

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11185 SENATE JUDICIARY

On August 9, 1995, Bleicher executed an [\*\*4] affidavit that included the information obtained from Heaven and from his investigation. He filed that affidavit in support of a request for a search warrant for Burrece's property. On August 10, 1995, District Court Judge Peter G. Ashman called from the Palmer court to the Trooper's office in Wasilla and asked Trooper Bleicher some questions about the investigation and his affidavit. Judge Ashman stated in part:

Trooper Bleicher is present at my request, by telephone today, I received a long affidavit for a search warrant in 3PA-95106SW and I ... I'm basically prepared to grant the search warrant but I need to clarify a few points in the affidavit. [ ] I'm really basing my decision there's probable cause to search on matters contained in the affidavit, um and since that's been presented to me and sworn to, I believe that taking this additional telephonic testimony is [ ] I think there's ground to go forward in this fashion.

Judge Ashman asked Bleicher several questions and then announced, "I'm going to find that this is really not a proceeding on telephonic testimony but rather a telephonic ... an opportunity for the court to announce the basis of its decision [\*\*5] and for the officer to take advisement telephonically." Judge Ashman granted the search warrant.

On August 14, 1995, the troopers served the search warrant and found eleven marijuana plants (two of them dead), "starter" marijuana plants, and over a pound of marijuana.

Burrece was indicted on three counts of fourth-degree misconduct involving a controlled substance. She moved to suppress the evidence that was seized pursuant to the warrant. Following a hearing, Superior Court Judge Beverly M. Cutler denied Burrece's [\*243] motion. Burrece entered a no contest plea to one of the counts, preserving the issues that she argues on appeal.

#### Discussion

First, Burrece argues that Heaven's tip was stale because it was four months old when given to Bleicher. Because the tip was four months old, she argues that there was no reasonable ground to believe there was evidence on the property when Bleicher applied for the warrant.

Before a search warrant can be issued, the issuing judge or magistrate must be satisfied that current information supports a finding that probable cause to search presently exists. n3 Whether the information presented to the court is fresh or stale is determined by a flexible [\*\*6] test. That test considers the totality of the circumstances. One of those circumstances is the span of time that has passed from the acquisition of that information by the

informer or the police officer and the presentation of that information to the court. n4 Other relevant circumstances include the type of crime involved and the character of the items sought. n5

n3 See *Snyder v. State*, 661 P.2d 638, 646-47 (Alaska App. 1983).

n4 See *id.* at 647.

n5 See *Snyder*, 661 P.2d at 647-48.

Probable cause to search requires sufficient information to permit the conclusion that the criminal activity, the contraband, or the evidence of the crime will be found at the place to be searched. n6 That conclusion does not have to reach an absolute certainty, but the State must provide "reasonable grounds" to justify the conclusion that the items searched for are at the premises to be searched. n7

n6 See *id.* at 645.

n7 *Simmons v. State*, 899 P.2d 931, 934 (Alaska App. 1995).

#### [\*\*7]

Bleicher's affidavit described the large amount of equipment commonly found in an operating grow, including high intensity lights, ballasts, tracks, timers, heaters, fans, pumps, and other equipment. Bleicher also noted that the electrical power for such an operation commonly is provided by the local utility and that windows in structures containing a grow are commonly covered to enhance the artificial-light cultivation. His affidavit also noted that the pattern of power consumption had not changed since Heaven had been at the property and that the trailer described by Heaven had boarded-up windows. All of this indicates that the site of marijuana cultivation is not likely to move in the four-month period between Heaven's visit to Burrece's property and the application for the search warrant.

Considering the totality of the circumstances in this case, we conclude that Judge Ashman could properly find that the information before him provided reasonable grounds to believe that evidence of a marijuana grow would be found when he issued the warrant. Judge Ashman could reasonably rely on the large amount of equipment that can be required for the cultivation of marijuana, the ongoing character [\*\*8] of plant cultivation, coupled with the specific information in Bleicher's affidavit about Burrece's property to conclude that there would be evidence of a marijuana grow on Burrece's property. The specific information included the report of the unchanging pattern of electrical consumption (which provided an additional basis to infer that the cultivation

was ongoing and to conclude that Heaven's tip was not stale) and Heaven's report to Bleicher about the marijuana. Thus, we reject Burrece's contention that the warrant was invalid because Heaven's tip was stale.

Burrece argues that Judge Ashman could not rely on the evidence of electrical consumption when granting this warrant. But as we noted above, the evidence of the pattern of electrical usage that was provided in the warrant permitted an inference that there was no significant change in the activity on the property since Heaven visited. We conclude that the district court could rely on the description of Burrece's pattern of electrical consumption to infer that Heaven's tip described an ongoing operation.

[\*244] Finally, Burrece relies on AS 12.35.015(a) n8 to attack the district court's use of Trooper Bleicher's telephonic testimony [\*\*9] in support of the warrant. Burrece argues that the exclusionary rule should be applied to suppress any evidence obtained pursuant to the warrant because Judge Ashman did not follow the procedure established in that statute. For purposes of resolving this issue, we assume that the statute applies to this case.

n8 AS 12.35.015(a) provides:

A judicial officer may issue a search warrant upon the sworn oral testimony of a person communicated by telephone or other appropriate means, or sworn affidavit transmitted by facsimile machine, if the judicial officer finds that there is probable cause to believe that

(1) the presentation of the applicant's affidavit or testimony personally before the judicial officer would result in delay in obtaining a search warrant and in executing the search; and

(2) the delay might result in loss or destruction of the evidence subject to seizure.

While Judge Ashman did not make the findings required by AS 12.35.015(a), Burrece has neither shown nor argued any bad faith [\*\*10] on the part of the court or the trooper. n9 Burrece argues that a violation of the statute by Judge Ashman is sufficient to suppress the evidence obtained pursuant to the warrant. But she does not argue that any of Bleicher's testimony was a critical or indispensable component of Judge Ashman's probable cause finding.

n9 See AS 12.35.015(f) ("Absent a finding of bad faith, evidence obtained under a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances did not support its issuance under (a) of this section.").

In several decisions, our appellate courts have faced the question whether the government's violation of a statute should result in the suppression of evidence. n10 An analysis of those decisions shows that the exclusionary rule embodied in Alaska Rule of Evidence 412 has not been applied when the statute that has been violated is wholly unrelated to a defendant's constitutional rights. n11 Furthermore, in *Sundberg*, a factor in the supreme court's [\*\*11] analysis was the absence of a legislative directive to apply the exclusionary rule to the violation of the statute at issue. "We note that there is no legislative directive calling for invocation of an exclusionary rule as a sanction ...." n12 In the statute in question here, the legislature issued a directive that the exclusionary rule should not apply in the absence of bad faith. And the statute here does not implement or enforce a defendant's constitutional right, but regulates the process of search warrant applications.

n10 See *Zsupnik v. State*, 789 P.2d 357, 361 (Alaska 1990); *Ward v. State*, 758 P.2d 87, 90 (Alaska 1988); *Copelin v. State*, 659 P.2d 1206, 1214-15 (Alaska 1983); *State v. Sundberg*, 611 P.2d 44, 50-52 (Alaska 1980); *Nathan v. Anchorage*, 955 P.2d 528, 533 (Alaska App. 1998); *Harker v. State*, 637 P.2d 716, 719-20 (Alaska App. 1981).

n11 Cf. *Zsupnik*, 789 P.2d 357, *Ward*, 758 P.2d 87, and *Copelin*, 659 P.2d 1206, with *Sundberg*, 611 P.2d 44, *Nathan*, 955 P.2d 528, and *Harker*, 637 P.2d 716.

n12 *Sundberg*, 611 P.2d at 50.

[\*\*12]

Burrece has not claimed that the purported violation of the statute was in bad faith. Furthermore, she has not claimed that absent Bleicher's testimony, the warrant would be invalid. We conclude that the exclusionary rule should not apply.

*Conclusion*

The judgment of the superior court is AFFIRMED.

CONCURBY:  
COATS

CONCUR:  
COATS, Chief Judge, Concurring.

I write separately because I am concerned that the court's decision might be read as more critical of Judge Ashman's actions than it should be. In my view, it is highly questionable whether Judge Ashman acted in violation of AS 12.35.015(a) when he took supplemental telephonic

testimony from Trooper Bleicher. As Judge Mannheimer concedes, there was nothing improper in Judge Ashman's action in having Trooper Bleicher provide supplemental information to strengthen the state's showing of established probable cause. n1 This appears to me to be the action of a conscientious magistrate reviewing a search warrant.

n1 Dissent at page 17.

[\*245] Since the information which [\*13] Trooper Bleicher provided was not the original application for the search warrant but was supplemental, in my view there is a serious question whether *AS 12.35.015* required Judge Ashman to find, in order to proceed telephonically, that "the delay might result in loss or destruction of the evidence subject to seizure." n2 Judge Stewart does not resolve this issue in his opinion. He concludes that even if there was a violation of the statute, Burrece has not made any claim which would warrant application of the exclusionary rule.

n2 *AS 12.35.015(a)(2)*.

I agree with Judge Stewart's opinion. However, I would state the conclusion somewhat more strongly. I think it is an open question whether Judge Ashman violated *AS 12.35.015(a)* in taking the supplemental testimony. I believe Judge Ashman's conclusion that the statute did not prevent telephonic supplementation was reasonable. Under these circumstances, I conclude that it would be inappropriate to find that Judge Ashman acted in bad faith. I further conclude that it [\*14] would not be appropriate to apply the exclusionary rule to this case.

**DISSENTBY:**  
MANNHEIMER

**DISSENT:**

MANNHEIMER, Judge, dissenting.

I agree with the majority's resolution of all issues except the last: Judge Ashman's decision to take telephonic testimony from Trooper Bleicher. The record shows that Judge Ashman knowingly violated *AS 12.35.010(b)* and *AS 12.35.015(a)*. n1

n1 *AS 12.35.010(b)* states, "A judicial officer may issue a search warrant upon the sworn oral testimony of a person communicated by telephone or other appropriate means, or sworn affidavit submitted by facsimile machine, in accordance with *AS 12.35.015*."

The pertinent language of *AS 12.35.015* is discussed in this dissent.

Judge Coats reasons that Judge Ashman did not violate these statutes since the trooper's telephonic testimony supplemented a prior written affidavit. But neither *AS 12.35.010(b)* nor *AS 12.35.015(a)* draws any distinction between an officer's initial testimony and any later testimony the officer may give to bolster the search warrant [\*15] application.

Judge Stewart concludes that even if Judge Ashman violated these statutes, the violation should be ignored. For the reasons explained here, I do not agree.

The facts of this case are straightforward. Trooper Bleicher initially applied for the search warrant by affidavit. After Judge Ashman read this affidavit, he contacted Bleicher and asked the trooper to give supplemental telephonic testimony:

**THE COURT:** Trooper Bleicher is present, at my request, by telephone today. I received a long affidavit for a search warrant in [case number] 3PA-95-106 SW, and I — I'm basically prepared to grant the search warrant, but I need to clarify a few points in the affidavit. Trooper Bleicher ... is [currently] located across the Valley in Wasilla, is that right?

**BLEICHER:** That is correct.

**THE COURT:** All right. And you're thirty minutes or so away from the courthouse?

**BLEICHER:** At least. Yes.

**THE COURT:** And it's now 5:10 in the afternoon. Given that the matters [I wish to inquire into] are simply ones of ... brief clarification, and [given] that Trooper Bleicher has testified personally in front of me literally hundreds of times, I believe that it's appropriate to [\*16] [take] brief supplemental telephonic testimony as part of the search warrant [application]. It's not an [indiscernible] circumstance, and I don't believe that it would cause the loss or destruction of evidence. And if the State feels that it would be more appropriate to set this [hearing] for a time when the trooper could be present personally, I'd be happy to accommodate the trooper. Trooper Bleicher, is it your preference to go forward like this today, or would you like an opportunity to come over [to the courthouse in Palmer]?

**BLEICHER:** I would like ... [to] proceed telephonically.

Under *AS 12.35.015(a)*, a judicial officer has the authority to hear a search warrant application telephonically, but only "if the [\*246] judicial officer finds that there is

probable cause to believe that ... [personal] presentation of the applicant's affidavit or testimony ... would result in delay [that] might result in loss or destruction of the evidence subject to seizure". The problem in the present case is that Judge Ashman affirmatively found that the statutory requirement was *not* satisfied. That is, Judge Ashman affirmatively found that there was no reason to believe that [\*\*17] delay might result in loss or destruction of any evidence.

The majority offers three reasons why Judge Ashman's violation of the statute does not matter.

First, the majority adopts Judge Ashman's rationale that the search warrant application was essentially complete, that Judge Ashman had already decided to issue the warrant, and that the judge only wanted the trooper to provide "brief clarification" of the matters stated in the affidavit. However, the record shows that Judge Ashman was not simply seeking clarification of Bleicher's affidavit. Instead, the judge was trying to supplement the record with fairly important information.

The search warrant application in this case was based primarily on hearsay information obtained from Troy Heaven, so the government had to establish Heaven's "basis of knowledge" and "credibility" under the Aguilar - Spinelli test. n2 Heaven gave the police a detailed account of discovering marijuana at Burrece's residence, thus satisfying the "basis of knowledge" prong of Aguilar - Spinelli. But the evidence supporting Heaven's credibility was thin. Heaven was a "police informant", and he had not provided information to the police in the [\*\*18] past. Moreover, in his statements to the police, Heaven provided reason to suspect that he was motivated by revenge or ill-will toward Burrece. (Heaven had a friend who was wanted by the law. The friend had been staying at Burrece's residence; but when Burrece discovered that Heaven's friend was hiding from a warrant, Burrece threw the friend out.) Thus, independent corroboration of Heaven's story was crucial to the issuance of the warrant.

n2 *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). See *State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of Alaska law, the Aguilar - Spinelli test continues to govern the evaluation of hearsay information offered to support a search or seizure).

In his affidavit, Trooper Bleicher referred to the fact that another search warrant had already been issued for a laundry in Big Lake. This prior search warrant application was based [\*\*19] on a tip provided by Troy Heaven,

who was also the informant in Burrece's case. However, Bleicher's affidavit was unclear regarding what the police discovered when they served the warrant at the laundry. Bleicher's affidavit stated:

[The] investigators observed that the Big Lake laundry mat [sic] *had been utilized* as a marijuana grow operation with extensive damage done to the facility, as well as evidence of marijuana being grown in 3 separate rooms within that building. The marijuana grow operation *appeared to have been an ongoing operation for an extended time period*[,] such as a couple of years.

(Emphasis added) This description, combined with Bleicher's failure to assert that the troopers found any marijuana or other evidence of current or recent marijuana cultivation, makes it sound as if the troopers had found an abandoned marijuana cultivation site. This state of affairs would arguably be inconsistent with Heaven's assertion that he had recently burglarized the laundry and had found marijuana growing there.

As the following portion of the transcript shows, Judge Ashman knew that the troopers had found quantities of marijuana when they served that [\*\*20] earlier warrant — a discovery which indicated that the site was only recently abandoned:

THE COURT: I reviewed the [trooper's current] affidavit, and I actually did the search warrant that's referred to, on ... let's see ...

BLEICHER: 8-4-95?

THE COURT: Yeah, I'm trying to find the page reference. Okay, the operation referred to on page 3 [of the current affidavit]; ... a Big Lake laundry was the [\*\*247] subject of [an earlier] search warrant, is that right?

BLEICHER: That's correct.

THE COURT: And ... as I read this affidavit, that [earlier] warrant was executed, and there were drugs found?

BLEICHER: That is correct, Your Honor.

...

THE COURT: And it was Troy Heaven who was one of the ... informants in that [earlier] case? And the State is asking the court to ... find that Heaven's credibility is corroborated by the fact that his information about the Big Lake laundry was verified by the search, is that right?

BLEICHER: That is correct.

In the above-quoted exchange, Judge Ashman indicates that all of this information about the earlier search was already contained in Bleicher's affidavit. But the judge's statement is not supported by the record. Bleicher's

[\*\*21] affidavit referred to the earlier search warrant issued for the laundry in Big Lake and the fact that Troy Heaven provided the tip about that laundry, but Bleicher's affidavit did not fully describe the results of that earlier search. From the record, it appears that Judge Ashman independently knew the results of that search because he was the judicial officer who issued the earlier warrant.

To me, this record indicates that Judge Ashman was not simply trying to "clarify" Bleicher's affidavit. Rather, Judge Ashman was attempting to make a record — attempting to supplement Bleicher's affidavit with material information that the judge already knew but that Bleicher had forgotten to mention. For this purpose, Judge Ashman asked Bleicher a series of leading questions — questions that simply required Trooper Bleicher to confirm the judge's statements.

I am not suggesting that Judge Ashman acted improperly when he prompted Bleicher to provide supplemental information. Judicial officers often deal with testimony or affidavits that are imprecisely or inartfully worded, requiring the judge to elicit clarifying testimony or supplemental affidavits. Moreover, I do not believe that judges [\*\*22] necessarily overstep their proper role when they ask police officers to confirm important facts that are already well-known but that somehow did not find their way into the officer's search warrant application. The problem here is that Judge Ashman was eliciting these important facts by telephone.

The fact that the earlier search of the laundry yielded positive evidence of a recently-abandoned marijuana cultivation site was not mere "clarification" of Bleicher's affidavit. This information was not contained in Bleicher's affidavit. Moreover, judging from the pains that Judge Ashman took to place this information on the record, the judge did not view this information as trivial. Rather, the record shows that Judge Ashman considered this information to be important when assessing the credibility of Troy Heaven's tip in Burrece's case.

For these reasons, I reject the idea that Bleicher's telephonic testimony was a mere "clarification" of his affidavit, and I further reject the majority's conclusion that Bleicher's telephonic testimony was of trivial importance.

Judge Coats concludes that, even if Bleicher's supplemental information was material to the ultimate finding of probable cause, [\*\*23] Judge Ashman did not violate *AS 12.35.010(b)* and *AS 12.35.015(a)* when he elicited the trooper's supplemental testimony by telephone. Judge Coats notes that Trooper Bleicher had previously submitted an affidavit in support of the search warrant application; the trooper's telephonic testimony was a "supplement" to this affidavit. Judge Coats then suggests that the

statutes apply only to the initial testimony in support of a search warrant — that they do not restrict telephonic testimony that "supplements" prior testimony.

The problem with this analysis is that the two statutes neither contain nor suggest any such distinction. By their terms, both *AS 12.35.010(b)* and *AS 12.35.015(a)* define the circumstances in which "[a] judicial officer may issue a search warrant upon ... sworn oral testimony ... communicated by telephone". The statutes do not distinguish between testimony that was part of the initial [\*\*248] search warrant application and testimony that was supplied later as a supplement to the application. If Judge Ashman relied upon Trooper Bleicher's telephonic testimony when he made his decision to issue the search warrant (and the record shows that he did), then Judge Ashman "issued [\*\*24] a search warrant upon ... sworn oral testimony ... communicated by telephone", and the two statutes governed his conduct.

Moreover, Judge Coats's suggestion that *AS 12.35.010(b)* does not apply to "supplemental" testimony leads to unacceptable results. Applying this same logic to the other subsection of the statute, *AS 12.35.010(a)*, one might conclude that the requirement of "oath or affirmation" applies only to the initial search warrant application — that supplemental statements in support of a search warrant need not be under oath. Such an interpretation, I assume, would be rejected out of hand. But just as I believe that *AS 12.35.010(a)* applies to any and all statements presented in support of a search warrant application, I likewise believe that its sibling provision, *AS 12.35.010(b)*, applies to any and all statements presented in support of a search warrant application. I therefore conclude that *AS 12.35.010(b)* and *AS 12.35.015(a)* apply to all telephonic testimony in support of a search warrant — even telephonic testimony that "supplements" an earlier search warrant application.

The majority offers a second reason for concluding that Judge Ashman's violation of the statute [\*\*25] does not matter. A separate clause of *AS 12.35.015* — subsection (f) — declares that, "absent a finding of bad faith, evidence obtained under a warrant issued under this section is not subject to [suppression] on the ground that the circumstances did not support [the warrant's] issuance under (a) of this section." Translating subsection (f) into plain English, the legislature has declared that when a search warrant is issued on the basis of a telephonic application, the warrant will generally remain valid even if the defendant later shows that there was, in fact, no probable cause to believe that delay in issuing the warrant would result in loss or destruction of evidence. The only exception is for situations in which someone has acted in bad faith.

The majority asserts that "Burrece has neither shown

nor argued any bad faith on the part of [Judge Ashman] or the trooper". I am not sure what the majority means by "bad faith". If, by "bad faith", the majority means "evil motive", the answer is that no evil motive is required.

As the transcript demonstrates, Judge Ashman knew that AS 12.35.015(a) authorized him to accept a telephonic search warrant application only under specific [\*\*26] circumstances. The judge declared that these circumstances did *not* exist (and the trooper did not dispute the judge's statement). The judge then stated that he would take Bleicher's telephonic testimony anyway. No other sort of "bad faith" is required to establish a violation.

The majority offers a third reason why Judge Ashman's violation of the statute does not matter. According to the majority, Burrece's challenge to the warrant must be rejected because Burrece has failed to assert that, but for Bleicher's telephonic testimony, the search warrant would not have been issued. It is true that Burrece does not directly assert that Bleicher's telephonic testimony was material to Judge Ashman's decision to issue the warrant, but the record certainly suggests that this was the case.

As explained above, Bleicher's telephonic testimony was not merely a trivial clarification of his affidavit; rather, it materially supplemented the information in the affidavit. Moreover, Judge Ashman went to a great deal of effort to make sure that Bleicher's "clarification" was placed on the record. To me, this strongly implies that Judge Ashman was not willing to issue the warrant until Bleicher provided [\*\*27] the supplemental testimony.

For these reasons, I can not join in the majority's decision to ignore Judge Ashman's violation of AS 12.35.015(a). I conclude that the statute was inexcusably violated, and I further conclude that the violation was important to the issuance of the search warrant.

[\*249] One might be tempted to ask what difference all of this makes. We live in an age of global wireless telephonic communication, an age of fax and of Internet e-mail. What purpose could be served by limiting a court's authority to accept telephonic search warrant applications — especially in a state like Alaska, where great distances have always hampered traditional forms of communication? I have two answers.

First, it is important that the guardians of the law take pains to observe the law. Whatever the arguments may be for unrestricted telephonic search warrants, the legislature has decreed that courts can accept telephonic search warrant applications only in limited circumstances. Trial judges and magistrates should not knowingly ignore these limitations, nor should this court turn a blind eye when the statute is violated — as I believe it was in this case.

The district court decided to take [\*\*28] Bleicher's telephonic testimony — in fact, the court actively solicited Bleicher's telephonic testimony — because it was the end of the business day (5:10 p.m.) and because Bleicher was some thirty minutes away by car. The court took Bleicher's testimony telephonically even though the court openly acknowledged that there was no reason to believe that a thirty-minute delay might result in loss or destruction of evidence. Inconvenience is not a valid reason to ignore the statute.

Second, the legislature's decision to limit telephonic search warrant applications is supported by important policy considerations. Clearly, the limitation on telephonic search warrant applications is not intended to ensure that officers apply in person for search warrants; if that had been the legislature's aim, they would have outlawed search warrant applications by affidavit. Instead, I conclude that telephonic testimony is disfavored because of the different way in which the oath is administered to the person(s) applying for the warrant.

In a normal search warrant application, the officer either signs an affidavit or testifies in court. In either case, the officer must personally appear before an official [\*\*29] (either a notary or a judge) and, in that official's presence, the officer must swear or affirm that they are telling the truth. When an oath is administered by telephone, on the other hand, there is no formal moment when the officer must stand before a public official, face to face, and formally swear or affirm that they are telling the truth.

Bowing to practical necessity, the legislature has authorized telephonic testimony and its less-formal oath, but only in restricted circumstances. Judge Ashman specifically found that those circumstances did not exist in Burrece's case.

Because there was no justification for the district court's violation of AS 12.35.015(a), and because Bleicher's telephonic testimony appears to have been material to the issuance of the search warrant, I conclude that Burrece should be entitled to a reversal of her conviction if one other condition is met: if, as a legal matter, a knowing violation of AS 12.35.015(a) requires suppression of the resulting evidence.

This question — whether courts should apply the exclusionary rule to purposeful violations of AS 12.35.015(a) — has no easy answer. Moreover, the parties have thus far failed to address this issue. [\*\*30] I would order the parties to brief this issue, and, if suppression is indeed the remedy for a violation of the statute, I would reverse Burrece's conviction.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR THERRIAULT

TO: SCS CSSSHB 86(JUD)

1 Page 1, following line 2:

2 Insert a new bill section to read:

3 **"\* Section 1.** The uncodified law of the State of Alaska is amended by adding a new  
4 section to read:

5 **PURPOSE AND FINDINGS.** (a) The purpose of secs. 3 and 4 of this Act is to  
6 legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin  
7 that have, as of the effective date of this Act, a final authorization, permit, or other form of  
8 approval from the Department of Environmental Conservation, the Department of Fish and  
9 Game, the Department of Natural Resources, or the division of governmental coordination,  
10 formerly part of the office of management and budget. AS 46.40.096(i), added by sec. 3 of  
11 this Act and sec. 4 of this Act supersede and replace any other form of approval previously  
12 required by law. A project authorized and approved by AS 46.40.096(i), added by sec. 3 of  
13 this Act and sec. 4 of this Act shall remain subject to regulation by any agency having  
14 jurisdiction over the project, consistent with the terms and requirements of the authorization,  
15 permit, or other approval issued by the agency.

16 (b) The legislature finds that

17 (1) it is in the best interests of the state to legislatively approve and authorize  
18 the oil and gas projects covered by secs. 3 and 4 of this Act;

19 (2) secs. 3 and 4 of this Act coincide with an executive branch reorganization  
20 directly affecting the Department of Environmental Conservation, the Department of Fish and  
21 Game, the Department of Natural Resources, and the division of governmental coordination,  
22 formerly part of the office of management and budget; secs. 3 and 4 of this Act are intended  
23 to help facilitate the reorganization and the transition to a new administrative structure by

1 removing from these agencies the burden of possible or on-going litigation over past  
2 administrative decisions;

3 (3) secs. 3 and 4 of this Act avoid costly litigation over projects overseen by  
4 these agencies that uniquely benefit all Alaskans, especially the larger population centers and  
5 communities encompassed by the Cook Inlet Basin; among other benefits, those projects  
6 provide jobs, generate local tax revenue, and fuel local economies by their tertiary economic  
7 effects; the legislature finds that it is in the public interest to promote those projects, without  
8 litigation;

9 (4) the public interest is protected by secs. 3 and 4 of this Act; all oil and gas  
10 projects authorized and approved by this Act remain subject to the regulation and oversight of  
11 all state agencies with jurisdiction over those projects; the appropriate state agencies shall  
12 regulate each project consistent with the terms and requirements of any permit or approval  
13 previously granted for the project; those permits and approvals are granted only after  
14 extensive administrative review, including public notice and comment with respect to the  
15 project; compliance with those requirements, coupled with the continued oversight by the  
16 appropriate state agencies, will ensure the protection of human health and safety and the  
17 environment."

18

19 Page 1, line 3:

20 Delete "Section 1."

21 Insert "Sec. 2."

22

23 Page 2, following line 19:

24 Insert new bill sections to read:

25 **"\* Sec. 3.** AS 46.40.096 is amended by adding a new subsection to read:

26 (i) Notwithstanding any other provision of law, and except with respect to an  
27 appeal filed by the applicant or an affected coastal resource district, or a claim based  
28 on the United States Constitution or the Constitution of the State of Alaska, a  
29 consistency determination made under this section is

30 (1) not subject to review, stay, or injunction by any court; and

31 (2) effective immediately.

1     \* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to  
2 read:

3           AUTHORIZATION AND APPROVAL OF PROJECTS IN THE COOK INLET  
4 BASIN. Notwithstanding any other provision of law, any oil and gas project located within  
5 the Cook Inlet Basin that, as of the effective date of this Act, is the subject of a final  
6 authorization, permit, or approval of the Department of Environmental Conservation, the  
7 Department of Fish and Game, the Department of Natural Resources, and the division of  
8 governmental coordination, formerly part of the office of management and budget, is hereby  
9 authorized and approved by the legislature. The authorization and approval provided by this  
10 section supersedes and replaces any permit or authorization previously required by law.  
11 AS 46.40.096(i), added by sec. 3 of this Act, and this section, the authorization and approval  
12 provided by sec. 3 of this Act and this section, and the final agency action previously required  
13 by law are not subject to judicial review or, if pending, continued judicial review. A project  
14 under this section shall continue to be subject to the jurisdiction of the appropriate state  
15 agencies, as otherwise provided by law, and shall be regulated under the terms and  
16 requirements of any permit or approval previously granted for that project, which are  
17 incorporated by reference in the authorization provided by this section."

18

19     Renumber the following bill section accordingly.

## Total Annual Impact to the State of Idling Redoubt Unit -- \$73.9 Million.

- Loss of \$1.2 million in property taxes.  
(60% to Borough, 40% to State)
- Loss of \$1.5 million in Redoubt royalties.
- Loss of \$500,000 in other Cook Inlet royalties.  
(due to higher (50¢/bbl) pipeline tariff on royalty oil)
- Loss of \$60,000 in production taxes.
- Direct loss of 150 high paying jobs with an estimate payroll of \$15 million. (Source: 2001 McDowell Study on Economic Impact of Oil Industry in Alaska)
- Indirect loss of 900 jobs with an estimated payroll of \$45 million.  
(Source: 2001 McDowell Study on Economic Impact of Oil Industry in Alaska)
- [NOTE: The above reflects loses at current production levels. The Development Plan for the Redoubt Unit contemplates increased production from the Unit as additional wells are drilled. These numbers increase significantly as production from the Unit increases over time.]

**FOREST OIL CORPORATION**

1600 Broadway, Suite 2200  
Denver, Colorado 80202  
303.812.1400 - Main

To: Brian Hove

Senator Ralph Ceekins Office

Fax #: 907-465-5241 Phone #: \_\_\_\_\_

Date: May 16, 2003

From: Newton W. "Trey" Wilson III  
Senior Vice President – Legal Affairs & Secretary

Phone: 303.812.1569

Fax: 303.812.1510

Assistant: Andrea St. Peter  
303.812.1645

Total number of pages (including cover sheet): 4

• **COMMENTS:**

RE: **HEARING OF THE ALASKA SENATE JUDICIARY COMMITTEE CONCERNING HOUSE BILL 86  
LETTER DATED MAY 16, 2003**

~~~~~  
THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INTENDED RECIPIENT NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY COPYING OF THIS COMMUNICATION OR DISSEMINATION OR DISTRIBUTION OF IT TO ANYONE OTHER THAN THE INTENDED RECIPIENT IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE.  
~~~~~

If you have any problems with this fax, please call Andrea St. Peter at 303.812.1645



## F O R E S T O I L C O R P O R A T I O N

*1600 Broadway • Suite 2200**Denver, Colorado 80202 (303) 812-1400*

May 16, 2003

Honorable Genc Therriault  
State Senate President  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Re: Hearing of the Alaska Senate Judiciary Committee Concerning House Bill 86

Dear Senator Therriault:

My name is Trey Wilson. I am an officer of Forest Oil Corporation and am located in the Company's headquarter offices in Denver, Colorado. My title is Senior Vice President, General Counsel & Secretary. In that capacity I provide legal advice to the senior management and Board of Directors of Forest Oil and attend all meetings of the Board and its committees. I have been with Forest Oil since November 2000.

It is my understanding that there will be a hearing of the Alaska Senate Judiciary Committee this afternoon regarding an amendment to House Bill 86, which amendment would provide legislative ratification of certain Cook Inlet projects with existing permits and final consistency determinations. It is also my understanding that if this amendment is adopted and House Bill 86 then becomes law, one effect would be legal finality to the permits and other approvals received by Forest Oil with regard to its Redoubt Shoal development and production project.

Gary Carlson, Forest Oil's Senior Vice President – Alaska, will testify at today's hearing regarding the amendment. I am sure he will inform the Committee as to the millions of dollars that Forest Oil has invested in projects in Alaska. However, I would like to share with you my thoughts on the impact of the existing uncertainty overshadowing the permitting and approval processes in Alaska for projects like Redoubt Shoal.

The Company believes that it has made a strong and committed effort to meet the regulatory requirements of the State of Alaska with regard to all of its projects and operations. We take our legal obligations very seriously, and we very much want to be a good corporate citizen as we conduct business in Alaska. We want to earn a good reputation with Alaskans as to the quality of our operations and our sensitivity to the concerns of our host state and its citizens. Therefore, we work very hard during the permitting and approval process to ensure that our projects satisfy the requirements of the State of Alaska. However, our experience has been that even though our projects have received the approval of the State, after significant opportunity for comment and input

Honorable Gene Therriault  
May 16, 2003  
Page 2

has been given to citizens of the State, there remains great uncertainty with regard to our ability to continue operations as planned without interruption.

In fact, the State's approval of our Redoubt Shoal project has to date been repeatedly attacked in the courts of Alaska at great expense to Forest Oil. In the last several years we have spent more than \$360,000 in legal expense and other fees associated with this litigation. However, more troubling than the cost is the uncertainty associated with the litigation. As you may know, our drilling operations were enjoined by the Supreme Court of Alaska for a number of weeks during the last session of the legislature, causing us to suspend drilling operations at Redoubt Shoal at a significant cost to the Company.

I can assure you that the litigation and the subsequent injunction gravely concerned our senior management and our Board of Directors, and they had great difficulty understanding how a project that had been so thoroughly reviewed by the State of Alaska could possibly be enjoined by a court. They also could not understand how a court could conclude that our drilling operations represent such a serious threat to the interests of others as to require a suspension of operations. With the help of the Alaska Legislature, we were ultimately able to put that litigation to rest; but as soon as our development and production phase permitting was final, new litigation commenced. We are now again embroiled in litigation involving the Superior Court and the Supreme Court of Alaska.

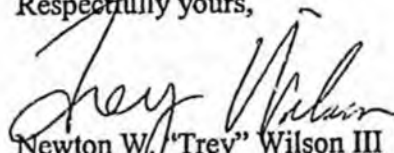
This litigation and its attendant uncertainty have a genuine negative effect on our Board of Directors as it considers investment in new projects. Currently we have nine prospects in Alaska with unrisks reserve potential of over 2 trillion cubic feet of gas and gas equivalents. Our Board of Directors has not yet made a decision to invest in any of these prospects and continues to weigh the additional costs and risks associated with litigation challenging State permitting action in Alaska. Additionally, it is difficult to find other investors to join us in the drilling of these prospects given the uncertainty of the permitting process. Finally, I would like to add that I believe that this uncertainty has also had a negative effect on the market's valuation of the Company's common stock. Indeed, we feel the need to describe the status of the on-going litigation in Alaska in the Company's periodic reports to the SEC.

In conclusion, we respectfully request that the Committee favorably consider the proposed amendment to bring finality to the permitting process for Cook Inlet projects. Adoption of the amendment would allow Forest Oil to continue to drill the remaining wells required for full development of the Redoubt Shoal field without interruption. We greatly appreciate the support that we have received from the Alaska State Legislature for our presence and operations in Alaska, and we hope that conditions will develop in the State that will encourage Forest Oil to make significant additional investment in oil and gas activities.

Honorable Gene Therriault  
May 16, 2003  
Page 3

I appreciate the opportunity to share my thoughts regarding this matter.

Respectfully yours,



Newton W. "Trey" Wilson III  
Senior Vice President, General Counsel & Secretary

NWW:asp

xc: Robert S. Boswell, Chairman and CEO  
H. Craig Clark, President and COO

Testimony of Gary E. Carlson, Senior Vice President  
Alaska Division, for Forest Oil Corporation  
On House Bill 86  
Before the Senate Judiciary Committee  
May 16, 2003

Mr. Chairman and members of the Committee, for the record my name is Gary Carlson, Senior Vice President Alaska of Forest Oil Corporation. Joining me today by telephone is Mr. Trey Wilson, Senior Vice President, General Counsel & Corporate Secretary for Forest Oil, who also has submitted a letter for the record and is available to respond to any questions the Committee might have regarding the Redoubt litigation. We appreciate this opportunity to address the committee this afternoon, as HB 86, as amended, is critical to Forest Oil and its Alaska operations.

Forest Oil is the operator of the Osprey Platform, which is developing the Redoubt Shoal Oil Field located offshore in Cook Inlet south of Anchorage. The Redoubt Shoal Field is the largest oil field to be developed in Cook Inlet since the early 1970s, and its production is vital to both Forest Oil's and the state's interest. Forest Oil has invested over 200 million dollars in this project to date, and it and the State are just now beginning to see some return on that investment.

The facilities to process the production have been installed and are functioning as designed. The pipelines have been installed, tested and commissioned. They are now transporting approximately 3,500 barrel of oil per day. It is hoped that this volume will climb to 10,000 barrels per day as additional development wells are completed and the field reached its maximum production.

All of this was accomplished in a safe manner, using state-of-the-art design, engineering and innovation to minimize the environmental impacts of the project. For example the Osprey Platform:

- is the first platform in the Cook Inlet to grind and inject all of its drill cuttings, thus eliminating the need to transport and bury those materials ashore;
- the first platform to re-inject all of its produced fluids on location;
- the first platform to electrify its drilling rig using shore power, thus eliminating the need for diesel engines and reducing associated air emissions; and
- the first Cook Inlet platform to use shore borings for pipeline installation, thus eliminating any disturbance to the shoreline.

As an investor in the State's resource development, we have done what the State asked—plus. Notwithstanding all of these voluntary efforts to minimize conflicts and to provide enhanced environmental protection, development of the Redoubt Shoal project has been the subject of continuing litigation, quite literally, since before the involved leases were issued by the State of Alaska. For those of you who may not be aware of the scope and the continuity of that litigation, I have summarized it in the attached chronology, because I think it is very important for you to recognize the financial costs and uncertainty that such litigation entails and the amount of value it destroys. Mr. Wilson, as well as Forest's outside counsel involved in the litigation, are available to answer any detailed questions related to the litigation that members may have.

As the attached chronology reflects, 10 years after the issuance of the subject leases was determined by Alaska to be both in the State's best interest and consistent with the Alaska Coastal Zone Management Program, litigation and uncertainty over the scope and cost of the development of the Redoubt Shoal Field continues. In fact, since the State made its initial decision to lease the Redoubt tracts in 1993, the Redoubt leases, as well as specific project permits and approvals, have been the subject of four separate legal challenges each of which involved substantially the same complaint – that leasing the

Redoubt tracts and authorizing oil and gas exploration and development on those tracts is not consistent with the Alaska Coastal Zone Management Program.

The cost of the litigation alone for Forest now exceeds \$2.0 million, including the costs of the shut-down as well as direct litigation costs. These costs do not reflect the costs that the Alaska Department of Law and other State agencies have incurred in defending the State's permits and authorizations.

Today, as we are continuing to drill the development wells necessary to realize the field's production potential, we are doing so under the very real threat that the Alaska Supreme Court could issue an injunction at any time. If it were to do so, the fiscal impacts for both Forest Oil and the State of Alaska would be dramatic and immediate. I have also attached another table that summarizes the minimum fiscal impacts that would occur, based upon the existing production volumes, which of course are considerably smaller than those anticipated at full production.

In summary, a shut down at this stage would cost the State and its citizens annually over \$73.9 million as follows:

- Loss of \$1.2 million in property taxes;
- Loss of 1.5 million in royalties from Redoubt production;
- Loss of an additional \$500,000 in other Cook Inlet royalties;
- Loss of at least \$60,000 in production taxes;
- Direct loss of 150 high paying jobs, with an estimated payroll of \$15 million; and
- Indirect loss of 900 jobs, with an estimated payroll of \$45 million.

The duration of those losses, should an injunction be issued, cannot be predicted. However, based upon the record of litigation to date, it would be unreasonable to assume that there would be a quick resolution.

In our view, there are few things that the Legislature can do to encourage continued and expanded exploration and development in Cook Inlet and elsewhere in the State that

would rival passage of this bill. We believe that it also makes sense in light of the Legislature's recent passage of House Bill 191 streamlining the State's administration of the Coastal Zone Management process.

Legislative ratification of oil and gas projects in Cook Inlet that have already received all their permits and Coastal Zone Consistency approvals under the prior procedures would eliminate the continuing uncertainty, avoid unnecessary litigation costs for all parties and assure the State's continued receipt of royalties, severance taxes and property taxes vital to its economy. Finally, and perhaps most importantly, it would send the clearest signal that having completed the long and costly process of compliance with the permitting and CZM procedures set out in statute, companies will be assured of their opportunity to develop the State's resources so long as their activities remain in compliance with the terms of their permits and authorizations.

Thank you again for the opportunity to share our views on this matter, and we urge your favorable consideration and passage of HB 86. I will be happy to answer any questions that members of the committee may have.

## **CHRONOLOGY OF REDOUBT SHOAL UNIT LITIGATION 1993 TO PRESENT**

- September 9, 1993—The State of Alaska issued its Coastal Zone Management Consistency Determination for Cook Inlet Sale 78;
- October 19, 1993—The State of Alaska issues its Final Best Interest Finding for Sale 78;
- October-November, 1993—Environmental Groups challenged Lease Sale 78 based upon alleged deficiencies in both the Best Interest Finding and in the CZM Determination—The Superior Court enjoined the sale—the Superior Court subsequently lifted its injunction, and Sale 78 was held;
- December 1993—The State of Alaska awarded the leases—the underlying litigation continued;
- December 1996—three years after the litigation was filed—the Alaska Supreme Court affirmed the Best Interest Finding for Sale 78, but reversed the Superior Court's decision upholding the Sale 78 CZM Consistency Determination—the litigation continued;
- October 8, 1996—The State of Alaska renders its CZM Consistency Determination affirming the United States Environmental Protection Agency's re-issuance of the Cook Inlet General Permit, which regulates discharges for oil and gas operations for the Inlet;
- November 4, 1996—Environmental Groups challenge the State's Consistency Determination for the General Permit in State Superior Court;
- June 16, 1997—The State's Consistency Determination for the re-issued General Permit is remanded by the Superior Court for additional review and findings;
- January 28, 1999—The State of Alaska issues its revised Consistency Determination;
- May 10, 1999—two and one half years after the State issued its original CZM Consistency Determination—the EPA re-issues the renewed Cook Inlet General Permit;

- May 1998—at Forest Oil's request, the State of Alaska begins its CZM Consistency and permitting review for the exploration phase at the Redoubt Shoal field;
- September 1999—The CZM Consistency Determination and permits for the exploration phase are issued by the State of Alaska after a 17 month review;
- October 1999—Environmental groups challenge the CZM Consistency Review;
- April 23, 2002—The Redoubt exploration project is halted by an injunction issued by Justice Matthews of the Alaska Supreme Court;
- April-June, 2002—Forest Oil suffers a 52 day project interruption due to the injunction; resulting in 100 + job layoffs at a cost of more than \$1.2 million to the company;
- June 2002—The Alaska Legislature passes SB 371, confirming the State of Alaska's reliance on general permits;
- June 13, 2002—The injunction is lifted, but the underlying litigation continues;
- December 2001—The State of Alaska begins its CZM Consistency and permit review for the Redoubt Development phase;
- May 2002—after fifteen months of review—the State of Alaska issues its affirmative CZM Consistency Determination and permits for the development of the Redoubt Shoal Field;
- May 2002—Environmental groups challenge the CZM Consistency Determination and request another injunction from the Superior Court—the Superior Court denies the injunction in November;
- November 2002—Environmental groups file a petition for review with the Alaska Supreme Court, seeking review of the Superior Court's denial of its injunction request;
- At present—the main case is pending before the Superior Court, and the groups' petition for review is pending before the Alaska Supreme Court.

### Oil & Gas Projects in Cook Inlet

Pioneer Unit -- development drilling, continued exploration drilling.

Ninilchik Unit -- Pad construction, expansion and drilling of development wells at the Grassim Oskolkoff pad, the Susan Dionne pad and the Falls Creek pad. Construction of the Kenai-Katchemak Pipeline to carry production from the Ninilchik Unit to Kenai.

Trading Bay Unit -- continued development work

Kasilof Unit -- exploration permitting, site survey work, etc.

Cosmopolitan Unit -- exploration drilling (Hansen No. 2 well).

Redoubt Unit -- continued development drilling



# 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

May 17, 2003

**SUBJECT:** Amendment X.2 to CSSSHB 86 (Judiciary) -- your memo of May 16 (Work Order No. 23-LS0349\X.2)

**TO:** Representative Hugh Fate

**FROM:** Jack Chenoweth  
Assistant Revisor of Statutes



Various points are outlined in Jim Pound's May 16 memo, to which I have been asked to prepare a response. The points consider elements of amendment X.2 offered to CSSSHB 86 (Judiciary).

### *Due process considerations:*

The memo cites uncodified intent language along with a permanent law provision and a temporary law provision that suspend judicial review as evidence that these provisions compromise due process.

The limited review provided under the permanent law provision set out in bill section 3 of the amendment probably accords with due process safeguards; the blanket prohibition against review appearing in the uncodified law set out in the amendments bill section 4 almost certainly does not.

The standard was enunciated by the court in *K&L Distributors v. Murkowski*, 486 P.2d 351 (Alaska 1971). The principle derived from that decision holds that courts have the power to look for administrative compliance with the demands of due process. In *Murkowski*, the court had to decide whether the commissioner of economic development's grant of an industrial incentive tax credit was subject to judicial review in the face of a statute, AS 43.26.040(e), which provided that "all decisions and findings of the [commissioner] . . . are final and no judicial or administrative appeal or other proceeding lies against them . . ."

It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska. We would not be able to carry out this duty to protect the citizens of this state in the exercise of their rights if we were unable to review the actions of administrative agencies simply because the legislature chose to exempt their decisions from judicial review. The legislative statement of finality is one which we

Representative Hugh Fate  
May 17, 2003  
Page 2

will honor to the extent that it accords with constitutional guarantees. But if the administrative action is questioned as violating, for example, the due process clause, we will not hesitate to review the propriety of the action to the extent that constitutional standards may require.

*Murkowski*, 486 P.2d at 357.

***Separation of powers consideration:***

The reference is to the amendment's page 3, lines 8 and 9, wherein

. . . any oil and gas project located within the Cook Inlet basin that, as of the effective date of this Act, is the subject of a final authorization, permit, or approval of [one of the three state resource agencies or the former division of governmental coordination] is hereby authorized and approved by the legislature. The authorization and approval provided by this section supersedes and replaces any permit or authorization previously required by law.

I take Mr. Pound's cryptic question as wanting a reply to this: Does this violate separation of powers considerations?

If asked to review the measure, there is a good likelihood that a court would find that the legislature has encroached on matters usually reserved to the executive.

As a consequence of the doctrine of separation of powers which is inherent in the Alaska Constitution, *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975), one branch of government is prohibited from encroaching upon and exercising the powers of another branch. The separation of powers doctrine places the primary responsibility for the conduct of legislative activities with the legislature. *Van Brunt v. State*, 653 P.2d 343, 346 (Alaska App., 1982). By contrast, in addition to vesting the executive power of the state in the governor, section 16 of Article III of the Alaska Constitution provides that "the governor shall be responsible for the faithful execution of the laws." *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

In this instance, the legislature, by law, is relieving the specific projects from complying with permit and authorization requirements that may be imposed elsewhere by law. Is this consistent with the "conduct of legislative activities [assigned by the state constitution to] the legislature" or does it, instead, compromise the obligation of the governor to "be responsible for the faithful execution of the laws"?

In a case challenging the relationship of the executive and the judiciary, the courts have indicated the limits on interference with the discretion of the executive. In the earlier-referenced *Public Defender Agency* decision, the Alaska Supreme Court considered an attempt by a judge of the superior court to order the attorney general to undertake a

Representative Hugh Fate

May 17, 2003

Page 3

criminal prosecution of a person. The Alaska Supreme Court found that criminal prosecution was an executive branch function and the courts had no authority to interject themselves into the criminal prosecution decision.

When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers.

The legislature has, by law, assigned the approval of permits and authorizations to particular officers of the executive branch. Disposition is subject to compliance with the general standards applicable to those approvals that are set down in law. These provisions circumscribe administrative discretion by express standards in order to reduce the opportunity for capricious exercise of power. Arguably, the legislative decision to set aside the operation of the usual procedures and standards that would be otherwise applicable and to arrogate to itself the final decision *without changing the content of the applicable law* could well be considered an encroachment on the executive's authority. I do not deny that the legislature could, for instance, suspend the operation of the statutes, or repeal or amend the statutes, to reach the same end -- that is, to provide an exception or exemption from the requirements otherwise imposed on similar projects. But this amendment doesn't do that. Here, the legislative action taken "by law" amounts to its own evaluation of the substantive standards and a substitution of the legislature's judgment for that of the administrators' as to compliance with the standards. Rather than modifying, repealing, or suspending the operation of the statute--all of which the legislature may properly do as part of its exercise of law-making authority so that the executive may not thereafter exercise judgment--the legislature retains the standards and, as against them, substitutes its judgment for that of the reasoned consideration that would otherwise be the prerogative of the executive.

JBC:lmb

03-213.lmb

# STATE OF ALASKA

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

*Frank H. Murkowski, Governor*

P.O. BOX 110300  
123 4<sup>TH</sup> ST., DIMOND COURT HOUSE  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-6729  
FAX: (907)465-2075

May 17, 2003

Honorable Gene Therriault  
Senate President  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801

Re: Department of Law Expenditures re "Chronology of Redoubt Shoal Unit Litigation"

Dear Senator Therriault:

At your request, the Department of Law has identified the legal fees and expenses incurred by the State of Alaska in connection with the events described in the "Chronology of Redoubt Shoal Unit Litigation, 1993 to Present," presented to the Senate Judiciary Committee on May 16, 2003 by representatives of Forest Oil Corporation.

The Department of Law did not begin department-wide timekeeping until January 1, 1996, so the internal attorneys' fees expended prior to that time cannot be ascertained with certainty. However, we can conclude the following:

1. Timekeeping records (1996 to the present) reflect approximately \$100,000 in attorney time expended by the Department of Law on these matters; and
2. By comparing the nature and extent of the legal work predating timekeeping to that afterward, we estimate that an additional \$40,000 of attorney time was expended by the Department of Law on these matters prior to 1996.

In addition, the Department of Law has submitted three separate claims to the Alaska State Legislature for payment of attorneys' fees and costs in connection with aspects of the Chronology on which Cook Inlet Keeper prevailed. In 2001 \$81,974.99, plus interest, was paid to Trustees for Alaska. Senate Bill 100, currently pending in the House Finance Committee, contains two additional claims payable to Trustees for Alaska totaling \$84,739.00, plus interest. If approved, the total attorneys' fees and costs paid by the State of Alaska to Trustees for Alaska will total \$166,713.99, plus interest. Copies of the claim forms submitted by the Department of Law are attached for your review.

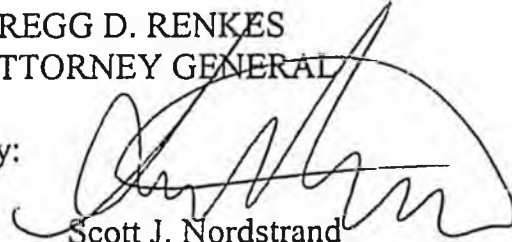
Senator Gene Therriault  
Re: Department of Law Expenditures

May 17, 2003  
Page 2

Sincerely,

GREGG D. RENKES  
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Scott J. Nordstrand", written over the printed name of the signatory.

Scott J. Nordstrand  
Deputy Attorney General  
Civil Division



Steve White  
Name  
465-3600  
Telephone Number

*Kathryn Daugherty for Scott Norstrand*  
Deputy Attorney General  
Date

Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST  
QUESTIONNAIRE

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper v. SOA, Forest Oil Corp.

Case No.: 3AN-99-03482 CI (superior court)

1. Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State. The appellant challenged the State's determination that Forest Oil Corp's Osprey Project (involving an exploratory drilling operation in Cook Inlet) was consistent with the Alaska Coastal Management Program. The superior court ruled in the State's favor, but it was reversed by the Alaska Supreme Court. That court found that the State had improperly excluded from its review the project's proposed discharges of various wastes.

2. Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case. The State took the position that since the Osprey Project's projected waste discharges were covered by an EPA general wastewater permit, which had itself undergone a consistency review, it was not necessary for the state to consider the waste discharges in its review of the Osprey Project. The Alaska Supreme Court disagreed, holding that the State should have considered the waste discharges in the specific context of the Osprey Project. The Supreme Court entered its decision on May 3, 2003.

The 22nd Alaska Legislature subsequently enacted SB 317, which, among other things, amended AS 46.40.096, providing that "the reviewing entity may exclude from the [ACMP] consistency review and determination process for a project . . . an activity that is authorized under a general or nationwide permit that has previously been determined to be consistent with the applicable coastal management programs." The amendment became effective on June 8, 2002.

3. Did the State prevail on any issues? If so, describe. No.

4. Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful. Yes.

We negotiated the attorney's fees and court costs that were requested by the appellants, which initially totaled \$35,611.36, down to \$33,000.00.

5. What was the source of the State's liability in this case? Appellate Rule 508 (providing for payment of attorney's fees and costs).

6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future? See item 2, above.

7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected from publication by statute, privilege, or right to privacy, indicate what the corrective action was. See item 2, above.

8. Any recommendations concerning cases of this type in the future? No.

9. Any recommendations for changes in statutes, regulations or policy? Cite any applicable statutes or regulations. No.

Attorney completing form:

Date:

Stephen M. White

May 9, 2003

Assistant Attorney General  
Title

465-6724  
Phone Number



Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST  
QUESTIONNAIRE

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper v. SOA, Forest Oil Corp.

Case No.: S-09730 (Trial Court 3AN-99-03482 CI)

1. Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State. The appellant challenged the state's determination that Forest Oil Corp's Osprey Project (involving an exploratory drilling operation in Cook Inlet) was consistent with the Alaska Coastal Management Program. The Alaska Supreme Court found for the appellant, holding that the state had improperly excluded from its review the project's proposed discharges of various wastes.

2. Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case. The state took the position that since the Osprey Project's projected waste discharges were covered by an EPA general wastewater permit, which had itself undergone a consistency review, it was not necessary for the state to consider the waste discharges in its review of the Osprey Project. The Alaska Supreme Court disagreed, holding that the state should have considered the waste discharges in the specific context of the Osprey Project. The Supreme Court entered its decision on May 3, 2003.

The 22nd Alaska Legislature subsequently enacted SB 317, which, among other things, amended AS 46.40.096, providing that "the reviewing entity may exclude from the [ACMP] consistency review and determination process for a project . . . an activity that is authorized under a general or nationwide permit that has previously been determined to be consistent with the applicable coastal management programs." The amendment became effective on June 8, 2002.

3. Did the State prevail on any issues? If so, describe. No.

4. Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful. No.

5. What was the source of the State's liability in this case? Appellate Rule 508 (providing for payment of attorney's fees and costs).

6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future? See item 2, above.

7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected from publication by statute, privilege, or right to privacy, indicate what the corrective action was. See item 2, above.

8. Any recommendations concerning cases of this type in the future? No.

9. Any recommendations for changes in statutes, regulations or policy? Cite any applicable statutes or regulations. No.

Attorney completing form:

Date:

Blaine H. Hollis \_\_\_\_\_

April 18, 2002 \_\_\_\_\_

Assistant Attorney General \_\_\_\_\_  
Title

465-3600 \_\_\_\_\_  
Phone Number

## Department of Law

## JUDGMENTS/CLAIMS/SETTLEMENTS FOR PAYMENT

(Please Type)

\*\*This form will be used for the purpose of standardizing the submission of claims to the Legislature. Complete and accurate information will expedite payment to the claimants, thereby reducing the amount of interest required to be paid by the state. If any of the information changes, please immediately advise the Director, Administrative Services Division, P.O. Box 110300, Juneau, AK 99811, or call (907) 465-3673.

## PART ONE

1. Case Name: Cook Inlet Keeper et al. v. State, DNR
  2. Case Number: 3AN-99-3343 CV
  3. Judge/Justices: Judge Murphy
  4. Date Judgment entered: 11/2/00
  5. Did the date of the cause of action accrue on or after August 7, 1997? Yes
  6. Amount to be paid: \$81,974.99
  7. Interest Rate: 8% Effective Date: November 2, 2000
  8. Requested hourly rate and total compensation of attorneys to be paid: \$143.00/\$123.768
  9. Court approved/ordered hourly rate and total compensation of attorneys to be paid: \$143.00/\$81.974.99
  10. Payable to: Trustees for Alaska; 1026 West Fourth Avenue, Suite 201 Anchorage, AK 99501
  11. EIN: 92-6010379 or SSN:
  12. Send check to: X above address Departmental contact: \_\_\_\_\_
- Departmental attorney contact: \_\_\_\_\_ Departmental Approval: \_\_\_\_\_  
Lawrence Ostrov, ky \_\_\_\_\_  
 Name Deputy Attorney General  
269-5256 \_\_\_\_\_  
 Telephone Number Date 12/19/00

## Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST  
QUESTIONNAIRE

## PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper et al. v. State, DNR

Case No.: 3AN-99-3343 CV

**1. Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State.**

Cook Inlet Keeper challenged DNR's Best Interest Finding and ACMP Consistency Determination for the 1999 Cook Inlet Areawide oil and gas lease sale. Cook Inlet Keeper's focus was on the fact that DNR included over 100 tracts that the National Marine Fisheries Service (NMFS) identified as important to beluga whale migration and feeding.

In spite of the fact that NMFS requested that the tracts be deleted from the sale, DNR concluded that specific measures to protect belugas could be put in place if the tracts were leased, and development actually proposed. Cook Inlet Keeper argued that because DNR did not follow NMFS's recommendation, the best interest finding was inadequate. Cook Inlet Keeper also argued that DNR inadequately considered, in both the best interest finding and the ACMP consistency determination, the potential harm to various fish and wildlife species and problems with transporting oil from remote areas of the sale.

**2. Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case.**

Before conducting oil and gas lease sales, DNR must best interest findings (AS 38.05.035) and ACMP Consistency Determinations (AS 46.40.096). As a matter of policy, DNR rejected NMFS's request to delete tracts, and determined that conflict issues with respect to Cook Inlet belugas are best treated after a lease is issued, and development actually proposed. The court found that DNR's best interest finding was inadequate because the Cook Inlet beluga population is threatened, and DNR needed to show a more substantial basis for its decision to go ahead with leasing the beluga tracts in the face of NMFS's opposition and show that there were mitigation measures in place to insure protection of the belugas.

**3. Did the State prevail on any issues? If so, describe.**

While DNR prevailed on the issues relating to transportation and other fish and wildlife, the court found that DNR did not fully consider the potential impacts to beluga whales. This was based both on NMFS's recommendation and on the fact that Cook Inlet beluga population has declined substantially. Even though the court recognized that oil and gas activities were not responsible for the decline of the Cook Inlet belugas, the court determined that oil and gas activities could be a threat to the already reduced population, and that DNR did not take that into adequate consideration in designing mitigation measures.

**4. Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful.**

Cook Inlet Keeper requested \$123,768 in attorney's fees and costs. DNR objected, arguing that Cook Inlet Keeper should not be considered the prevailing party because DNR prevailed on more issues. DNR also argued that attorney's fees and costs should be apportioned to the specific issues on which Cook Inlet Keeper actually prevailed. Finally, DNR argued that Cook Inlet Keeper was not entitled to attorney's fees and costs incurred during the portion of the appeal that was before DNR. The court rejected the first two arguments, but agreed that Cook Inlet Keeper could not recover attorney's fees and costs incurred during the portion of the case before DNR, and reduced the request to \$81,974. <sup>9</sup>

It would be very difficult to overturn the trial court's decision because its findings are not clearly erroneous and are consistent with Alaska Supreme Court rulings on awarding attorney's fees and costs. The Alaska Supreme Court has determined that, to be considered the prevailing party, a party is not required to prevail on *all* the issues in a case, merely the *main* issue. In addition, the Court does not permit apportionment of attorney's fees and costs by issue except when fees are frivolous or obviously inflated. Cook Inlet Keeper provided an itemized bill and there was no evidence that attorney's fees and costs were either frivolous or inflated.

**5. What was the source of the State's liability in this case?**

Under Alaska law, prevailing public interest litigants are entitled to *full* reasonable attorney's fees and costs in order to encourage meritorious claims that otherwise might not be brought. In a similar case, the appellants challenging a state oil and gas lease sale were found to be public interest litigants. See *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206 (Alaska 1998).

**6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future?**

Because of the court's ruling, former Commissioner Shively withdrew the beluga tracts from upcoming sales, and determined that they would only be included if DNR made a supplemental finding that there is a comprehensive plan in place to address concerns about beluga habitat.

**7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected**

AMENDMENT #2

OFFERED IN THE SENATE

BY SENATOR THERRIAULT

TO: SCS CSSSHB 86(JUD)

1 Page 1, following line 2:

2 Insert a new bill section to read:

3 **\*\* Section 1.** The uncodified law of the State of Alaska is amended by adding a new  
4 section to read:

5 **PURPOSE AND FINDINGS.** (a) The purpose of secs. 3 and 4 of this Act is to  
6 legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin  
7 that have, as of the effective date of this Act, a final authorization, permit, or other form of  
8 approval from the Department of Environmental Conservation, the Department of Fish and  
9 Game, the Department of Natural Resources, or the division of governmental coordination,  
10 formerly part of the office of management and budget. AS 46.40.096(i), added by sec. 3 of  
11 this Act and sec. 4 of this Act supersede and replace any other form of approval previously  
12 required by law. A project authorized and approved by AS 46.40.096(i), added by sec. 3 of  
13 this Act and sec. 4 of this Act shall remain subject to regulation by any agency having  
14 jurisdiction over the project, consistent with the terms and requirements of the authorization,  
15 permit, or other approval issued by the agency.

16 (b) The legislature finds that

17 (1) it is in the best interests of the state to legislatively approve and authorize  
18 the oil and gas projects covered by secs. 3 and 4 of this Act;

19 (2) secs. 3 and 4 of this Act coincide with an executive branch reorganization  
20 directly affecting the Department of Environmental Conservation, the Department of Fish and  
21 Game, the Department of Natural Resources, and the division of governmental coordination,  
22 formerly part of the office of management and budget; secs. 3 and 4 of this Act are intended  
23 to help facilitate the reorganization and the transition to a new administrative structure by

1 removing from these agencies the burden of possible or on-going litigation over past  
2 administrative decisions;

3 (3) secs. 3 and 4 of this Act avoid costly litigation over projects overseen by  
4 these agencies that uniquely benefit all Alaskans, especially the larger population centers and  
5 communities encompassed by the Cook Inlet Basin; among other benefits, those projects  
6 provide jobs, generate local tax revenue, and fuel local economies by their tertiary economic  
7 effects; the legislature finds that it is in the public interest to promote those projects, without  
8 litigation;

9 (4) the public interest is protected by secs. 3 and 4 of this Act; all oil and gas  
10 projects authorized and approved by this Act remain subject to the regulation and oversight of  
11 all state agencies with jurisdiction over those projects; the appropriate state agencies shall  
12 regulate each project consistent with the terms and requirements of any permit or approval  
13 previously granted for the project; those permits and approvals are granted only after  
14 extensive administrative review, including public notice and comment with respect to the  
15 project; compliance with those requirements, coupled with the continued oversight by the  
16 appropriate state agencies, will ensure the protection of human health and safety and the  
17 environment."  
18

19 Page 1, line 3:

20 Delete "Section 1."

21 Insert "Sec. 2."

22

23 Page 2, following line 19:

24 Insert new bill sections to read:

25 **"\* Sec. 3.** AS 46.40.096 is amended by adding a new subsection to read:

26 (i) Notwithstanding any other provision of law, and except with respect to an  
27 appeal filed by the applicant or an affected coastal resource district, or a claim based  
28 on the United States Constitution or the Constitution of the State of Alaska, a  
29 consistency determination made under this section is

30 (1) not subject to review, stay, or injunction by any court; and

31 (2) effective immediately.

1 \* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to  
2 read:

3 AUTHORIZATION AND APPROVAL OF PROJECTS IN THE COOK INLET  
4 BASIN. Notwithstanding any other provision of law, any oil and gas project located within  
5 the Cook Inlet Basin that, as of the effective date of this Act, is the subject of a final  
6 authorization, permit, or approval of the Department of Environmental Conservation, the  
7 Department of Fish and Game, the Department of Natural Resources, and the division of  
8 governmental coordination, formerly part of the office of management and budget, is hereby  
9 authorized and approved by the legislature. ~~The authorization and approval provided by this~~  
10 ~~section supersedes and replaces any permit or authorization previously required by law.~~  
11 AS 46.40.096(i), added by sec. 3 of this Act, and this section, the authorization and approval  
12 provided by sec. 3 of this Act and this section, and the final agency action previously required  
13 by law are not subject to judicial review or, if pending, continued judicial review. A project  
14 under this section shall continue to be subject to the jurisdiction of the appropriate state  
15 agencies, as otherwise provided by law, and shall be regulated under the terms and  
16 requirements of any permit or approval previously granted for that project, which are  
17 incorporated by reference in the authorization provided by this section."

18

19 Renumber the following bill section accordingly.

\* unless it is a claim based on a ~~constitutional~~  
the United States Constitution or the Constitution  
of the State of Alaska.

## THE JUDICIAL REVIEW AMENDMENT TO HB 86 UNCONSTITUTIONALLY RESTRICTS COURT ACCESS TO A PRIVILEGED CLASS OF CITIZENS

*"[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law..."* Alaska Constitution, Art. 1, sec. 1 (Equal Protection Clause).

*"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."* Alaska Constitution, Art. VIII, sec. 17 (Uniform Application Clause).

*"[A]ll potential litigants ... have a constitutional right in Alaska of meaningful access to the justice system."* Peter v. The Progressive Corp., 986 P.2d 865, 872 (Alaska 1999).

*"[A]ny system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII."* McDowell v. State, 785 P.2d 1, 9 (Alaska 1989).

- The amendment to HB 86 proposed in the Senate Judiciary Committee on May 16, 2003, would **prohibit most Alaska citizens** from challenging important coastal zone decisions. Only project applicants and coastal districts would be allowed to file lawsuits.
- This **unequal access to the courts** violates the Equal Protection and Uniform Application Clauses of the Alaska Constitution.
- The Alaska Supreme Court has held that the right of access to the courts is an "important" one, and that laws providing unequal access require "**close scrutiny**." *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).
- The Uniform Application Clause of Article VIII requires even "**more stringent review**" when the unequal treatment concerns use of natural resources. *McDowell*, 785 P.2d at 10. This is why the Supreme Court struck down the rural preference for subsistence uses in Alaska.
- For the same reason that state laws may not discriminate between rural and urban residents in providing access to subsistence resources, the laws may not discriminate between different classes of citizens in providing access to the courts in natural resource cases.

# TRUSTEES FOR ALASKA

A Nonprofit Public Interest Law Firm Providing Counsel to Protect and Sustain Alaska's Environment

1026 W. 4<sup>th</sup> Ave., Suite 201 Anchorage, AK 99501 (907) 276-4244 (907) 276-7110 Fax Email: [ecolaw@trustees.org](mailto:ecolaw@trustees.org)  
Web address: [www.trustees.org](http://www.trustees.org)

May 17, 2003

Honorable Ralph Seekins  
Chair, Senate Judiciary Committee  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1183

Re: Proposed Amendment to SCS CSSSHB 86(JUD) (23-LS0349\X.2)

Dear Senator Seekins and Members of the Senate Judiciary Committee:

We are writing on behalf of Cook Inlet Keeper and the Alaska Center for the Environment to provide information about the problems with the proposed amendment to HB 86 and about the litigation over the Redoubt Shoal project, in which we represent Cook Inlet Keeper and which is the target of the proposed amendment. Please accept this letter, share it with the other members of your committee and include it as part of the Committee's record of proceedings on HB 86.

## Why Is This Amendment Being Rushed Through Without a Public Hearing?

Our first concern about this amendment is its timing and the drastic change that it makes to the previous version of the bill. Until the amendment was distributed in the Judiciary Committee meeting yesterday, there was no indication that legislation of this nature was coming. And yet the Redoubt Shoal litigation targeted by the amendment has been going on during the entire legislative session. This amendment should have been brought out much earlier in the process to allow all parties an opportunity to provide information and for the issues to be fully aired and considered.

Instead, the amendment was brought out six days before the end of the session, with no advance notice to the public of the nature or substance of the amendment. Not surprisingly, no interested member of the public was present to testify because no one knew the amendment was coming. Even though we represent one party in the lawsuit targeted by the amendment, we were not given the amendment in time for the meeting; our Anchorage Legislative Information Office did not have it until after the meeting

adjourned; and as of 8:30 this morning, the amendment was still not available online. Most of the people who historically have demonstrated a concern for coastal consistency reviews and the environmental quality of Cook Inlet – fishermen, Native villages, local communities, conservation groups – still are entirely unaware of this amendment. Instead, the only people who were prepared for yesterday's meeting with copies of the amendment and written testimony were the people associated with Forest Oil Corporation.

The timing and handling of this amendment suggest that consideration of this amendment was never intended to be an open or deliberate process, and that the exclusion of the public is intentional. This is never the way new law should be made, but the exclusion of the public is especially wrong here because the amendment is completely unrelated to the subject matter of HB 86 and it guts the public's ability to safeguard its interests in Alaska's coastal resources – resources that belong to all Alaskans, not just a privileged few.

There has not been adequate time to fully air these significant proposed changes to HB 86, and the interested members of the public were blind-sided by the introduction of such an unrelated amendment to the bill. We urge the members of the Committee not to go along with this distortion of the public process, and instead to give this amendment the analysis, the deliberate consideration, and the full and fair hearing that it warrants.

#### What Is Wrong With the Proposed Amendment to HB 86?

First, as just discussed, the amendment was brought out too late in the legislative process with no public notice, so it has not received the careful consideration that it warrants.

Second, the amendment is unfair to the Alaskan public because it shuts them out of the consistency review process, closing the courthouse doors to the public even when the agencies make a bad decision. Fishermen, Native villages, local communities, and conservation groups are a critical counterbalance to industry influence as the resource agencies make decisions that affect natural resources belonging to all Alaskans. Alaskans depend on these groups to represent their interests in the environmental side of the oil and gas equation. That's why thousands of Alaskans belong to Cook Inlet Keeper, Alaska Center for the Environment, and other groups that seek to protect the water quality, fisheries, and habitats of Cook Inlet and Alaska. This amendment would silence all of these voices.

Third, this amendment breaks a promise that the State has made for years, that a thorough and site-specific consistency review will be done when a specific oil and gas development is proposed, rather than at earlier stages like the lease sale stage. When the Niniilchik Traditional Council litigated Lease Sale 78 (which Forest Oil mentions in its chronology) because the State had failed to analyze the coastal impacts with enough specificity, the State argued that it could not do an adequate analysis because of the speculative nature of a lease sale. Instead, the State claimed that the detailed, specific

analysis would occur when there is a specific oil and gas project. When the Villages of Port Graham and Nanwalek litigated the Cook Inlet general permit (also mentioned in the chronology) in part because the subsistence analysis was not site-specific, the State again argued that its analysis was properly general at that stage. (The Superior Court agreed with the Villages, and the State did not appeal.) When Cook Inlet Keeper litigated the Redoubt Shoal exploration project because the polluted wastewater discharges weren't analyzed at all, the State claimed it didn't have to because that analysis already was done at the general permit stage. (The Alaska Supreme Court agreed with Cook Inlet Keeper.) The State has always promised it would provide specific analysis of oil and gas project impacts when a specific project is developed, and then tried to argue its way out of that promise when a specific project review is challenged. Now it is breaking the promise entirely by promoting an amendment that takes away the public's right to judicial review altogether. Without the right of judicial review, the public cannot hold the State agencies accountable and compel them to keep their promise and do the consistency review right.

Finally, the amendment raises serious constitutional questions that do not appear to have been analyzed. Whenever a piece of legislation closes the courthouse doors to particular groups or for particular types of actions, its legality should be carefully reviewed. The timing and substance of this amendment indicate that this kind of careful review has not been done.

#### Why Is the Redoubt Shoal Project Controversial?

Cook Inlet Keeper sued over the Redoubt Shoal project because of the project's discharges of pollution into the inlet and its impacts on the inlet's habitats, fisheries, and subsistence resources. These harms to coastal resources were not fully considered by the reviewing agency (the Division of Governmental Coordination), as Alaska's coastal law requires. Without this full review, the agency could not and did not make an informed decision about whether coastal habitats, fisheries, and subsistence areas would be protected if the project were allowed to go forward.

Alaskans care deeply about clean air, clean water, and healthy fisheries, just as they care about jobs and economic development. Cook Inlet Keeper and the Alaska Center for the Environment exist to put that care into practice, and in the case of Redoubt Shoal, that ultimately meant going to court to compel the State to withdraw its approval. Like the fishermen, Native villages, and local community groups that historically have turned to the agencies and the courts to pursue their interests in protecting coastal resources, Cook Inlet Keeper exercised its First Amendment right to petition the government with its legitimate claims about the project and the consistency review. Had the State done its job right in the first place, litigation wouldn't have been necessary.

Other oil and gas projects have managed to go forward without litigation – in fact, far more projects go unchallenged than go to court. During the years of the Redoubt Shoal litigation, dozens of oil and gas-related projects in Alaska have been approved and moved forward without lawsuits. Just a few examples are the Kenai-Kachemak pipeline and its related pads and facilities, ConocoPhillip's Cosmopolitan Project on Stariski

Creek, and the Cook Inlet areawide lease sales of the last couple years. Many more projects are identified on DGC's website, which was unfortunately down last night and this morning.

#### What Has the Redoubt Shoal Litigation Accomplished?

Cook Inlet Keeper sued the State over the exploration phase of the Redoubt Shoal project in 1999. The Superior Court ruled in the State's favor and Cook Inlet Keeper appealed. In 2002, the Alaska Supreme Court issued an injunction that temporarily stopped drilling activity on the final exploration well, finding that Cook Inlet Keeper was likely to succeed on the merits of its claim. (The last well was not included in the original plan and therefore was never given a coastal consistency review at all.) And indeed, Cook Inlet Keeper did succeed on the merits. Shortly after the injunction was issued, the Alaska Supreme Court ruled without dissent that the State had illegally failed to analyze the polluted water discharges that were part of the project and it remanded the case to DGC for a new consistency review. *Cook Inlet Keeper v. State, DGC*, 46 P.3d 957 (Alaska 2002). The Legislature then passed a bill (SB 371) that essentially resolved the impasse, and shortly thereafter Cook Inlet Keeper, the State, and Forest Oil reached a settlement that ended the litigation over the exploration stage.

The result of the settlement was that Forest Oil stopped all of its discharges of toxic wastewater into Cook Inlet. This was an important accomplishment and precedent that is good for Cook Inlet's fisheries and water quality and that advances the state of the technology used in oil and gas projects in the inlet. It's also a big boost to the Kenai Peninsula Borough's wild salmon initiative in Cook Inlet. This important achievement shows why access to the judicial branch is critical to resolving disputes over coastal resources that belong to all Alaskans. It also demonstrates the importance of judicial review to ensuring that companies like Forest Oil clean up their act.

The lawsuit over the development phase of the Redoubt Shoal is presently pending in the Alaska Supreme Court. The project's impacts on coastal habitats and subsistence areas were not fully identified, much less analyzed, by DGC. This consistency review is the only public check on the process to ensure projects will not harm sensitive coastal resources. As we discussed earlier, when it is not done right, the public's interest in its coastal resources is impaired. Based on the exploration phase experience, however, it is evident that this suit too could be resolved in a way that benefits all by protecting coastal resources and advancing the technology used by the oil and gas industry in Cook Inlet.

---

In sum, this amendment is too much, too little analyzed, too late in the game. It deserves careful legislative and public scrutiny, as well as substantial legal analysis. As it stands, the amendment has skirted the normal public process and evaded the attention of the fishermen, conservation groups, Alaska Native communities, and local community groups that have consistently demonstrated their concern for Alaska's coastal resources.

Adopting this amendment without hearing from these groups would be a grave injustice. If the amendment is in fact a good faith attempt to address a legitimate issue, then it should be fully aired and all sides allowed to present information and testimony on the amendment.

We urge the Committee to slow down this amendment to HB 86 and to give it deeper consideration and a full public process before moving it forward. Thank you for accepting this statement.

Sincerely,

Rebecca Bernard  
Staff Attorney  
Trustees for Alaska

On Behalf Of:

Cook Inlet Keeper  
Alaska Center for the Environment

# ALASKA STATE LEGISLATURE

## House of Representatives

Representative Hugh (Bud) Fate



State Capitol, Room 128  
Juneau, AK 99801  
Phone: (907) 465-4976  
Fax: (907) 465-3883  
Toll Free: (866) 465-4976

Co-Chair Resources  
Member:  
*Military & Veterans Affairs*  
*Oil & Gas*  
*Transportation*

## Memorandum

To: Senator Ralph Seekins, Chair Senate Judiciary Committee

Fm: Jim Pound, Chief of Staff

Cc:

Date: May 5, 2003

Re: CS for SS for HB 86am "INJUNCTIONS AGAINST PERMITTED PROJECTS"

---

Please accept this memo and attached documents as a request for the Senate Judiciary Committee to schedule for hearing CSSS for House Bill 86am, "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, CSSS for HB 86am, SSHB 86, HB 86, House Floor Action, Committee Action, Support Documents, 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  
Juneau, Alaska 99801-1182  
(907) 465-4976  
Fax: 465-3883  
Toll Free:  
1 866-465-4976



Sponsor Statement

CS for SS for House Bill 86 (JUD)am

**"An Act relating state permitted projects; and providing for an effective date."**

Committee Substitute for Sponsor Substitute for House Bill 86am 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 Code of Civil Procedure language means, those who file malicious claims in an attempt to stop projects, may have to realize the economic effects of their actions. The bill is written to give the defendant a cause of action, and provides guidance to the courts when determining damages.

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. CSSSHB 86am 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. CS for SSHB 86am gives Alaskans and the courts the 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  
Sponsor: Representative Fate Component: Environmental Law  
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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CAPITAL EXPENDITURES</b>						
<b>CHANGE IN REVENUES ( )</b>						

**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 Daughhelee for Gregg D. Renkes, Attorney General Date 4/2/2003  
Agency: Department of Law

COMMITTEE COPY

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.

Paid for by Fran Ulmer for Governor

PO Box 200890, Anchorage, AK 99520-0890 • 907-569-FRAN (3726) • 907-569-1003 (fax)

Jay Hammond & Janie Leask, Co-Chairs •

**Gubernatorial Candidate Ulmer  
On Convincing Scientific Evidence**

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 49<sup>th</sup> 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.*

Alaska's size 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.

America'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.

Alaska'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 21<sup>st</sup> 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.

Here'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.

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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 a Juneau federal courtroom this week. U.S. Forest Service officials, timber industry advocates, conservationists and Southeast community leaders were in court today for the second of three days of testimony about a possible Tongass logging injunction.

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

So far, much of the discussion has focused on eight timber sales in southern and central Southeast Alaska. Viking Lumber and Silver Bay Logging hope to use five of the sales to fuel sawmills in Wrangell and on Prince of Wales Island this year. Conservationists argue the sale areas are better off left alone.

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

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

Sitka Conservation Society Executive Director Pat Veasart testified Wednesday that timber harvest and road building would hurt wilderness values in the eight areas. The isolated sites provide wildlife habitat and opportunities for primitive recreation, he said.

"To me, wilderness is a place where one can experience a high degree of solitude," he said. "A place where one can see the Earth as created by its maker." Alaska Forest Association attorney Jim Clark said the sites don't have the attributes required to be classified as wilderness. Roads already have been built and timber harvest has already occurred, he said.

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

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 Swan Lake-Lake Tyee electric intertie. The 57-mile power line would link Ketchikan and Wrangell.

The hearing continues Friday in Juneau.

Joanna Markell can be reached at [joannam@juneauempire.com](mailto: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 mooted 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  $\frac{7}{8}$  of an inch and the other is  $\frac{3}{4}$  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 PUJD 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.

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**HB**

**102**

## REPRESENTATIVE ERIC CROFT

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## REPRESENTATIVE ERIC CROFT

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### Memorandum

TO: Senator Ralph Seekins  
Chair Senate Judiciary Committee

FROM: Representative Eric Croft

DATE: May 2, 2003

RE: Committee Substitute (STA) House Bill 102

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I respectfully request that House Bill 102 be scheduled for a hearing in the Senate Judiciary Committee at your earliest possible convenience. I have attached a sponsor statement and background information on this resolution. I would like to allow Brian Judy from the National Rifle Association to testify and answer questions from the committee.

Thank you. *Eric Croft*



## REPRESENTATIVE ERIC CROFT

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### Sponsor Statement HB 102 An Act Relating to Concealed Deadly Weapons

HB 102 repeals the concealed carry laws that require permits to carry deadly weapons including handguns, knives and other legal to own deadly weapons. It does not repeal any of the restrictions on where a person can carry a concealed weapon such as on school grounds, in courthouses or on private property where the owner may prohibit such weapons.

Under HB 102, a person will be allowed to carry a concealed weapon without a permit with the same freedoms allowed in Vermont under that state's gun laws as long as the person is not a convicted felon or anyone else who is by law prohibited from obtaining a permit. The laws in Vermont have not proven to increase the rate of crime or to be reckless in any way. Vermont, like Alaska, is rural by nature and has a high number of outdoor sportsmen and other citizens who carry weapons for a variety of legitimate reasons.

HB 102 does not eliminate the state's concealed carry permit program for two reasons. First, a person may want a permit to allow reciprocity, i.e. traveling to a reciprocity state for a hunt. Second, a concealed carry permit is useful for purchasing because it allows permit holders to bypass the required waiting period because the FBI background checks have already been completed during the permitting process.

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CS FOR HOUSE BILL NO. 102( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES CROFT, Foster, Stoltze, Crawford, Gatto, Anderson

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to concealed deadly weapons."

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

3 \* Section 1. AS 11.61.220(a) is amended to read:

4 (a) A person commits the crime of misconduct involving weapons in the fifth  
5 degree if the person

6 (1) is 21 years of age or older and knowingly possesses a deadly  
7 weapon, other than an ordinary pocket knife or a defensive weapon,

8 (A) that is concealed on the person, and, when contacted by a  
9 peace officer, the person fails to

10 (i) immediately inform the peace officer of that  
11 possession; or

12 (ii) allow the peace officer to secure the deadly  
13 weapon, or fails to secure the weapon at the direction of the peace  
14 officer, during the duration of the contact;

15 (B) that is concealed on the person within the residence of

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another person unless the person has first obtained the express permission of an adult residing there to bring a concealed deadly weapon within the residence;

(2) knowingly possesses a loaded firearm on the person in any place where intoxicating liquor is sold for consumption on the premises;

(3) being an unemancipated minor under 16 years of age, possesses a firearm without the consent of a parent or guardian of the minor;

(4) knowingly possesses a firearm

(A) within the grounds of or on a parking lot immediately adjacent to a center, other than a private residence, licensed under AS 14.37, AS 47.33, or AS 47.35 or recognized by the federal government for the care of children;

(B) within a

(i) courtroom or office of the Alaska Court System; or

(ii) courthouse that is occupied only by the Alaska Court System and other justice-related agencies; or

(C) within a domestic violence or sexual assault shelter that receives funding from the state; [OR]

(5) possesses or transports a switchblade or a gravity knife; or

(6) is less than 21 years of age and knowingly possesses a deadly weapon, other than an ordinary pocket knife or a defensive weapon, that is concealed on the person.

\* Sec. 2. AS 11.61.220(b) is amended to read:

(b) In a prosecution under (a)(6) [(a)(1)] of this section, it is an affirmative defense that the defendant, at the time of possession, was

(1) in the defendant's dwelling or on land owned or leased by the defendant appurtenant to the dwelling; or

(2) actually engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection [;

(3) THE HOLDER OF A VALID PERMIT TO CARRY A

1 CONCEALED HANDGUN UNDER AS 18.65.700 - 18.65.790 AND THE  
2 WEAPON WAS A CONCEALED HANDGUN AS DEFINED IN AS 18.65.790; OR  
3 (4) CONSIDERED A PERMITTEE UNDER AS 18.65.748 AND  
4 THE WEAPON WAS A CONCEALED HANDGUN AS DEFINED IN  
5 AS 18.65.790].

6 \* Sec. 3. AS 11.61.220(h) is amended to read:

7 (h) The provisions of (a)(1) and (6) of this section do not apply to a  
8 (1) peace officer of this state or a municipality of this state acting  
9 within the scope and authority of the officer's employment;  
10 (2) peace officer employed by another state or a political subdivision  
11 of another state who, at the time of the possession, is  
12 (A) certified as a peace officer by the other state; and  
13 (B) acting within the scope and authority of the officer's  
14 employment; or  
15 (3) police officer of this state or a police officer or chief administrative  
16 officer of a municipality of this state; in this paragraph, "police officer" and "chief  
17 administrative officer" have the meanings given in AS 18.65.290.

18 \* Sec. 4. AS 11.61.220 is amended by adding a new subsection to read:

19 (j) In (a)(1) of this section, "contacted by a peace officer" means stopped,  
20 detained, questioned, or addressed in person by the peace officer for an official  
21 purpose.

22 \* Sec. 5. AS 18.65.748 is amended to read:

23 **Sec. 18.65.748. Permit holders from other jurisdictions considered Alaska**  
24 **permit holders.** A person holding a valid permit to carry a concealed handgun from  
25 another state or a political subdivision of another state is a permittee under  
26 AS 18.65.700(b) for purposes of AS 18.65.755 - 18.65.765 [AS 18.65.750 -  
27 18.65.765] if the person has not had an application for a concealed handgun permit  
28 rejected in this state because the person was unqualified under AS 18.65.705 or had a  
29 concealed handgun permit revoked or suspended by this state.

30 \* Sec. 6. AS 18.65.770 is amended to read:

31 **Sec. 18.65.770. Permits, applications, and other materials not public**

1  
2  
3  
4  
5  
6  
7

records [ACCESS TO LIST OF PERMITTEES BY PEACE OFFICERS].  
Applications [THE DEPARTMENT SHALL COMPILE A LIST OF PERMITTEES  
IN A MANNER THAT ALLOWS IMMEDIATE ACCESS TO THE  
INFORMATION BY PEACE OFFICERS. THE LIST OF PERMITTEES AND ALL  
APPLICATIONS], permits, and renewals are not public records under AS 40.25.110 -  
40.25.125 and may only be used for law enforcement purposes.

\* Sec. 7. AS 11.61.220(d)(1)(A); AS 18.65.750, and 18.65.755(a)(1) are repealed.



## REPRESENTATIVE ERIC CROFT

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### MEMORANDUM

TO: Members of the House Judiciary Committee

FROM: Representative Eric Croft

DATE: April 10, 2003

RE: CSHB 102 (STA)

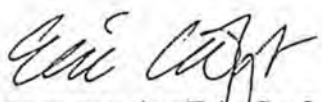
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Dear Colleagues,

In the House State Affairs Committee hearings on HB 102, there were many questions about the technicalities of this bill and the logic behind each proposed change to the statutes. The committee substitute takes into consideration the committee members' valid points and hopefully puts them forward in a clear manner. To further clarify the intent of the bill, I have included the committee substitute, my own sectional analysis and a letter of support from the National Rifle Association in this memo.

I hope this helps to answer any questions you might have about HB 102.

Sincerely,

  
Representative Eric Croft

Page 1 of 4

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January-May: State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4998 • (800) 689-4998 • Fax (907) 465-4419  
June-December: 716 W. 4<sup>th</sup> Avenue • Anchorage, Alaska 99501 • (907) 258-8162  
Representative\_Eric\_Croft@legis.state.ak.us



## REPRESENTATIVE ERIC CROFT

---

### SPONSOR SUMMARY HB 102

**“An Act relating to concealed deadly weapons.”**

**Section 1.** Section 1(a)(1) makes it legal for someone to carry a concealed deadly weapon without a permit if they are 21 years old or older with the same restrictions that permit holders have now. The original bill did not include the requirement to be 21 to carry concealed.

Section 1(a)(1)(A) requires anyone carrying a concealed deadly weapon to inform a peace officer that they are carrying a concealed weapon when contacted by an officer, to secure the weapon when directed by the officer, and to allow the officer to secure the weapon if requested to do so by the officer. Under the changes brought by this bill, these requirements apply even if the person is on their own property when contacted by the officer. This is not currently required in statute.

Section 1(a)(1)(B) states that before a person carrying a concealed deadly weapon enters the residence of another person, the carrier must obtain express permission of an adult residing in the residence allowing the carrier to bring the weapon into the residence.

Part (6) makes it a crime for anyone under the age of 21 to carry a concealed deadly weapon other than an ordinary pocketknife or a defensive weapon [as defined in AS 11.81.900(b) 19]. Currently, anyone applying for a concealed weapon permit must be at least 21 years old. By adding subsection (6), I am simply maintaining the current age requirement to carry concealed or to obtain a permit.

**Section 2.** The changes to this section make it conform to Section 1.

Section 2. (b). The reference (a)(1) is deleted because the following defenses in this section are unnecessary because it is no longer a crime to carry a

Page 2 of 4



**SPONSOR SUMMARY HB102**  
**"An Act relating to concealed deadly weapons."**

concealed weapon in accordance with Section 1. The reference (a)(6) replaces (a)(1) because now these defenses apply to people under the age of 21. In other words, this provision keeps it legal for a person under 21 to carry a concealed weapon in their house, on their land or while engaged in a lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection such as hunting, fishing or trapping.

**Section 2.(b)(3)and(4)** are deleted because the whole section (b) now only applies to people under the age of 21 and those people cannot be permit holders.

**Section 3.** The change to this section takes into consideration peace officers under the age of 21.

**Section 4.** This section replaces the clause from AS 18.65.750(b) that defines the phrase "contacted by a peace officer." Section 7 of this bill repeals this language, so we replace it here. We maintain this language in statute to help clarify the law and aid in prosecution of the crime.

**Section 5.** This section gives permit holders from outside Alaska the same rights as Alaskan permit holders and holds them to the same responsibilities as Alaskan concealed weapons carriers.

**Section 6.** This section takes the list of permit applications, permits and renewals off the public record. It also absolves the Department of Public Safety of the responsibility of compiling a list of permittees and applications for access by peace officers. This does not preclude the department from keeping such a list; it just helps protect the rights of those who still wish to get a concealed carry permit. Why should the law require that they be on a list when anyone can carry concealed without a permit?

**Section 7.** This section repeals three sections that no longer apply if a permit is not required to carry a concealed weapon.

**AS 18.65.750** I repeal this section because Section 1 and Section 4 of this bill address the issues surrounding contact by a peace officer. Also, if it is legal to carry a concealed weapon without a permit, than there is no reason to mandate that a permit holder carry his permit at all times.

Page 3 of 4

9.



**SPONSOR SUMMARY HB102**  
**“An Act relating to concealed deadly weapons.”**

AS 18.65.755(a)(1) Section 1 of this bill covers this provision.

AS 11.61.220(d)(1)(A) Section 1 of this bill makes this an unnecessary requirement of defense. Currently, permittees can carry legally in a restaurant (as defined in AS 04.16.049) because of the defenses listed in this section. Without removing the permit part of the affirmative defense, it would make it illegal for a person to carry concealed in a restaurant unless they had a permit even if they were not drinking. This exception would be confusing and unfair to those citizens who choose to carry without a permit. I remove this clause because it was not my intention to add or remove any restrictions of where a person is allowed to carry a concealed weapon.



NATIONAL RIFLE ASSOCIATION OF AMERICA  
INSTITUTE FOR LEGISLATIVE ACTION  
555 CAPITOL MALL, SUITE 625  
SACRAMENTO, CALIFORNIA 95814  
(916)446-2455 voice ■ (916)448-7469 fax

STATE & LOCAL AFFAIRS DIVISION  
BRIAN JUDY, ALASKA STATE LIAISON

April 4, 2003

Representative Eric Croft  
State Capitol, Room 400  
Juneau, AK 99801-1182

Dear Representative Croft:

On behalf of the over 24,000 Alaska members of the National Rifle Association, let me take this opportunity to offer our strong support for House Bill 102. HB 102 would repeal the existing provision of law which prohibits the carrying of a concealed weapon in Alaska.

Law-abiding citizens should not be required to obtain permission to provide a means of self protection for themselves or their family. Indeed, Article I, Section 19 of the Alaska State Constitution provides that "The *individual* right to keep and *bear* arms shall not be denied or infringed by the state..." Alaska's prohibition on concealed carry essentially puts a pricetag on those Alaskan's natural right to self-defense for whom carrying a firearm in plain view is not a reasonable nor responsible option.

In fact, in Alaska a law-abiding citizen needs no permission to carry a firearm openly anywhere in the state, whether loaded or unloaded, nor to carry concealed when engaged in lawful outdoor activities that necessarily involve the carrying of a weapon for self protection. But if that person desires to wear outer clothing which might cover a weapon, is dressed in a manner which is not compatible with open carry, is engaged in other than an "outdoor activity" or is in a situation in which open carry might not be responsible due to possible intimidation of others, advance governmental permission must be obtained.

It really makes no sense to require a law-abiding citizen to pay a fee, endure a relatively significant bureaucratic process, be subjected to fingerprinting, obtain the government's permission and be added to a government-maintained list of firearm owners simply so they can wear a coat or carry in what would arguably be a more responsible manner during circumstances in which open carry is not appropriate.

11.

Vermont is currently the only state which allows the carrying of concealed weapons without a permit. Unlike other states, Vermont has no criminal code provision prohibiting concealed carry and thus, no concealed weapon permit system. In Vermont any law-abiding citizen who can legally own and possess a firearm is entitled to carry it openly or concealed, loaded or unloaded. According to the FBI Uniform Crime Report, the State of Vermont consistently falls near the bottom of the list in terms of crime. For 2001, the most recent year for which statistics are available, Vermont ranks as follows: Total violent crime - 49, Murder & non-negligent manslaughter - 48, Forcible rape - 49, Robbery - 47 and Aggravated Assault - 48.

There is absolutely nothing inherently wrong with a law-abiding citizen carrying a firearm concealed. The prohibition against concealed carry is a "Malum prohibitum" offense, that is it is only wrong (illegal) because a statute has been passed to arbitrarily make it illegal. This is as opposed to a "Malum in se" offense (such as murder), that is an offense which is inherently wrong.

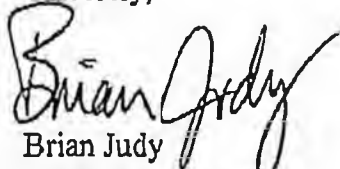
Only law-abiding citizens are currently obtaining permits to carry concealed firearms. Being allowed to carry concealed without the permit will not change the fact they are law-abiding. Criminals, on the other hand, are already carrying concealed firearms without permits. Those with existing criminal records who are prohibited from owning or possessing firearms can be prosecuted for mere possession. Those with no prior record, but who commit a crime in conjunction with the concealed carry, can be charged with the other, probably more serious, offense.

Alaska's concealed handgun permit law was passed in 1995. Opponents screamed hysterically that "blood would run in the streets." Such did not occur. The permit system was reformed in 1998 amidst the same dire warnings and predictions. Empirical evidence, again, proved the alarmist rhetoric to be unfounded. Further streamlining in 2000 and 2002 has not had negative consequences and no increase in firearm-related problems. Repealing the prohibition on concealed carry is the ultimate in streamlining and the predictable outcome is that such a statutory revision will have no negative impact. If anything, Alaska residents should expect that crime rates will decrease, moving in the direction of those in the State of Vermont.

The National Rifle Association supports your approach to this issue with House Bill 102 by maintaining Alaska's concealed handgun permit system and repealing only the prohibition on concealed carry. As such, any person who would still desire a permit so that they can carry in other states which reciprocate with or recognize Alaska permits or who want to continue to be exempt from firearm purchase background checks may still obtain a permit.

Please let me know how I can be of assistance in the effort to pass House Bill 102.

Sincerely,

  
 Brian Judy  
 Alaska State Liaison

# FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: HB 102  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
Title "An Act relating to concealed deadly BRU Criminal Division  
weapons." Component All  
Sponsor Representative Croft  
Requester House State Affairs Committee 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 recognizes valid permits to carry a concealed weapon from other jurisdictions. Holders of those permits would automatically be considered Alaska permittees as well, unless the person had an application to carry a concealed weapon in Alaska rejected because they were unqualified, or the person had their Alaska permit revoked or suspended by the state.

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 3/11/03 11:02 AM  
Approved by: Kathryn Daughhettee for Gregg D. Renkes, Attorney General Date 3/11/2003  
Agency Department of Law

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
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Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

April 9, 2003

**SUBJECT:** Concealed Deadly Weapons and Contacted by a Peace Officer  
(Work Order No. 23-LS0515A)

**TO:** Representative Eric Croft  
Attn: Mark

**FROM:** Gerald P. Luckhaupt *JERRY*  
Legislative Counsel

You have asked about the origin of the term "contacted by a peace officer" which is used in sec. 1 of CSHB 102( ) and defined in sec. 4 of that bill. This term exists in the Alaska statutes in AS 18.65.750.<sup>1</sup> It currently governs the conduct of concealed handgun permittees when those permittees are "contacted by a peace officer." This language was developed after much discussion in 1994 when the concealed handgun permit system was

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<sup>1</sup> AS 18.65.750 provides:

Sec. 18.65.750. Possession and display of permit.

(a) A permittee shall carry the permit at all times the permittee carries a concealed handgun. The permittee shall display both the license and other proper identification when asked to do so by a peace officer at any time.

(b) Whenever a permittee who is carrying a concealed handgun is contacted by a peace officer, the permittee shall immediately inform the peace officer that the permittee is carrying a concealed handgun under the permit.

(c) During a contact with a permittee, a peace officer may secure a handgun, or direct that it be secured, during the duration of the contact if the peace officer determines that the action is necessary for the safety of any person, including the peace officer, present. The permittee shall submit to the securing of the handgun.

(d) In this section, "contacted by a peace officer" means stopped, detained, questioned, or addressed in person by the peace officer for an official purpose.

(e) A person who violates (a) of this section is guilty of a violation and upon conviction may be punished by a fine of not more than \$100.

(f) A person who violates (b) or (c) of this section is guilty of a class A misdemeanor.

Representative Eric Croft

April 9, 2003

Page 2

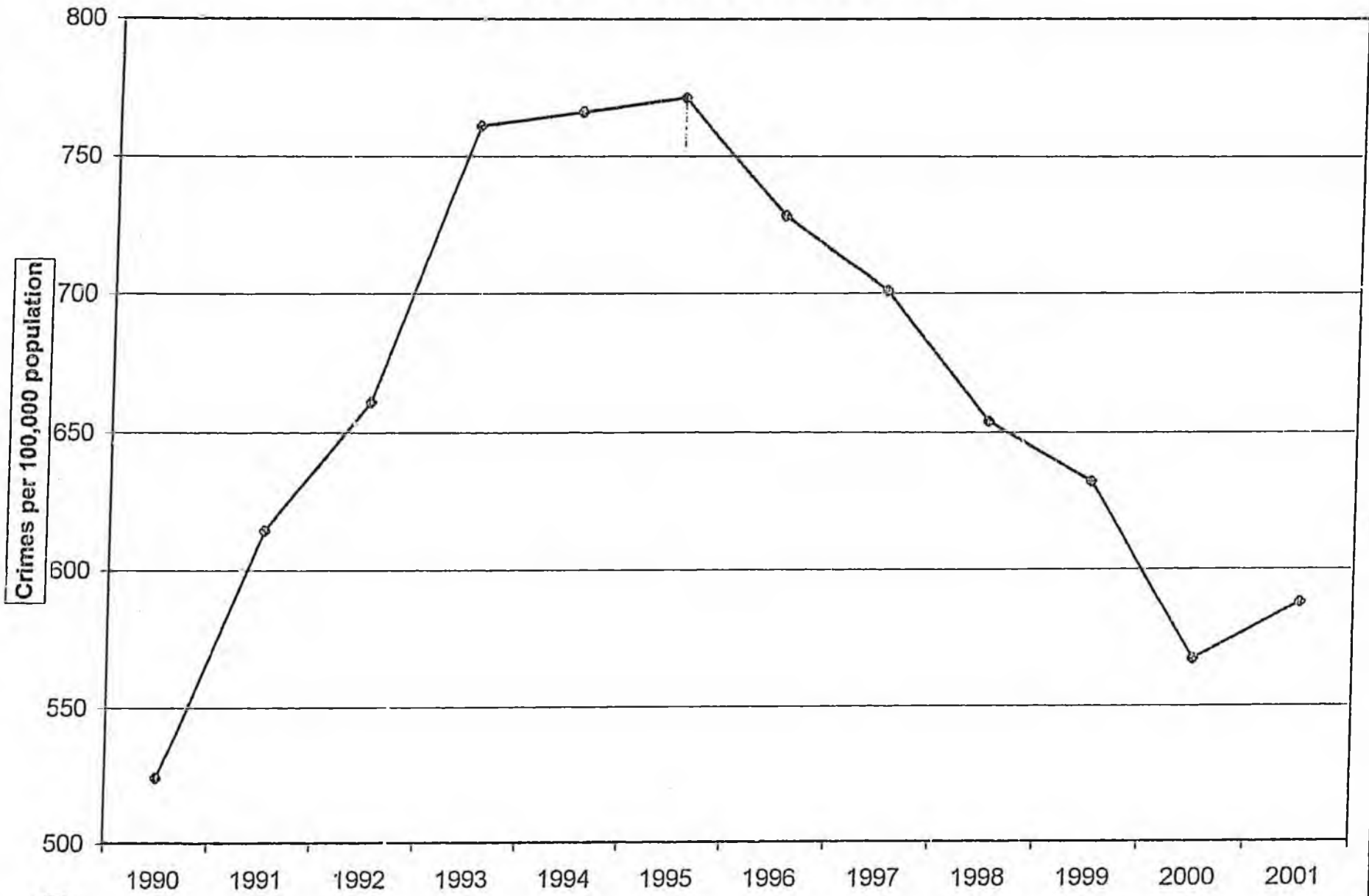
first adopted. I have not been informed of any problems in the application of this statute in the concealed handgun permit system. It was designed to reach situations when a concealed handgun permittee is contacted by a peace officer and the peace officer is entitled to do a protective frisk of the person under the authority of *Terry v. Ohio*, 392 U.S. 1 (1968).

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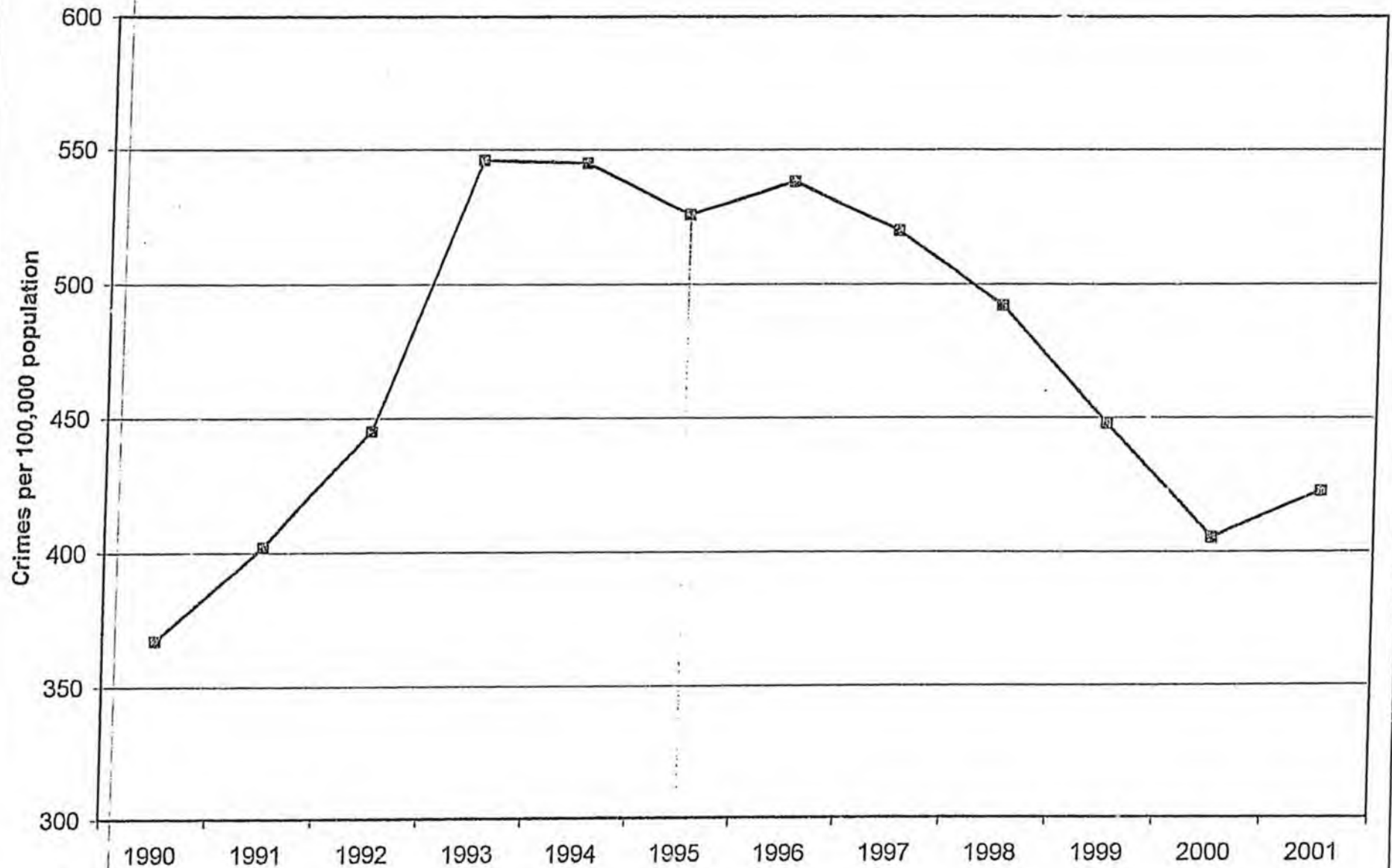
# Alaska Crime Rates

**Violent Crime**  
Sources: FBI and Bureau of Justice Statistics



# Alaska Crime Rates

**Aggravated Assault**  
Sources: FBI and Bureau of Justice Statistics



# Alaska Crime Rates

Robbery  
Sources: FBI and Bureau of Justice Statistics

