted a comprehensive internal investigation that resulted in the U.S. Attorney declining to prosecute the company. We assisted the company in self disclosure of the matter and in settling a companion civil enforcement action. Based on the company's self disclosure and cooperation, we negotiated an 80% reduction in DEQ's penalty and convinced the agency to drop its economic benefit penalty.

Client Name Withheld
We advise the nation's largest luxury motor coach manufacturer on environmental issues at its five Oregon plants. One of these plants was the focus of a multimillion-dollar nuisance and trespass suit brought by its neighbors. We assisted the company in crafting a settlement that satisfied the neighbors' concerns and allowed the manufacturer to maintain its operational levels.

Client Name Withheld
We represented a major industrial client with manufacturing operations in Oregon that determined that a change in feedstock unexpectedly resulted in a substantial increase in sulfur dioxide emissions. This triggered the need to submit a joint Title V and new source review permit application and respond to state and federal information requests. As part of this effort, the facility was required to perform a complex best available control technology determination. DEQ initially proposed multimillion-dollar penalties related to the higher emissions. We assisted this client in preparing the application, responding to the information requests, addressing the control technology determination and ultimately negotiating a reasonable penalty.

Client Name Withheld
We successfully defended a petroleum refining company in two CWA citizen suits brought in the U.S. District Court for the Northern District of California. The cases presented the question of whether the sale of the facility met the test for "mootness" under recent U.S. Supreme Court precedent on the basis that there was no reasonable possibility that any CWA violations could be committed by the refining company at the sites. We prevailed on motions for summary judgment. The case is now on appeal and is a case of first impression in the Ninth Circuit.

Client Names Withheld
Many parts of the Northwest suffered from severe drought conditions during 2001. We assisted a number of clients, including industries, municipalities and private businesses such as golf courses and nursery operations, in obtaining water right diversion point changes, securing back-up sources of water and firming up existing water supplies. We also represented water suppliers in contract negotiations with water users to

address the many unique water supply needs created by the drought.

HB

92

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 26, 2003 **FURTHER REFERRALS:**

Date of Committee Action: April 9, 2003

The JUDICIARY Committee considered: **HB 92**

HOUSE BILL NO. 92 **CLERGY TO REPORT CHILD ABUSE**

"An Act relating to reports by members of the clergy and custodians of clerical records who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 92 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
HSS	1			
LAW	2			

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara			✓	
	SAMUELS			✓	
	Holman			✓	
	Ogg			✓	
	ANDERSON			X	
	Gruenberg	✓			
			✓		
Chair:	McGuire	✓			
Chair:					

HOUSE COMMITTEE REPORT

3-26-03

(7)

Date Referred to Committee: February 12, 2003 **FURTHER REFERRALS: Judician**

Date of Committee Action: March 18, 2003

The STATE AFFAIRS Committee considered: **HB 92**

HOUSE BILL NO. 92 **CLERGY TO REPORT CHILD ABUSE**

"An Act relating to reports by members of the clergy and custodians of clerical records who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

Recommends it be replaced with [ ] HCS *or* [✓] CS for HB 92 (STA)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HSS	1			✓
LAW	2			✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	DP (5)	DNP	NR (1)	AM (1)
	Gruenberg	—			
Paul K Seaton	SEATON	✓			
	HOLM	✓			
	LYNN	✓			
	Dahlstrom	✓			
	Berkowitz				✓
Chair: Buky Hanah	Weyrauch			✓	
Chair:					

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 11, 2003

SUBJECT: Reports by members of the clergy of suspected child abuse or neglect (CSHB 92(JUD), draft version "V")

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is the work draft you requested (although Basis says the bill has passed from committee.)

Your staff instructed that the 9 amendments could be considered to be conceptual in nature so that I could "juxtapose into the correct lines of the bill and conform with the existing statutory language."

To that end, amendment #7 has not been implemented because it is superseded by amendment #8, and amendment #9 has been placed as a new paragraph in subsection (b) in bill section 2 (rather than as a new subsection (c)) with the word "instance" being replaced by "known or suspected" in order to match the wording in AS 47.07.020 and AS 47.07.021.

If you are ready for a final, want other changes, or if I may be of other assistance, please advise.

TML:med
03-386.med

Enclosure

23-LS0257\V
Lauterbach
4/11/03

CS FOR HOUSE BILL NO. 92(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES LYNN, Wilson, Wolf, Kookesh, Stevens, Heinze, Kerttula

A BILL

FOR AN ACT ENTITLED

"An Act relating to reports by members of the clergy who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

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

*** Section 1.** AS 47.17.020(a) is amended to read:

(a) The following persons who, in the performance of their occupational duties, or with respect to (8) of this subsection, in the performance of their appointed duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) peace officers and officers of the Department of Corrections;

(4) administrative officers of institutions;

(5) child care providers;

(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;

(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;

(8) members of a child fatality review team established under AS 12.65.015(e) or 12.65.120 or the multidisciplinary child protection team created under AS 47.14.300;

(9) clergy members, except as provided in AS 47.17.021.

* **Sec. 2.** AS 47.17 is amended by adding a new section to read:

Sec. 47.17.021. Reports by clergy members. (a) Except as provided in (b)(1) of this section, the reporting requirement of AS 47.17.020(a) does not apply to a clergy member with regard to a confession or confidential communication made to the clergy member in the clergy member's religious capacity in the course of discipline sanctioned by the church to which the clergy member belongs if (1) the church would qualify as tax-exempt under 26 U.S.C. 501(c)(3) (Internal Revenue Code); (2) the confession or confidential communication was made directly to the clergy member; and (3) the confession or confidential communication was made in the manner and context that places the clergy member specifically and strictly under a level of confidentiality that is considered inviolate by canon law or religious doctrine. A confession or confidential communication made under any other circumstances does not fall under this exemption.

(b) This section may not be construed to

(1) modify or limit a clergy member's duty to report known or suspected child abuse or neglect when the clergy member is acting in some other capacity that would otherwise make the clergy member a mandated reporter under AS 47.17.020(a); or

(2) prevent a clergy member from reporting known or suspected child abuse or neglect.

* **Sec. 3.** AS 47.17.290 is amended by adding a new paragraph to read:

(17) "clergy member" means a person who has been ordained, licensed, listed,

or set apart, in accordance with the laws, ceremonial or ritual practices, or discipline of a church or religious organization that has been established on the basis of a community of religious faith, belief, doctrines, or practices.

23-LS0257\U
Lauterbach
4/8/03

CS FOR HOUSE BILL NO. 92(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES LYNN, Wilson, Holm, Wolf, Kookesh, Stevens, Heinze, Kerttula

A BILL

FOR AN ACT ENTITLED

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(5) child care providers;

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(b) This section may not be construed to modify or limit a clergy member's duty to report known or suspected child abuse or neglect when the clergy member is acting in some other capacity that would otherwise make the clergy member a mandated reporter under AS 47.17.020(a).

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in accordance with the bona fide doctrines or discipline of that church or religious organization.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 10, 2003

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS0257\U, HB 92, incorporating the attached nine amendments. All of these amendments are conceptual by the way, so that they may be juxtaposed into the correct lines of the bill and conform with the existing statutory language. I have also written all of these amendments into the attached copy of the bill for clarification.

If you have any questions, which I'm sure you will☺, please call me at 4990. Thank you!

23-LS0257\U
Lauterbach
4/8/03

CS FOR HOUSE BILL NO. 92(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES LYNN, Wilson, Holm, Wolf, Kookesh, Stevens, Heinze, Kerttula

A BILL

FOR AN ACT ENTITLED

"An Act relating to reports by members of the clergy who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

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(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) peace officers and officers of the Department of Corrections;

(4) administrative officers of institutions;

(5) child care providers;

(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;

(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;

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(b) This section may not be construed to modify or limit a clergy member's duty to report known or suspected child abuse or neglect when the clergy member is acting in some other capacity that would otherwise make the clergy member a mandated reporter under AS 47.17.020(a).

* **Sec. 3.** AS 47.17.290 is amended by adding a new paragraph to read:

(17) "clergy member" means a person who has been ordained, licensed, or listed or set apart, in accordance with the laws, ceremonial, or ritual practices or discipline of a church or religious organization that has been established on the basis of a community of religious faith, belief, doctrines, or practices ~~and to hear confessions and confidential communications~~

~~in accordance with the bona fide doctrines or discipline of that church or religious organization.~~

Amendment #1 to HB92 by Rep. McGuire

Page 2, Line 14

Delete ~~in the clergy member's ecclesiastical capacity~~

"ecclesiastical"

Insert "religious"

Amend. #2

P. 2, Line 15:

Replace "enjoined" w/ "sanctioned"

~~Amend. #3~~

Amend. #4

P. 2, L. 16

replace "qualifies" with "would qualify"

HB 92

Amendment #3 - Adopted

~~At~~ P. 2 ln 20

~~Delete~~ "church" an

Replace "church" with "religious"

Amend #5

P. 2, Line 28

After "ordained,"
Insert, "licensed,* listed,"

Amendment #1e Adopted to HB 92 By Rep. McGuire

Page 2, Line 29

After "the", insert "laws,"
After "ceremonial," insert "or"
After "ritual" insert "practices"

So it reads:
"laws, ceremonial or ritual practices, or discipline ..."

Amendment #7 to HB 92 - Adopted by Rep. McGuire

Page 2, Line 31
After "confessions"
Delete "and"
Insert "or"

Conceptual Amend. #8 - Adopted

-ensure that "everyone's" req. to report but only those that ~~share~~ break confessions or confid. comm. are given exemption ~~with~~ w/o giving preference to one religion over others.

Please.

* DO this by making the following Changes:

P. 2, Line 31
After "doctrines," Change "and" to "or"
~~After practices~~

Delete everything after "practices"

~~Adopted~~

Amendment ** #9 - Fiorini Gara

Insert at p. 2 line ~~6~~ 7 in Section 2

(c) Nothing in this section shall prevent a clergy member from reporting ~~this~~ an instance of child abuse or neglect.

23-LS0257\S
Luckhaupt/Lauterbach
4/5/03

CS FOR HOUSE BILL NO. 92(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES LYNN, Wilson, Holm, Wolf, Kookesh, Stevens, Heinze, Kerttula

A BILL

FOR AN ACT ENTITLED

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*** Section 1.** AS 47.17.020(a) is amended to read:

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(1) practitioners of the healing arts;

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(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;

(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;

(8) members of a child fatality review team established under AS 12.65.015(e) or 12.65.120 or the multidisciplinary child protection team created under AS 47.14.300;

(9) clergy members.

CLERGY REPORTS OF PAST SUSPECTED SEXUAL ABUSE. (a) On or before January 1, 2004, a clergy member or a custodian of records for the clergy member may report to the Department of Health and Social Services or to a law enforcement agency that the clergy member or a custodian of records for the clergy member, before the effective date of this Act, in a professional capacity or within the scope of employment, other than during a penitential communication, acquired knowledge of or reasonable cause to suspect that a child had been the victim of sexual abuse that the clergy member or a custodian of records for the clergy member did not previously report to the department or to a law enforcement agency. Except for AS 47.17.068, the provisions of AS 47.17 apply to all reports made under this subsection.

(b) This section shall apply even if the victim of the known or suspected abuse has reached the age of majority by the time the report is made.

(c) The local law enforcement agency shall have the jurisdiction to investigate a report of sexual abuse made under this section, even if the report is made after the victim has reached the age of majority.

(d) The definitions in AS 47.17.290 apply to this section.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
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House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 7, 2003

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for HB 92, work order #23-LS0257. Working off of version A may be the easiest way to proceed considering the changes we would like to make.

Section 1 will appear as it did in version A.

Section 2: AS 47.17.021 (a) is amended to mirror the language of the attached Idaho statute 16-1619 (c). I believe everyone really likes the way it reads, but of course feel free to conform it to the way our statutes generally read.
AS 47.17.021 (b) will appear as it did in version A.

Section 3: AS 47.17.290 (17) is amended to mirror the language of the attached Idaho statute 16-1619 (b). We can keep the term "clergy member" in the our bill, but define it the same way the Idaho statute defines "duly ordained minister of religion" in (b) for purposes of uniformity, unless you would advise otherwise.

Section 4 is removed.

If you have any questions, please call me at 4990. Thank you!

Compiler's notes. Former § 16-1618 was repealed, see Compilers' notes, § 16-1601.

In order to receive basic state grant and children's justice grant funds authorized by the Child Abuse Prevention and Treatment Act (Title I of Public Law 100-294), state law pertaining to this subject must include a provision mandating appointment of a guardian ad litem in every case involving an abused or neglected child. Federal regulations (45 CFR 1340.2(g)) provides that in the absence of a mandatory statute provision, the state may yet satisfy this requirement by, among other means, enacting a statute permitting the appointments, accompanied by a statement from the Governor that the appointments are made in every case.

Subsection (b) of § 16-1618 which was added by S.L. 1989, ch. 281, § 2, provides that a court "may" appoint counsel for a child if a guardian ad litem is for certain reasons not available; thus, the decision appears to be within the court's discretion, rather than mandatory.

The statement of Legislative Intent regarding ch. 281, however, as recorded in the Senate Journal of March 27, 1989, pp. 383, 384 (referring to ch. 281 as H 291) provides in part:

"The intent of this amendment in permitting the appointment of an attorney rather than a guardian is to make clear that a Court has the authority to make such an appointment where no guardian ad litem is available. In all cases, however, a guardian ad litem is to be preferred, but an attorney may serve in that role. The unavailability of a lay guardian ad litem in no instance should relieve a Court from appointing either a lay person or attorney and the appointment of one or the other is mandatory in all cases.

"The further intent of H 291, as amended, is to comply in all respects with the existing requirements relating to the appointment of guardians ad litem contained in the Child Abuse Prevention and Treatment Act P.L. 93-247, as amended, and duly promulgated regulations thereunder".

At the time of this compilation, the Governor had issued no statement regarding this subject; however, in light of expressed legislative intent, the user should be aware of the intent of state officials to avoid rendering the State ineligible to receive these federal funds.

Sections 1 and 3 of S.L. 1989, ch. 281 are compiled as §§ 16-1602 and 16-1624, respectively.

Section 19 of S.L. 2001, ch. 107 is compiled as § 16-1623.

Rule to sec. ref. This section is referred to in Idaho Juvenile Rules, Rule 44.

Cited in: James v. Dunlap, 100 Idaho 697, 604 P.2d 711 (1979).

16-1619. Reporting of abuse, abandonment or neglect. — (a) Any physician, resident on a hospital staff, intern, nurse, coroner, school teacher, day care personnel, social worker, or other person having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported within twenty-four (24) hours such conditions or circumstances to the proper law enforcement agency or the department. The department shall be informed by law enforcement of any report made directly to it. When the attendance of a physician, resident, intern, nurse, day care worker, or social worker is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

(b) For purposes of subsection (c) of this section the term "duly ordained minister of religion" means a person who has been ordained or set apart, in accordance with the ceremonial, ritual or discipline of a church or religious organization which has been established on the basis of a community of religious faith, belief, doctrines and practices, to hear confessions and confidential communications in accordance with the bona fide doctrines or discipline of that church or religious organization.

(c) The notification requirements of subsection (a) of this section do not apply to a duly ordained minister of religion, with regard to any confession

or confidential communication made to him in his ecclesiastical capacity in the course of discipline enjoined by the church to which he belongs if:

(1) The church qualifies as tax-exempt under 26 U.S.C. 501(c)(3);

(2) The confession or confidential communication was made directly to the duly ordained minister of religion; and

(3) The confession or confidential communication was made in the manner and context which places the duly ordained minister of religion specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine. A confession or confidential communication made under any other circumstances does not fall under this exemption.

(d) Failure to report as required in this section shall be a misdemeanor. [I.C., § 16-1619, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 18, p. 491; am. 1985, ch. 158, § 1, p. 416; am. 1995, ch. 329, § 1, p. 1098.]

Compiler's notes. Former § 16-1619 has been repealed, see Compiler's notes, § 16-1601.

Sec. to sec. ref. This section is referred to in §§ 6-1903, 54-4407, 18-609A.

Rule to sec. ref. This section is referred to in I.R.E., Rule 507.

Opinions of Attorney General. School personnel must report all instances of suspected child abuse, abandonment and neglect to either law enforcement or the Department of Health and Welfare within 24 hours of discovery. Failure to do so is a misdemeanor. OAG 93-2.

The religious exemption provision of subdivision (a)(1) (now (t)(1) of § 16-1602 does not affect the normal reporting and investigation provision for suspected child abuse, neglect and abandonment of this section. OAG 93-9.

16-1620. Immunity. — Any person who has reason to believe that a child has been abused, abandoned or neglected and, acting upon that belief, makes a report of abuse, abandonment or neglect as required in section 16-1619, Idaho Code, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any such judicial proceeding resulting from such report. Any person who reports in bad faith or with malice shall not be protected by this section. Any privilege between husband and wife, or between any professional person except the lawyer-client privilege, including but not limited to physicians, counselors, hospitals, clinics, day care centers and schools and their clients shall not be grounds for excluding evidence at any proceeding regarding the abuse, abandonment or neglect of the child or the cause thereof. [I.C., § 16-1620, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 19, p. 491; am. 1985, ch. 158, § 2, p. 416; am. 1995, ch. 328, § 1, p. 1097.]

Compiler's notes. Former § 16-1620 has been repealed, see Compiler's notes, § 16-1601.

Sec. to sec. ref. This section is referred to in § 54-4407.

Opinions of Attorney General. School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation so long as the reporting was done in good faith and without malice. OAG 93-2.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 4, 2003

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS0257\Q, HB 92, incorporating the attached two amendments. We are planning to bring the bill back up before the committee on Monday, April 7 at 1:00pm, so if we could get the draft CS by then it would be wonderful!

If you have any questions, please call me at 4990. Thank you!

Amendment #1

Gara

Proposed amendment:

Delete Page two, lines 9-12, everything after "AS.47.17.021"

Rationale: AS 47.17.290 defines child neglect as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child".

This is a fairly narrow definition and includes acts that should clearly be reported; for instance, child starvation; lock-ins (e.g., locking children in closets or sheds); lock-outs, (e.g., locking the child out of the house or throwing the child out); failure to provide medical care for injuries or illness; failure toprovide a child with shoes or a winter coat.

As with all professions, training is available to clergy if/as needed.

CARA

Amendment # 2

At Page 2

Delete Section 2.
+
Section 3.

Rationale

1. In our elder abuse law clergy Do not have a privilege exemption. Why create one for child abuse?

See Elder Abuse Law, AS 47.24.010(a)(10).

2. All other professionals, ~~who are~~ must report child abuse. If psychologists, counsellors + others should protect children by reporting abuse, so should clergy. It's a difficult issue, but protecting children is more important than protecting confidentiality.

Alaska State Legislature

Chair
Military and Veterans Affairs Committee

Vice-Chair
Labor and Commerce Committee

Member
Resources Committee
State Affairs Committee
Joint Armed Services Committee

Finance Subcommittees
House Environmental Conservation
House Military & Veterans' Affairs
House Court System

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

Session:
Alaska State Capitol
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
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716 W. 4th Ave., #330
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Phone: (907) 269-0205
Fax: (907) 269-0207
Representative_Bob_Lynn@legis.state.ak.us

March 31, 2003

To: Representative Lesil McGuire, Chairman
Judiciary Committee
Rep. Anderson; Rep. Holm; Rep. Ogg; Rep. Samuels;
Rep. Gara and Rep. Gruenberg

Fr: Representative Bob Lynn BL

Re: Scheduling of HB 92
"An Act relating to reports by members of the clergy who have reasonable cause to suspect that a child has suffered harm as a result of child abuse."

Thank you for scheduling HB 92 in the Judiciary Committee this Wednesday. Attached are the supporting documents for this bill. I would appreciate it if members of the committee would contact my office concerning any changes they might care to suggest in order that a CS might be prepared in advance of the meeting.

Alaska State Legislature

Chair
Military and Veterans Affairs Committee

Vice-Chair
Labor and Commerce Committee

Member
Resources Committee
State Affairs Committee
Joint Armed Services Committee

Finance Subcommittees
House Environmental Conservation
House Military & Veterans' Affairs
House Court System

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SPONSOR STATEMENT

HB 92

It is essential that children be protected from the abuse of sexual predators. Several classes of persons, such as nurses and teachers, are currently mandated to report actual or suspected child abuse to the appropriate authorities.

HB 92 adds clergy to the list of mandated reporters of child abuse. The bill does recognize and address the unique character of "penitential communication".

In summary, HB 92 adds to the protection of child safety, and enhances the beneficial work and reputation of the faith community.

Alaska State Legislature

Chair
Military and Veterans Affairs Committee

Vice-Chair
Labor and Commerce Committee

Member
Resources Committee
State Affairs Committee
Joint Armed Services Committee

Finance Subcommittees
House Environmental Conservation
House Military & Veterans' Affairs
House Court System

A Communication From
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District 31 Anchorage

Session:
Alaska State Capitol
Juneau, AK 99801-1182

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Sectional Analysis for HB 92

Section 1. Simply adds *clergy members* as a 9th category to the existing 8 categories of people currently required to report child abuse or neglect.

Section 2. Exempts knowledge obtained through a confession/penitential communication from the law.

Section 3. Defines Clergy member in statute

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 92
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to reports by members of the clergy . . .suspect that a child has suffered harm . . ."
BRU Criminal Division
Component All
Sponsor Representative Lynn
Requester House State Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would add members of the clergy to the list of mandatory reporters of child abuse and neglect, unless the knowledge of or reasonable cause to suspect child abuse and neglect was acquired during a penitential communication. The law would be retroactive, even if the victim had reached the age of majority. Failure to report is a class B misdemeanor.

The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 2/24/03 5:13 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 2/24/2003
Agency Department of Law

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 92
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: REPORTS OF HARM BY CLERGY
BRU: Family and Youth Services
Component: Front Line Social Workers

Sponsor: LYNN

Requester: HOUSE (STA)
Component No.: 2305

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 92 requires that members of the clergy be identified as mandated reporters of suspected child sexual abuse or neglect under certain circumstances. Section 1 amends AS 47.17.020(a) which governs identified mandatory reporters of suspected child abuse or neglect. The amendment adds clergy members to the list of mandated reporters. The Department is in agreement with requiring members of the clergy to be mandated reporters and supports this amendment.

Section 2 amends AS 47.17 by adding a new Section 47.17.021, which allows "penitential communication" to not be subject to the mandatory reporting requirement. The section goes on to define penitential communication as a communication with a clergy member intended to be confidential, as part of the clergy members official duties.

Prepared by: Tom Cherian, Acting Division Director — Phone 465-3191
Division: Family & Youth Services — Date/Time 02/20/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 02/27/2003
Agency: Department of Health and Social Services

ANALYSIS CONTINUATION

The Department supports Section 2 as written.

Section 3 amends AS 47.17.290 by adding a definition of "clergy member." The Department agrees with this definition.

Section 4 amends the uncodified law to address clergy reports of past sexual abuse. The amendment states that on or before January 1, 2004, a member of the clergy or a custodian of records for the clergy may report to the Department or law enforcement, suspected or known child sexual abuse that may have occurred in the past that they did not report. This applies even if the alleged victim has reached the age of majority. Law enforcement would have the jurisdiction to investigate these reports of past sexual abuse. There would be no penalty for failure to report the suspected abuse in the past. The Department supports this amendment.

Should this bill become law the department does not anticipate any fiscal impact.

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Section 2. Exempts knowledge obtained through a confession/penitential communication from the law.

Section 3. Defines Clergy member in statute

Section 4. Transitional provision encouraging clergy and record keepers to report suspicion of child abuse, which took place before the passage of this bill.