ALASKA LEGISLATURE COMMITTEE FILES, 2003-2006 8672

11501 HOUSE JUDICIARY

Fairbanks Daily News-Miner

Changes to Stranded Gas Act weighed

By R.A. DILLON

Friday, June 02, 2006 - Staff Writer

JUNEAU--Alaska legislators on Thursday took up amendments to the state's Stranded Gas Development Act.

Gov. Frank Murkowski is asking lawmakers to approve changes that would allow him to lock-in the producers' taxes and royalty for 30 years on oil and 45 years for gas, as well as take the state's share of production in natural gas instead of cash.

The 10-page bill contains more than a dozen alterations to the Stranded Gas Development Act, the law under which Murkowski negotiated a deal with Exxon, BP and ConocoPhillips to develop the North Slope's 35 trillion cubic feet of gas reserves.

Kevin Jardell, Murkowski's legislative director, said the amendments provide the administration with greater authority to negotiate the terms of the contract with the producers.

Murk-owski has been in talks with the producers for nearly two years but the proposed deal goes beyond the limits of the stranded gas act, so he needs lawmakers to amend the act to make the contract legal.

Jardell and other administration officials provided members of the House Resources Committee and the newly formed Senate Special Committee on Natural Gas Development a page-by-page walkthrough of the amendments. The amendments would:

* Repeal language in the Stranded Gas Act that prohibits significantly altering tax and royalty rates on existing oil and gas production.

* Allow the state to take royalty and production tax on gas in-kind instead of cash.

* If approved, the final contract would override the state's existing leases on the North Slope.

* Require the state to agree to arbitration to settle all disputes with the producers and prohibit the state from taking the companies to court.

While some of the changes are likely to receive the approval of lawmakers, others face a much tougher battle, said House Resources Co-Chairman Ralph Samuels, R-Anchorage.

"We're not going to lock oil in for 30 years," he said. "That we can't do."

Lawmakers have been consistent in their opposition to freezing taxes on oil for the life of the contract, something the producers argue is needed before they can invest billions of dollars to build a gas pipeline from the North Slope to markets in Alberta, Canada, and perhaps Chicago. The state needs

time to make sure the new tax system works and no one can guarantee the future price of oil, Samuels said.

"Nobody's crystal ball is perfect; not even the industry's," he said.

Samuels said he would try to remove or alter the provision before the bill leaves his committee.

Sen. Ralph Seekins, chairman of the Senate Special Committee on Natural Gas Development, said the Legislature may reduce the length of fiscal certainty to reduce the risk to the state.

"We can improve the economics of the pipeline without having to put a fixed date on it," he said.

Seekins said the chief concern was whether the Legislature should increase the powers the governor already has under the 1998 Stranded Gas Act to negotiate with the producers.

Samuels had fewer problems with granting the governor wider powers to negotiate a gas deal. The final decision still remains with the Legislature, he said.

"The point is, 60 people are never going to be able to negotiate a contract," he said, "so we are turning it over to the administration and if we don't like what they do, we vote it down."

Rep. Harry Crawford raised concern over the administration's attempt to change the requirement that the contract be in the "best fiscal interest" to the "long-term interest" of the state.

The Anchorage Democrat said the change would allow the administration to approve almost any contract.

"It gives them huge latitude on what is in the long-term interest of the state," he said. "That's a big difference to what's in the best fiscal interest of the state."

Jardell said the change was a minor technical amendment to make sure the language in the contract is consistent with the findings released by the commissioner of the Department of Revenue.

Crawford also objected to language in the amendments that would exempt the producers from tax increases passed through the public initiative process.

Crawford is one of the sponsors of an initiative on the November ballot that would tax leaseholders $1 billion a year if they fail to develop gas fields on the North Slope.

Crawford said he planned to meet with other members of the minority caucus to discuss possible amendments to the administration's bill.

House Resources will take up the amendments again today at 9 a.m. Samuels said he expects to have a committee substitute ready by Saturday and the measure could be passed out the same day.

Seekins, R-Fairbanks, said the special Senate gas committee would hear from the administration and the Legislature's legal advisers this morning and take public testimony starting at 9 a.m. on Saturday.

He said the committee would consider amendments Sunday, but he did not know when a committee

substitute might be introduced.

The special session must end no later than midnight on June 8.

"If we don't hit that deadline, we don't hit it," he said. "This is too important to hurry."

The governor can call a second special session beginning June 9 if he wants to keep lawmakers working on the gas contract.

Staff writer R.A. Dillon can be reached at (907) 463-4893 or rdillon@newsminer.com .

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
Attention: Senator Gene Therriault and Representative Ralph Samuels

FROM: Phillip C. Gildan

DATE: June 3, 2006

RE: SB 2004 Proposed Stranded Gas Development Act Conforming Legislation
Legislative Amendments For Consideration Re Alternate Dispute Resolution

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In addition to our June 2, 2006, memorandum addressing potential amendments to SB 2004, Section 11, regarding Project Entities, we have proposed an amendment for consideration addressing concerns regarding alternative dispute resolution provisions of the proposed SGFC.

This amendment arises from the following concerns based on review of the proposed Stranded Gas Fiscal Contract ("SGFC").

Waiver of Sovereign Immunity. The SGFC contains numerous provisions effecting a waiver of sovereign immunity by the State in various different capacities, predominantly to allow for claims to be brought against the State by the Producers. Under the doctrine of sovereign immunity, without an express waiver, the state would not be subject to claims actions. The determination to provide such waivers or not is a policy level decision. However, one feature usually attendant to a state's waiver of sovereign immunity is not expressly addressed in the SGFC; that is a reasonable monetary limitation on the size of individual and aggregate claims against the state, absent which the state's potential liability is limitless. If the legislature wishes to address this concern, an optional amendment to SB 2004 is set forth below in AS 43.82.200(5)(A).

Indemnification. The SGFC contains numerous provisions requiring the State to indemnify or reimburse the Producers for losses in a variety of different situations. See Sections 8.3, 10.10, 11.12 , 21.3 and 22.1(g)(ii). Indemnification is an equitable doctrine that shifts the risk of loss from a direct party that incurs the loss, to an indirect party for whom or on whose behalf the direct party was acting. The determination to provide indemnification or not is a policy level decision. However, one feature often attendant to a grant of indemnity which is missing from the SGFC indemnifications is a limitation against indemnifying a direct party for losses caused by its own negligence, intentional actions or crimes, and to further limit indemnity to actual damages. It is generally considered unfair to shift the risk of loss to an indirect party, where the direct party is at fault and caused the loss. If the legislature wishes to address these

Amend Section 3 of SB 2004, to further amend AS 43.82.200 (5) to read as follows:

Sec. 3. AS 42.82.200 is amended to read:

(5) Terms regarding arbitration or alternative dispute resolution procedures, **provided,**

(A) the state shall not agree to a waiver of sovereign immunity without a reasonable monetary limit on such waiver under the facts and circumstances;

(B) the state shall not agree to indemnify, or otherwise hold harmless any person or entity that has been adjudged in a judicial, administrative, or alternative dispute resolution proceeding to be liable for negligence or misconduct in the performance of the person's or entity's duty or has been adjudged guilty of a crime or had such criminal adjudication withheld subject to probationary terms;

(C) the state may not eliminate claims for actual damages incurred by the state, and may not eliminate the equitable rights to seek specific performance and injunctive relief;

(D) the state shall not provide reimbursement or indemnification of special, consequential, incidental, lost profits or punitive damages; and

(E) arbitration or alternative dispute resolution procedures shall incorporate equivalent presumptions and burdens of proof as set forth for civil trials in Rule 301, Presumptions in General in Civil Actions and Proceedings, and Rule 302, Applicability of Federal Law in Civil Actions and Proceedings, Alaska Rules of Evidence, as amended.

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

July 24, 2006

HAND DELIVERED

The Honorable Representative Lesil McGuire
Chair of the House Judiciary Committee
716 W. 4th Ave Ste 430
Anchorage, AK 99501-2133

Dear Representative McGuire:

You have requested my view of the constitutionality of AS 43.82.435 which provides that the fiscal contract that the Governor will present to the legislature "is not binding upon or enforceable against the state or other parties to the contract unless the governor is authorized to execute the contract by law." As I explain below, I believe that legislative approval of the contract is constitutionally required because the contract changes taxes that would be paid by the producers. I have conveyed my views to the Governor, and he, in turn, has indicated that he intends to follow the law as provided in AS 43.82.435.

Each of the three branches of government possess powers that are not supposed to be encroached upon by the other branches of government.[1] This principle is the essence of the "separation of powers" doctrine.

The Alaska Supreme Court generally takes a strict view towards encroachment of one branch upon another branch's powers.[2] On the other hand, the Court acknowledges

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[1] *See, e.g., Bradner v. Hammond*, 553 P.2d 1 (Ak. 1976, 'statute providing for legislative confirmation of deputy commissioners and certain other administrative officials violated separation of powers doctrine because appointment of agency officials is an executive branch function and the constitution expressly limits the extent of the legislature's confirmation authority to commissioners).

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CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
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concerns. optional amendments to SB 2004 are set forth below in AS 43.82.200(5)(B)(C) and (D).

Burdens of Proof/Presumptions/Remedies. Section 38.3 of the SGFC eliminates any legal or equitable presumptions in favor or against a party in the interpretation of the SGFC (except for a minor presumptions provided in Section 19.10 of the SGFC). Exhibit C to the SGFC provides mandatory dispute resolution procedures which apply to any Dispute pursuant to Article 26 of the SGFC. These provisions are policy level decisions, and may benefit any given party on any given dispute. Section 5.5 of the SGFC, however, purports to supersede the provisions of Section 38.3 and Exhibit C for a Dispute arising out of a Participant's failure to act by Diligence, imposing different burdens of proof, limiting available remedies and imposing different presumptions, each of which negatively impacts the State and benefits of the Participants. For example, the State's right to seek specific performance by the Producers as a remedy is removed and the State is limited to termination of the contract. As another example, the normal dispute burden of proof is raised from the preponderance of evidence standard to a clear and convincing standard, a significantly more difficult burden of proof for a claimant. Whether to provide such exception for this one Dispute is also a policy decision. If the legislature wishes to address this concern, options include subjecting a Section 5.5 Dispute to the same dispute resolution provisions as other Disputes under Article 26 and Section 38.3, or amending the SGDA as per proposes AS 43.82.200(5)(E) below.

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some overlap between branches with respect to some powers.[3] It also recognizes the legal doctrine of "comity" in which one branch accepts limitations placed upon it by another branch even if it is not strictly bound by the limitation placed upon it by the other branch.[4]

This and previous administrations have a long history of encouraging legislative approval of the fiscal contract not only as a matter of comity, but also because the legislative taxation power is implicated.[5] Additionally, one court has recognized that legislative approval of a contract does not violate the separation of powers doctrine when a legislative power is clearly implicated and when approval would not interfere with the exercise of the executive's power.[6]

The Alaska Supreme Court's previous separation of powers cases do not consider a set of facts that is especially close to the current situation in which the SGDA provides for legislative approval of a fiscal contract. Thus, although one can reasonably argue that legislative approval of the fiscal contract would violate the separation of powers doctrine,[7] because the power of taxation is so clearly implicated by the contract, in my opinion legislative approval of the fiscal contract is constitutionally required.[8]

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[3] *See, e.g., Continental Insurance Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410 (Ak. 1976) (identifying some overlap in powers between congress and legislatively created courts).

[4] *See, e.g., id.* (even when no overlap, statutes that reasonably regulate court contempt powers should be given effect as a matter of comity).

[5] *See, e.g.*, Attorney General's May 29, 1998 Bill Review Letter for SCS CSHB 393 (Fin) (because the contract involves "the state's fiscal regime, a subject substantially within the purview of the legislative branch ... the legislature may well be required to levy the new tax by law. Viewed in this light, the legislature's approach might not only be permissible, but necessary, under the constitution.")

[6] *Enourato v. New Jersey Building Authority*, 448 A.2d 449, 453 (N.J. 1982) (legislative approval of contracts was appropriate because the projects would require continued funding from the legislature, thereby implicating the legislative appropriation power). *See also Baliles v. Mazur*, 297 S.E. 2d 695, 700-701 (similar holding).

[7] *See* May 23, 2006 Opinion of Theresa Bannister, Legislative Counsel, June 22, 2006 Opinion of Tamara Brandt Cook, Director, Legal Services, Legislative Affairs Agency.

[8] Furthermore, entering into a contract which changes taxes without legislative approval may also constitute an unlawful delegation of legislative power. *See, e.g., State v. Alex*, 646 P.2d 203 (Alaska 1982) (assessments by salmon enhancement associations would constitute unlawful delegation of tax power); *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987) (statute providing that governor had complete discretion to reduce appropriations constituted an unlawful delegation of legislative power because no limits placed on delegated authority).

The Court takes a practical and common sense approach to interpreting the constitution, particularly when competing constitutional values like those presented here are involved.[9]

Finally, we expect a constitutional challenge to the contract. There is no reason to add an additional challenge regarding lack of legislative authority.

As noted at the outset, I have conveyed my view to the Governor that the statute is constitutional. In accordance with that advice, the Governor has stated that he will follow the law and submit the fiscal contract to the legislature for approval as required by AS 43.82.435. The Governor has already called two special sessions to obtain Legislative approval of the Stranded Gas Development Act (SGDA) amendments and ratification of the contract which demonstrates his commitment to following the law.

The Governor urges the legislature to pass the SGDA Amendments and ratify the contract prior to the November election to protect the project from the reserves tax. The reserves tax would kill the gas pipeline project's economics and would be a strong disincentive to oil and gas exploration investment. Alaska needs that investment to arrest the significant decline in oil production which will lead to a gradual wind down of the TransAlaska Pipeline System (TAPS) by 2030. Approving the contract would take away any reason Alaskans might have to support the reserves tax on the ground that it is necessary to incentivize the Producers to proceed with the project.

Sincerely yours,

David Márquez
Attorney General

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[9] *See, e.g., Legislative Council v. Knowles*, 988 P.2d 604, 609 (Alaska 1999) (citation omitted) ("In construing a constitutional provision, we must give it a 'reasonable and practical interpretation in accordance with common sense...'"); *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 391-393 (Court took a practical approach to resolution of this case which involved the "competing constitutional values" of the anti-dedication clause and the legislative's power to appropriate funds and "manage state assets to control risk").

HB

3002

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 July 24, 2006

SUBJECT: Sectional Summary (HB3002)

TO: Representative Lesil McGuire
Attn: Shalon Szymanski

FROM: Dennis C. Bailey
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Adds to the purpose section of the Alaska Stranded Gas Development Act (SGDA) provisions authorizing fiscal terms related to oil and gas agreements and taxes related to oil and gas business. Removes the restriction that new investment may not significantly alter existing taxes and royalties.

Section 2. If the contract creates one or more economically affected municipality, the contract shall provide for a periodic payment to the state that may be appropriated to the natural gas pipeline impact fund to benefit the economically affected municipalities.

Section 3. Establishes a special account and the Alaska natural gas pipeline impact construction impact fund. The legislature may appropriate money from the account to the fund to address the economic and social impacts incurred by a municipality or a nonprofit organization serving the unorganized borough during construction.

Requires the Department of Commerce, Community, and Economic Development (DCCED) to adopt regulations concerning application and eligibility and establishes priority for the most directly or severely impacted communities or organizations. Payments are made to municipalities and organizations to the extent money is available. The department must report to the legislature the grants received, the determinations of eligibility for future grants, and recommendations of the amounts to be granted, with written justification for past and potential grants.

In consultation with the municipal advisory group, the commissioner of DCCED shall use money appropriated to the impact fund to make grants to municipalities and non-profit organizations serving the unorganized borough for listed impacts.

Before making grant awards, the commissioner shall provide reasonable public notice of grant applications received, recommendations, preliminary determinations concerning eligibility, and proposal allocations. The commissioner must hold public meetings to receive comments about the preliminary determinations and allocations, and shall give notice of final grant awards. Grants may be awarded thirty days after such public notice is given.

Grant money may not be used to retire municipal debt. Natural gas pipeline construction impact fund money does not lapse.

A direct or severe impact is defined to mean a clearly demonstrable effect on a community that contributes to a material change to transportation, infrastructure, law enforcement, emergency services, health and human services, education, the labor force, population, wages, subsistence, or a socio-cultural impact brought about by construction.

Section 4. Municipal advisory groups are disbanded 90 days after final distribution of impact money or commencement of operation of the project. Expenses of the advisory group may be reimbursed by grant under AS 43.82.505.

Section 5. Regulations adopted by DCCED to determine local contribution in a revenue-affected municipality and to perform its duties under AS 14.17.510 shall establish assessment standards for property that would have been assessed but instead is generating a payment in lieu of taxes under a contract developed under SGDA. The regulations must establish assessment standards and ensure that this type of property is included in the full and true value of the city and borough school district for the purpose of determining required local contributions for education funding.

Section 6. Sections 1 and 2 are retroactive to January 1, 2004.

Section 7. The Act is effective immediately.

If I may be of further assistance, please advise.

DCB:med
06-441.med

FRANK H. MURKOWSKI
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

July 12, 2006

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Harris:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill relating to the Alaska Stranded Gas Development Act. This bill is a shorter version of SB 2004, which was introduced at my request during the Second Special Session of the Twenty-Fourth Alaska State Legislature. The provisions of the present bill are based largely on certain amendments to SB 2004 that were reflected in CSSB 2004(NGD). The bill I am transmitting would authorize the commissioner of revenue to negotiate fiscal terms relating to oil, and includes provisions relating to certain payments to municipalities and nonprofit organizations.

I continue to believe that the proposed fiscal contract originally negotiated with the producers would be in the public interest. However, it is my intent to be responsive to the concerns expressed by the Legislature and members of the public concerning the provisions in the fiscal contract that provide for fiscal certainty for certain taxes levied on the production of oil. I encourage the Legislature to continue its review of the fiscal contract and consider amendments to the Stranded Gas Development Act that will provide a sound foundation throughout the duration of the contract. I pledge the full cooperation of my administration to assist you in this effort, which is in the long-term fiscal interest of the state.

I urge your prompt and favorable consideration of this bill.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure

HB 3002

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
Attention: Senator Gene Therriault and Representative Ralph Samuels

FROM: Phillip C. Gildan

DATE: July 13, 2006

RE: Initial Comments on Senate Bill No. 3002, Amendments to the Alaska Stranded Gas Development Act, Introduced 7/12/06

Senate Bill No. 3002 (SB 3002) significantly differs from Senate Bill No. 2004 (SB 2004) introduced during the last Special Session of the Legislature on the same subject matter. This memorandum discusses the provisions of Section 1 and Section 6 of SB 3002 vis-à-vis the provisions of SB 2004 (and does not address the municipal/education provisions in Sections 2-5 of SB 3002).

SB 2004 had addressed numerous structural changes to the various provisions of the Alaska Stranded Gas Development Act (SGDA) to reconcile the provisions of the SGDA with the terms of the Alaska Stranded Gas Fiscal Contract (SGFC) as negotiated among the Administration and the Producers. In that sense, SB 2004 represented a micro level restructuring of the various directions of the Legislature to the Administration for development of a contract. With SB 3002, the Administration appears to have switched emphasis from a micro level restructuring of the SGDA to a macro level restructuring without specific revision to the Legislature's prior directions in the SGDA.

This macro level emphasis manifests itself in the singular revision to the Purpose finding of the Legislature set forth in AS 43.82.010. Where the current SGDA dictates that development of the State's stranded gas be effected "without significantly altering tax and royalty methodologies and rates on existing oil and gas infrastructure and production," SB 3002 reveres that purpose. Section 1 of SB 3002 eliminates the prohibition against significant alteration of existing oil and gas taxes and royalties, and then broadly expands the scope of the SGDA to

cover establishment of fiscal terms for all "oil and gas agreements and taxes for a qualified sponsor . . . and related to their oil and gas business activity in the state."

This macro level restructuring approach then takes advantage of the existing terms of the SGDA to obviate the necessity of micro level restructuring of the SGDA. In particular, AS 43.82.200(7) provides:

> Sec. 43.82.200. Contract development
>
> If the commissioner approves an application and proposed project plan under AS 43.82.140, the commissioner may develop a contract that may include
>
> (7) other terms or conditions that are
>
> (A) necessary to further the purpose of this chapter; or
>
> (B) in the best interests of the state.

Subsection (7)(A) above provides the vehicle, when combined with the SB 3002 revision to the Purpose of the SGDA, for the Administration to posit that no further amendments to the SGDA are necessary to reconcile the terms of its negotiated SGFC with the SGDA.

The final revision needed to complete the macro level restructuring of the SGDA appears in Section 6 of SB 3002. This section makes the Section 1 revision to the Purpose of the SGDA retroactive to January 1, 2004. This retroactivity clause tends to provide protection against a third party challenge that the Administration's negotiation of the proposed SGFC prior to authorization in the SGDA was invalid.

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Indemnification. The SGFC contains numerous provisions requiring the State to indemnify or reimburse the Producers for losses in a variety of different situations. See Sections 8.3, 10.10, 11.12 , 21.3 and 22.1(g)(ii). Indemnification is an equitable doctrine that shifts the risk of loss from a direct party that incurs the loss, to an indirect party for whom or on whose behalf the direct party was acting. The determination to provide indemnification or not is a policy level decision. However, one feature often attendant to a grant of indemnity which is missing from the SGFC indemnifications is a limitation against indemnifying a direct party for losses caused by its own negligence, intentional actions or crimes, and to further limit indemnity to actual damages. It is generally considered unfair to shift the risk of loss to an indirect party, where the direct party is at fault and caused the loss. If the legislature wishes to address these

concerns, optional amendments to SB 2004 are set forth below in AS 43.82.200(5)(B)(C) and (D).

Burdens of Proof/Presumptions/Remedies. Section 38.3 of the SGFC eliminates any legal or equitable presumptions in favor or against a party in the interpretation of the SGFC (except for a minor presumptions provided in Section 19.10 of the SGFC). Exhibit C to the SGFC provides mandatory dispute resolution procedures which apply to any Dispute pursuant to Article 26 of the SGFC. These provisions are policy level decisions, and may benefit any given party on any given dispute. Section 5.5 of the SGFC, however, purports to supersede the provisions of Section 38.3 and Exhibit C for a Dispute arising out of a Participant's failure to act by Diligence, imposing different burdens of proof, limiting available remedies and imposing different presumptions, each of which negatively impacts the State and benefits of the Participants. For example, the State's right to seek specific performance by the Producers as a remedy is removed and the State is limited to termination of the contract. As another example, the normal dispute burden of proof is raised from the preponderance of evidence standard to a clear and convincing standard, a significantly more difficult burden of proof for a claimant. Whether to provide such exception for this one Dispute is also a policy decision. If the legislature wishes to address this concern, options include subjecting a Section 5.5 Dispute to the same dispute resolution provisions as other Disputes under Article 26 and Section 38.3, or amending the SGDA as per proposes AS 43.82.200(5)(E) below.

Amend Section 3 of SB 2004, to further amend AS 43.82.200 (5) to read as follows:

Sec. 3. AS 42.82.200 is amended to read:

(5) Terms regarding arbitration or alternative dispute resolution procedures, **provided,**

(A) the state shall not agree to a waiver of sovereign immunity without a reasonable monetary limit on such waiver under the facts and circumstances;

(B) the state shall not agree to indemnify, or otherwise hold harmless any person or entity that has been adjudged in a judicial, administrative, or alternative dispute resolution proceeding to be liable for negligence or misconduct in the performance of the person's or entity's duty or has been adjudged guilty of a crime or had such criminal adjudication withheld subject to probationary terms;

(C) the state may not eliminate claims for actual damages incurred by the state, and may not eliminate the equitable rights to seek specific performance and injunctive relief;

(D) the state shall not provide reimbursement or indemnification of special, consequential, incidental, lost profits or punitive damages; and

(E) arbitration or alternative dispute resolution procedures shall incorporate equivalent presumptions and burdens of proof as set forth for civil trials in Rule 301, Presumptions in General in Civil Actions and Proceedings, and Rule 302, Applicability of Federal Law in Civil Actions and Proceedings, Alaska Rules of Evidence, as amended.

ATTACHMENTS

Memo Prepared by Mr. Phil Gildan of Greenberg Traurig
May 22, 2006 Memorandum on LLC choice of law
and
June 2, 2006 Memorandum proposed SGDA amendments

Greenberg Traurig

Memorandum

TO: Don Shepler

FROM: Phillip C. Gildan

DATE: May 22, 2006

RE: Alaska Natural Gas Pipeline: Form of Ownership Entity
Limited Liability Company/Choice of Laws

The choice of utilizing a Limited Liability Company (LLC) as the form of ownership entity for the Alaska Natural Gas Pipeline appears to have been agreed to among the Producers and the State negotiating team. This memorandum does not discuss the conclusion to use the indirect ownership structure of an LLC, vis-à-vis a direct ownership structure of an undivided joint interest (UJI) form of project ownership. Instead, this memorandum addresses only the question of choice of law as to formation of the LLC, and implications to the State from such choice. (Note: this memorandum does not address tax implications from choice of formation law).

From the Gas Pipeline Contract Presentations by the State negotiating team, it has been represented that the Producers and the State negotiating team have agreed upon use of the Delaware Limited Liability Company Act, Delaware Code, Title 6, Subtitle II, Chapter 18 ("Delaware Act") in lieu of the Alaska Revised Limited Liability Company Act, AS Chapter 10.50 ("Alaska Act").

Why choose the Delaware Act to form an Alaska Pipeline LLC instead of using the Alaska Act? In broad general terms, the business community maintains the perception that Delaware Courts provide a more developed body of case law affecting business entities than other states, and accordingly provide greater certainty of prediction of outcome in the event of business disputes. The corollary of this perception holds that Delaware Chancery Court Judges have a greater expertise in resolution of business disputes than judges in other states, again leading to greater certainty of prediction of outcome. An undercurrent of the perception of Delaware superiority, from both a body of law and judiciary, is that decisions by Delaware courts on business entity issues more often favor management/majority owners over minority owners. These perceptions may or may not prove out on a case by case analysis, but help explain the prevalent practice in the corporate world to establish business entities in Delaware.

Significant Differences Between Acts/Implications to Alaska

The Delaware Act represents one end of the spectrum of LLC enabling acts. It provides less mandatory entity terms, rights and obligations in favor of flexibility of the parties to freely set their own terms, rights and obligations by contract. The Alaska Act falls in the middle of the

spectrum. It provides significant freedom for the parties to set their own terms, rights and obligations, but imposes certain minimum member protections that cannot be contracted away. These minimum member protections afforded by the Alaska Act can be incorporated into a Delaware Act LLC by negotiation between/among the member parties, but absent such negotiation, those member protections will not exist. Two of these protections will be discussed below.

1. Duty of Managing Members to Entity:

The Delaware Act imposes no duty on managing members to either the company or to the other members of the company. It permits the members to contractually eliminate or create duties for managing members, with the exception that the general contract law which implies a duty of good faith and fair dealing, which can not be eliminated. The statute states:

§ 18-1101. Construction and application of chapter and limited liability company agreement.

> (a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.
> (b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.
> (c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

The Alaska Act, however imposes an express duty on managing members to act in the best interest of the company and adopts an ordinary prudent person standard of care. This duty is imposed as statutory protection of minority members (and other managing members) rights from a manager or managing member acting in its own self-interest which may be contrary to the business of the entity and the investment backed interests of the other members. It states:

AS 10.50.135. Duty of care.

> (a) A person who is a manager or a managing member of a limited liability company shall perform the duties of management in good faith, in a manner the person reasonably believes to be in the best interests of the company, and with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances.

Without the duty of care that the Alaska Act provides, a manager or managing members controlling an entity could act in their own self interest and contrary to the interest of the entity's business, with only the implied covenant of good faith, which is a significantly lower standard of care and more difficult to apply if the parties have contractually elected not to impose a duty to the entity.

2. Indemnity of Managing Members.

The Delaware Act grants broad discretion to the members to indemnify and hold harmless any member from and against any claims and demands without limitation. It states:

§ 18-108. Indemnification.

> Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.

The Alaska Act also provides the right to indemnify members, but imposes specific limitations on the ability to indemnify members, with material procedural terms enumerated. It states (with emphasis added):

AS 10.50.148. Indemnification of managers, managing members, employees, and agents; insurance.

> (a) A limited liability company may indemnify a person who was, is, or is threatened to be made a party to a completed, pending, or threatened action or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the company, by reason of the fact that the person is or was a manager, managing member, employee, or agent of the company, or is or was serving at the request of the company as a manager, managing member, employee, or agent of another limited liability company, partnership, joint venture, trust, or other enterprise. Indemnification may include reimbursement of expenses, attorney fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the person in connection with the action or proceeding ***if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the company, and, with respect to a criminal action or proceeding, the person had no reasonable cause to believe the conduct was unlawful.*** The termination of an action or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the company, and, with respect to a criminal

action or proceeding, the person had reasonable cause to believe that the conduct was unlawful.

(b) A limited liability company may indemnify a person who was, is, or is threatened to be made a party to a completed, pending, or threatened action by or in the right of the company to procure a judgment in its favor by reason of the fact that the person is or was a manager, managing member, employee, or agent of the company, or is or was serving at the request of the company as a manager, managing member, employee, or agent of another limited liability company, partnership, joint venture, trust, or other enterprise. Indemnification may include reimbursement for expenses and attorney fees actually and reasonably incurred by the person in connection with the defense or settlement of the action ***if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the company. Indemnification may not be made in respect of any claim, issue, or matter as to which the person has been adjudged to be liable for negligence or misconduct in the performance of the person's duty to the company except to the extent that the court in which the action was brought determines upon application that, despite the adjudication of liability, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for expenses that the court considers proper.***

(c) To the extent that a manager, managing member, employee, or agent of a limited liability company has been successful on the merits or otherwise in defense of an action or proceeding referred to in (a) or (b) of this section, or in defense of a claim, issue, or matter in the action or proceeding, the manager, managing member, employee, or agent shall be indemnified against expenses and attorney fees actually and reasonably incurred in connection with the defense.

(d) ***Unless otherwise ordered by a court, indemnification under (a) or (b) of this section may only be made by a company upon a determination that indemnification of the manager, managing member, employee, or agent is proper in the circumstances because the manager, managing member, employee, or agent has met the applicable standard of conduct set out in (a) and (b) of this section. The determination shall be made by the members.***

Without these limitations on indemnification, indemnity protection could be contractually provided even in those instances where the indemnified party acted against the interests of the entity, had causal or contributing negligence, or committed a crime.

3. **Dispute Resolution/Venue:** Neither the Delaware Act nor the Alaska Act dictates any particular form of dispute resolution or the location of venue for any dispute resolution proceeding involving companies organized under their respective acts. Under both of the acts, the parties may seek resort to the courts of each respective state to resolve disputes, but such resort is not mandated.

As presented in the proposed Alaska Stranded Gas Fiscal Contract, the parties are proposing a structurally developed alternative dispute resolution process and procedures. Under

the Contract, the substantive law of the State of Alaska applies with the Alaska Superior Court the venue for award judgment of matters arising out of the Contract. This may mitigate towards aligning the dispute resolution processes under the Contract and the LLC into a single integrated process, as disputes that might be anticipated to arise under the LLC or the Contract would likely implicate the other necessitating a global resolution under both.

From the Administration's presentations, however, it appears that the parties may be considering a traditional dispute resolution procedure for LLC related disputes, with venue in the Delaware Chancery Court, under the argument discussed above that Delaware judges would be more proficient in adjudicating claims arising from the Delaware LLC statute. Aside from an inconvenient forum arguments as the project and many of the participants will be located in Alaska, the likelihood of conflicting dispute resolution procedures and forums would likely eliminate any perceived superiority of Delaware Judges over Alaska Judges in interpreting Delaware LLC laws, particularly where the Delaware Act essentially waives statutory protections in lieu of contract agreement – such that no particular expertise in the Delaware Act may be necessary, but only expertise with contract interpretation in the context of pipeline project issues, in which the Alaska courts may have superior experience and proficiency.

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
Attention: Senator Gene Therriault and Representative Ralph Samuels

FROM: Phillip C. Gildan

DATE: June 2, 2006

RE: Alaska Stranded Gas Fiscal Contract:
Summary of Concerns Regarding Structure/Governance/Operation of Entities to Be Formed to Own And Operate the Various Elements of the Pipeline Project
Legislative Options

We have been requested to summarize our primary concerns with the draft Alaska Stranded Gas Fiscal Contract, dated May 24, 2006 (the "SGFC") and to review SB 2004, the SGDA Conforming Amendments proposed by the Administration ("SB 2004 Amendments") legislative options to address our concerns. This memorandum addresses one of those concerns; the lack of specificity of terms and conditions addressing the structure, governance and operation of the various Project Entities referenced in the ASGFC to be created to implement the Project, and own and operate the various Project elements (the "Entities Concern").

For purposes of this memorandum and for continuity of review, unless otherwise defined, the capitalized terms we have used in this memorandum have the same meaning given such terms in the SGFC.

Article 4 of the SGFC provides a general Project description, identifying the following Project elements: Gas Transmission Pipelines, GTP, Mainline, NGL Plant, Alaska to Alberta Project, and Alberta to Lower 48 Project. Within Article 5, Article 6, Article 7 and Article 9, the drafters of the SGFC provide that separate legal entities will be created to develop, own and operate each of the Project elements, and to implement the general terms of the SFGC (an "Entity" or collectively the "Entities"). The SGFC, however, provides little guidance or direction as to the structure, governance and operation of such Entities, the coordination between and among the Entities and the parties to the SGFC, or the interface of the terms and obligations set forth in the SGFC with the as yet unknown terms and conditions in the Project Entity agreements. As an example of some of the fundamental terms and conditions omitted from the SGFC are the following:

- form of entity and choice of establishing law;

- terms of Entity governance controlling the relationships among the interest holders, management and the entity;
- terms of Entity ownership, including initial and periodic capital contributions, duties among members and to the Entity, member transfer and buy-out issues, accounting and tax allocations, liquidation and dissolution, reporting and record keeping, audit and review;
- terms of Project implementation, including management, member voting, minority protections, staffing, procurement, vendor selection, asset acquisition and divestiture, amendment of Qualified Project Plan, creation of sub-entities, milestone triggers and approvals;
- terms of Project operating agreements addressing how the Project will be administered, termination and replacement of operators, compensation;
- terms regarding Project Tariff design, FERC applications, initial and continuing Open Seasons, expansion and extension, contracting with shippers;

The significance of these missing terms and conditions can be seen based on the duties and responsibilities which the SGFC delegates to the Project Entities. The Project Entities are charged to undertake the Project planning under the Qualified Project Plan, to update and amend the Qualified Project Plan, to structure and process the FERC and NEB project application and certification review, to determine whether to proceed with construction, to determine whether to terminate the Project or proceed to operation, to determine financing plans for the Project and capital contribution obligations, to structure the Pipeline tariff, to decide whether to Expand or Extend the Pipeline, and to own and operate the designated segments of the pipeline system both within and without the state.

However, the Contract contains scant direction regarding the Project Entities, and the Legislature has not been provided with drafts of any of the proposed Project Entity agreements. It is our understanding that negotiations are still on-going to develop the first and primary of these agreements—an agreement among the Producers and the State providing for the creation, governance, management, financing, capital contributions, operations and administration of the "Mainline Entity," and providing the structure and implementation criteria for the Qualified Project Plan.

The importance of the Project Entity agreements to the implementation of the intent of the Legislature set forth in the SGDA to assure the construction of the Project can hardly be overstated. Just listing the breadth and depth of the decisions and responsibilities delegated to the Project Entities under the Contract demonstrates the point. The apparent difficulty the Producers and the Administration are having in finalizing the first of the these agreements for the Mainline Entity, and their inability to complete such negotiations in time for submittal with the proposed Contract, proves the importance of the terms and conditions of the Project Entity agreements.

While we are told that the terms of the Mainline Entity LLC agreement are still being negotiated it is not clear that any of the Project Entity agreements will be provided to the

Legislature for comment or for approval. Indeed, SB2004 provides that the Commissioners of Revenue and Natural Resources will be authorized to enter into "collateral agreements" after execution of the Contract, and expressly without required approval of the Legislature (*See* Section 11 of SB 2004).

This is troubling since the specific terms of the Project Entity agreements can limit the rights and actions of the State with respect to critical decisions affecting the project. For example, it would be expected that the Mainline Entity LLC agreement will specify the voting rights of the participants with respect to approving the filing of the application for a FERC certificate. Likewise, it would be expected that the agreement will specify the voting rights of the State with respect to the decision to accept or reject a certificate and to proceed with construction of the project or terminate. Decisions with respect to voluntary expansions of the line will also presumably be addressed in the LLC agreement, as will decisions with respect to the pricing of expansion capacity (*i.e.*, whether it will be priced incrementally or on a rolled-in basis).

Even as basic a decision as where to establish the Mainline Entity can have significant impact on the likelihood of success of the Project. The state law in which an LLC is established can establish or negate certain duties among the parties which serve to protect minority members. The Alaska LLC Act imposes a much greater duty of care and fair dealing upon owners of an LLC than does the Delaware LLC law—which the Administration has indicated is intended to be the state in which the Mainline Entity LLC will be established. Such a duty of care and fair dealing is important where, as here, the State is a minority interest owner of the LLC. Without such duties being imposed by law the managing members of the LLC or the majority owners would be free to pursue their own self interests, and pursue activities contrary to the interest of the LLC and the Project. The choice that the Administration seems to have made with respect to the state in which to establish the LLCs is not optimal from the State's standpoint as a minority interest owner.

These missing terms and conditions are essential contractual elements. Without an agreement among the parties on these essential contract terms and conditions, the SGFC could be interpreted as nothing more than an agreement to agree, which may not reach the level of an enforceable contract.

Attached to this memorandum as an exhibit is an illustrative legislative amendment that provides an example of the type of guidance and direction to the commissioners of revenue and natural resources regarding Entity agreement terms and conditions that the legislature could consider to address the concerns discussed above.

EXHIBIT I

ILLUSTRATIVE LEGISLATIVE AMENDMENT

TO THE SB 2004 AMENDMENTS

Amend Section 11, by replacing AS 43.82.437(a) with the following:

Sec. 11. AS 43.82 is amended by adding a new section to read:

Sec. 43.82.437. Collateral Agreements. (a) The commissioner of revenue with the concurrence of the commissioner of natural resources may negotiate collateral agreements that are required to implement the state's acquisition of an ownership interest in the project **and each project entity to be created to own and operate any part of the project** that is the subject of a proposed contract developed under this chapter. **Each such collateral agreement shall be a condition subsequent to the proposed contract developed under this chapter, shall be subject to review and authorization to execute by the legislature, or the Legislative Budget and Audit Committee if the legislature is not in session, and upon approval may be entered into by the public corporation as provided in (b) below.** The authority of the commissioner of revenue to negotiate collateral agreements on behalf of the state lapses 180 days after the effective date of the law authorizing the contract under AS 43.82.435, **provided, that with respect to collateral agreements submitted by the commissioner of revenue to the legislature or the Legislative Budget and Audit Committee within the 180 day time limit, the time limit shall be extended to 5 days after authorization has been approved. Each project entity collateral agreement to be negotiated shall incorporate the following minimum elements:**

(1) if organized to do business in the state, the project entity shall be a limited liability company organized under the Alaska Revised Limited Liability Company Act, AS Chapter 10.50 ("Alaska Act");

(2) for project entities organized under the Alaska Act, the operating agreement adopted under AS 10.50.095, or equivalent governing document for project entities organized under other jurisdictions ("Operating Agreement"), shall include the limitation that the state's obligation to fund continuing capital and operating obligations shall be subject to annual appropriation by the legislature; and provide further that the state's failure to appropriate a capital or operating obligation shall not be deemed a default of the state's obligation, but shall be deemed only to reduce the state's ownership interest on a pro rata basis based upon the amount of the failed appropriation relative to the amount of the capital or operating obligations funded by the remaining project owners.

(3) the Operating Agreement shall provide that the state shall not agree to a waiver of sovereign immunity without a reasonable monetary limit on such waiver under

the facts and circumstances; and provided further, that the state shall not indemnify, or otherwise hold harmless any person or entity that has been adjudged in a judicial, administrative, or alternative dispute resolution proceeding to be liable for negligence or misconduct in the performance of the person's or entity's duty or has been adjudged guilty of a crime or had such criminal adjudication withheld subject to probationary terms; provided further, that the state may not eliminate claims for actual damages incurred by the state, and may not eliminate the equitable rights to seek specific performance and injunctive relief; and provided further that the rights and limitations provided in this subsection shall apply to collateral agreements to be entered into under AS 43.82.437.

(4) the Operating Agreement shall provide that in the event of a dispute between or among the members of the entity, a subsidiary entity, an affiliate of a member, a member representative, and any other person or legal entity that has a membership or ownership interest in an owner entity of the project, such dispute shall be subject to the dispute resolution terms and procedures set forth in the contract as approved by the legislature pursuant to AS 43.82.435. The term "dispute" shall mean a dispute, matter, controversy or claim arising out of or relating to any owner entity of the project, to any ownership interest in the project, to any agreement between or among the members or owners of any owner entity of the project arising out of or relating to such owner entity of the project, or to the operation, management, or implementation of the project, including its interpretation, construction, performance, enforcement, privileges, rights or obligations. Such dispute resolution terms shall incorporate equivalent presumptions and burdens of proof as set forth for civil trials in Rule 301, Presumptions in General in Civil Actions and Proceedings, and Rule 302, Applicability of Federal Law in Civil Actions and Proceedings, Alaska Rules of Evidence as amended.

(5) the Operating Agreement shall provide that the managing members and member representatives owe a duty to act in the best interest of the entity and perform their duties in good faith towards the goal of implementation of the project.

(6) the Operating Agreement shall provide that the entity shall not effect a material change or amendment to the Qualified Project Plan without the review and authorization of the legislature, or the Legislative Budget and Audit Committee if the legislature is not in session.

(7) the Operating Agreement shall provide that the members of the governing body of any subsidiary entity organized by the entity shall be the members of the governing board of the entity, unless otherwise authorized by the legislature, or the Legislative Budget and Audit Committee if the legislature is not in session.

(8) the Operating Agreement shall provide the state the unilateral right to initiate expansions of the project, provided the state funds or obtains third party funding from a credit worthy customer for each such expansion or extension, and shall include terms for voluntary expansion, including:

A) holding periodic (every 3-5 years) binding or non-binding open seasons to assess market demand for expansion;

B) commit to satisfy all creditworthy demands for capacity expansion in reasonable engineering increments;

C) commit expansion for creditworthy shippers in less-than reasonable engineering increments when such shippers commit to contributions in aid of construction sufficient to keep the project entity whole, including authorized return; and

D) commit the project entity to propose and defend the use of rolled-in pricing for all expansions.

(9) the Operating Agreement shall provide that in the event the entity elects to contract with a vendor to operate the entity or implement the project, such vendor shall be independent of and not an affiliate of the members of the entity.

(10) the Operating Agreement shall provide that state member shall have the right to participate in all meetings of the governing board of the entity and vote on all decisions of the entity, including, but not limited to, decisions affecting tax allocations between or among the taxpaying members of the entity.

(11) the Operating Agreement shall provide that the state member shall have the right to review all books and records of the entity, including, but not limited to, all contracts, and to audit the finances of the entity at any time and from time to time.

(12) the Operating Agreement shall provide that upon termination, liquidation or dissolution of the entity, the state shall have a right of first refusal and option to acquire all of the assets of the entity at the then fair value of the assets.

(13) the Operating Agreement shall provide that in the event a member seeks to transfer or divest its ownership interest in the entity, the state shall have a right of first refusal and option to acquire the member's ownership interest at the then fair value of the interest.

(14) the Operating Agreement shall provide that in the event that the entity seeks to transfer or divest any or all of the project assets, the state shall have a right of first refusal and option to acquire such project assets at the then fair value of such project assets.

(15) the Operating Agreement shall include a right of first refusal and option by which the state may acquire all or any part of the project assets in the event that Federal Energy Regulatory Commission of the United States Department of Energy, the United States Department of Justice, the Federal Trade Commission, or other applicable federal or state agency or adjudicatory body orders one or more qualified sponsor or the qualified

sponsor group, or their affiliates, to divest any or all ownership interest in the project, at the then fair value of such project assets.

(16) the Operating Agreement shall provide that the project entity shall utilize project financing supported by federal guarantee instruments as defined in the Alaska Natural Gas Pipeline Act to the maximum extent available from the Federal Treasury, and shall limit the equity portion of project capitalization to no more than 20% of total capital.

For purposes of this section (a), the term "fair value" means the value as agreed to by the affected members or as determined under the dispute resolution process if no agreement can be reached, provided fair value shall be determined based on original cost less depreciation, comparable sales or income approach valuation methodologies.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 3002
(H) Publish Date: 7/12/06

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Stranded Gas Development Act Amendments
RDU: Resource Development
Component: Oil and Gas Development
Sponsor: Rules by Request of the Governor
Requester: Governor
Component No. 439

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would amend the Alaska Stranded Gas Development Act including provisions relating to certain payments to municipalities and nonprofit organizations.

There is no anticipated cost to DNR from this bill.

Prepared by: William Van Dyke, Acting Director
Phone 269-8800
Division: Oil and Gas
Date/Time 7/12/2006
Approved by: Michael Menge, Commissioner
Date 7/12/2006
Agency: Natural Resources

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 3002
(H) Publish Date: 7/12/06

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Stranded Gas Development Act Amendments
RDU: Administration and Support
Component: Commissioner's Office
Sponsor: Rules Committee
Requester: Governor
Component No.: 123

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
Bond Proceeds						
Bond Bank Investment Earnings						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill amends the Alaska Stranded Gas Development Act (AS 43.82) (SGDA) to clarify and/or provide additional authority for the development of stranded gas fiscal contract terms relating to oil. The bill also includes provisions relating to certain payments to municipalities and nonprofit organizations and creates an impact grant fund.

Funding for negotiations under the SGDA has been previously provided and no additional funding is required as a result of this legislation.

Prepared by: Jerry Burnett
Phone 465-2312
Division: Administrative Services
Date/Time 7/12/06 12:00 AM
Approved: Steve Porter
Date 5/9/2006
Agency: Department of Revenue

(Revised 9/7/2005 OMB)

May 29, 1998

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99801-0001

Re: SCS CSHB 393(FIN) -- Alaska Stranded Gas Development Act
A.G. file no: 883-98-0083

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed SCS CSHB 393(FIN), the Alaska Stranded Gas Development Act, which would authorize the commissioner of revenue to develop new fiscal terms for projects that develop stranded natural gas resources in the state.

The bill is identical in most important respects to the bill introduced at the request of the governor. The bill is largely the product of the North Slope Gas Commercialization Team, which was established last year by House Bill 250. The team, which consisted of the attorney general, the commissioner of revenue, and the commissioner of natural resources, was charged with recommending terms for a contract that would improve the economic feasibility and competitiveness of a North Slope gas project. The team also was asked to recommend legislative provisions necessary or appropriate to implement such a contract. The purpose of the team s efforts and of the bill is to enable the state to create a fiscal regime appropriately tailored to the development of some or all of the approximately 35 trillion cubic feet of gas on the North Slope. Today that gas is stranded there because of the prohibitive cost of getting it to market.

Sections 1 through 9 of the bill would authorize the commissioner of revenue to develop the terms of a fiscal contract with sponsors of projects to develop known gas reserves that currently cannot be marketed economically. Unlike the governor s proposal, the bill is limited to liquefied natural gas (LNG) projects. In a letter of intent adopted by the Senate, Senator Kelly explains that while the state has studied the economics of a North Slope LNG project, no comparable study has been made of the next most likely alternative, a gas-to-liquids (GTL) project. The letter of intent suggests that the state should continue to explore any method of commercializing its stranded gas resources, and that an economic analysis of GTL may support amending the Stranded Gas

Development Act to include i' The North Slope Gas Commercialization Team s Report to the Governor of December 15, 19' .1 fact identifies an LNG project as the most promising alternative for commercializing North Slo[illegible] gas and focuses its economic analysis exclusively upon it, although the fiscal principles in the Report which are incorporated in the bill, could be applied more broadly.

The payments required by the contract would replace some or all of the state and local taxes that would otherwise apply to qualified sponsors as a consequence of their participation in a qualified project. Those taxes might include: (1) the state and local ad valorem property taxes that would be imposed on the project facilities; (2) the production or severance tax that would be imposed on the gas produced and marketed by the project; and (3) the state corporate income tax obligation arising as a consequence of the construction and operation of the project. In addition, the commissioner of natural resources may develop terms, which the commissioner of revenue may include in a contract, addressing timing and notice of the state s right to take its royalty gas in kind, as well as a method for valuing the state s royalty share of gas. In effect, the bill would permit the commissioner of revenue to develop terms that would replace the state s current fiscal regime --which, if applied to a North Slope gas project today, would be relatively regressive and front-end loaded -- with a regime that is more progressive and back-end loaded, in an effort to lower the risk of the project and boost the rate of return that investors could expect.

The principal difference between this bill and the version introduced at the governor s request is that the former, though empowering the commissioner of revenue to negotiate fiscal terms, does not authorize the commissioner to actually execute the contract. Instead, sec. 3 of the bill adds AS 43.82.435, which provides that the governor may transmit a contract developed under this chapter to the legislature together with a request for authorization to execute the contract. The section further provides that the contract is not binding unless the governor is authorized to execute the contract by a subsequent enactment. In the view of legislative counsel, this aspect of the bill may reflect an encroachment by the legislature upon the powers properly reserved to the executive branch under the Alaska Constitution. However, legislative counsel also recognized that the executive is free as a matter of comity to acquiesce in what amounts to the legislature s request for more active oversight. In fact, the governor, in the transmittal letter accompanying his proposed legislation, encouraged the legislature to review the contract and approve it before it became effective. The governor made this request because of the importance of North Slope gas development to the state.

We agree with legislative counsel that the governor may acquiesce in the approach adopted by the legislature. We also note that it is far from clear that the legislature s approach would, in fact, violate the separation of powers doctrine. The legislature arguably has not usurped an executive function, but rather has divided its delegation of authority into two steps, rather than the traditional one. It should be noted, moreover, that both the negotiation of the contract and its submission to the legislature are discretionary. Finally, it is relevant that the contract that is to be provided to the legislature involves the state s fiscal regime, a subject substantially within the purview of the legislative branch under art. IX of the Alaska Constitution. Since the contractual payments in lieu of taxes authorized by this bill could be characterized as, in essence, a new tax, the legislature may well be required to levy the new tax by law. Viewed in this light, the legislature s approach might not only be permissible, but necessary, under the constitution.

There are a number of other important issues raised by this legislation. First, art. IX, sec. 1 of the Alaska Constitution provides that [t]he power of taxation shall never be surrendered. The bill raises the surrender of the taxing power question because it contemplates development of a long-term contract that reflects the fiscal terms applicable to the sponsors of a stranded gas project. The legislation itself, however, is not unconstitutional under art. IX, because it does not purport to bind future legislatures. Instead, it merely authorizes the commissioners of revenue and natural resources to develop appropriate contract terms. Authorization to execute the contract will not be delegated to the executive branch until the legislature has had an opportunity to review the contract and ascertain whether its terms are in the public interest Even if that authorization is given, the legislature may expressly provide that the contract s fiscal terms are binding only so long as no future legislature decides to exercise the taxing power in a different way. In other words, the surrender of the taxing power issue may never arise. A concrete analysis of the issue must be left to the day the legislature decides whether, and if so under what terms, it will allow execution of a contract at all.

The second issue is the bill s provision in sec. 3, adding AS 43.82.500 - 43.82.520, for municipal participation and revenue sharing. Like the former Industrial Incentive Act (AS 43.25, repealed in 1986), the bill recognizes that changes in the state s tax regime will be ineffective to encourage development unless municipal tax changes are also included. Unlike the former Act, the bill includes provisions to ensure that affected municipalities receive a fair and reasonable share of the payments from a project that affects them. The bill also creates a municipal advisory group to assist the commissioner in developing the contract terms that may affect municipalities.

Third, the bill recognizes that the commissioners of revenue and natural resources may have to review confidential company data in order to develop fiscal terms that best advance the state s interests. The people of the state, nowever, have a right to know the basis for administrative decisions affecting their welfare. The bill strikes a balance between, on the one hand, the state s interest in encouraging competition and the right of companies to keep proprietary information from their competitors and, on the other hand, the public s right to review their elected and appointed officials decisions. The bill does this by limiting confidential treatment to proprietary information that, if revealed, would both affect a company s competitive position and significantly diminish the value of the information. In addition, information loses its confidential status as soon as confidentiality is no longer necessary to protect the company s competitive position or the information s value.

Finally, an important goal of this legislation is to facilitate the hiring of Alaskans in all phases of the construction and operation of a stranded gas project. The bill adds AS 43.82.230, which requires employers participating in a project to advertise locally for available positions and use Alaska job service organizations located throughout the state. Most significantly, the commissioner is directed, [w]ithin the constraints of law, to include a provision in a contract requiring sponsors to employ qualified Alaska residents and Alaskan-owned businesses. The commissioner of labor will prepare and present to the legislature an annual report compiled from state data bases, particularly quarterly unemployment insurance reports, regarding the residency of employees working in the state on the project. We see no constitutional problem with these aspects of the bill, because the bill expressly provides that the Alaska hire provisions in the contract must be consistent with the constraints of law.

Finally, we note that although the bill is unique in many respects, the legislature has passed comparable measures to encourage industrial development in the past. For example, the liquefied gas plant, gas pipeline and related facilities on the Kenai Peninsula benefitted directly from the Alaska Industrial Incentive Act, former AS 43.25. Without the tax advantages provided by the Act at that time, the Kenai LNG facility might never have been built. Today, that facility is a significant source of jobs and property tax revenues in the Cook Inlet area.

We see no legal problems presented by this bill.

Sincerely,

Bruce M. Botelho
Attorney General

BMT:JPG:jfs

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MEMORANDUM May 23, 2006

SUBJECT: Authority of legislature to approve or reject an executive branch contract (Work Order No. 24-LS1939)

TO: Representative Les Gara

FROM: Theresa Bannister
Legislative Counsel

You have stated that the oil companies or the governor may argue that legislative approval is not needed for the Alaska Stranded Gas Fiscal Contract (Contract) because that legislative role violates the separation of powers doctrine of the state constitution. You have asked what the likelihood is that the argument would prevail.

Based on current authority, it is my opinion that the legislative approval required by AS 43.82.435 would probably be held to violate the separation of powers doctrine of the state's constitution. Notwithstanding this conclusion, however, the legislature's inherent power over the fiscal matters of the state, the size and uniqueness of the contract, and a limited line of authority in New Jersey and Virginia, do provide some basis for arguing that the approval does not violate the separation of powers doctrine.

Contracts to implement and execute the laws of the state are normally considered to fall within the province of the executive branch, so requiring the approval of an executive branch contract by the legislature appears to be an intrusion into executive branch powers. While the legislature may enact standards for the exercise of an executive power, it may generally not reserve the power to approve or authorize a particular action. For example, former AS 37.05.280, which required legislative approval of certain leases of state office space, was held to violate the doctrine of separation of powers.[1]

Although some executive and legislative powers overlap (e.g., regulations are legislative in nature), the Supreme Court in this state has held that the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision.[2] Although the legislature has extensive power over

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[1] Marine View Chapter Juneau Tenants Association v. Alaska State Housing Authority, Superior Court, First Judicial District, 1JU-80-1037 Civ., Nov. 3, 1981.

[2] Bradner v. Hammond, 553 P.2d 1, 8 (Alaska 1976).

the purse strings of the state, there is no express authority in the state constitution that allows the legislature to approve executive branch contracts or requires the executive branch to submit its contracts to the legislature for approval.

The executive branch has, for many years, taken the position that the requirement for legislative approval of royalty oil contracts is unconstitutional.[3] However, while the executive branch has consistently asserted that legislative approval provisions are unconstitutional, it has often complied with these requirements as an accommodation to the legislative desire for oversight.

The Department of Law has held fairly consistently to the position that negotiation of contracts is the prerogative and obligation of the administration, to the exclusion of the legislature, citing separation of powers principles:

> [O]ur office [that is, the Department of Law] has noted that a statute requiring legislative approval of an individual contract . . . was possibly constitutionally infirm. 1987 Inf. Op. Att'y Gen. (April 1; 663-87-0392); 1985 Inf. Op. Att'y Gen. (Aug. 13; 166-065-86); 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82); 1976 Inf. Op. Att'y Gen. (Feb. 11; Boness).[4]

In addition, the attorney general has stated:

> In approving individual contracts, the legislature does not exercise a lawmaking function. Consequently, in the absence of a constitutional grant of such power or some unique circumstance that we cannot presently contemplate, a statute requiring legislative approval of an individual contract is a violation of the separation of powers.[5]

However, from the inception of consideration of the bill that eventually became the Alaska Stranded Gas Development Act, the Knowles administration (eventually acknowledging that because the contractual payments in lieu of taxes provisions are potentially troublesome, legislative involvement "might not only be permissible, but necessary, under the constitution"[6]) drew a clear line between the process of negotiation

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[3] See Governor's transmittal letter for SB 164 dated April 22, 1995, Senate Journal, pages 1190-1191.

[4] Quoted in Opinion of the Attorney General 1988-2, August 30, 1988.

[5] 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82), at 4 - 5.

[6] The source of the quoted language is the bill analysis letter for SCS CSHB 393(FIN) (Alaska Stranded Gas Development Act), pp. 5 - 6, prepared by the Office of the Attorney General, May 29, 1998, and reads in part:

of the terms and conditions of a proposed contract, an activity reserved to the executive, and exercise of a power of approval of a contract as proposed (expressed in terms of an "authorization to execute") that has been transmitted to the legislature for review and approval before the contract's final execution. Under this approach it could be argued that while legislative approval of a contract is exceptional, the circumstances under which payment in lieu of taxes is to substitute for actual tax receipts is also unprecedented and could justify this intrusion into executive branch powers. The size and uniqueness of the proposed contract may tempt one to conclude that the separation of powers doctrine is not violated in this situation, but there does not appear to be much authority to support that conclusion.

There is a line of reasoning that would allow a legislature more leeway in this regard where there is no possibility of significant interference with the executive branch's discretion, as in this case where the governor presents the contract to the legislature for an up or down vote. This line of reasoning regarding legislative oversight appears in New Jersey where the court recognized the importance of legislative oversight where projects require continued budget appropriations.[7] In that case, the court seemed to place importance on the limited potential that the legislative action had to interfere with executive action and emphasized that the legislature had no control over the agency's projects unless the Governor first approved them.[8] However, there was a vigorous dissent in the case, and the dissent cited an Alaska case to support its position.[9] This case

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> . . . We . . . note that it is far from clear that the legislature's approach would, in fact, violate the separation of powers doctrine. The legislature arguably has not usurped an executive function, but rather has divided its delegation of authority into two steps, rather than the traditional one. It should be noted, moreover, that both the negotiation of the contract and its submission to the legislature are discretionary. Finally, it is relevant that the contract that is to be provided to the legislature involves the state's fiscal regime, a subject substantially within the purview of the legislative branch under art. IX of the Alaska Constitution. Since the contractual payments in lieu of taxes authorized by this bill could be characterized as, in essence, a new tax, the legislature may well be required to levy the new tax by law. Viewed in this light, the legislature's appro might not only be permissible, but necessary, under the constitution.

[7] Enourato v. N.J. Building Auth., 448 A.2d 449, 453 (New Jersey 1982).

[8] Enourato at 453 - 454.

[9] Enourato at 461.

was cited by a Virginia court to hold that a legislative approval requirement (in a situation similar to that in Enourato) did not violate the separation of powers doctrine.[10]

In conclusion, while it may be possible to successfully make a case in this situation that the legislature's approval does not violate the separation of powers doctrine, there seems not to be much authority for that position.

If I may be of further assistance, please advise.

TLB:med
06-392.med

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[10] See Baliles v. Mazur, 297 S.E.2d 695, 700 - 701 (Virginia 1982) (emphasizing the reasonableness of legislative oversight for major projects).

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MEMORANDUM June 22, 2006

SUBJECT: Proposed Natural Gas Pipeline Contract (Work Order 24-LS1968)

TO: Representative Les Gara
Attn: Darcy Dugan

FROM: Tamara Brandt Cook
Director TBC

(1) *Does the legislation proposed by the Governor during the last special session, HB 2001, 2002, 2003, and 2004, provide the legal authority for the Governor to execute the proposed natural gas pipeline contract, as far as you know?*

It is my understanding that it is the Governor's position that the legislation he introduced, taken together, provide the necessary legal basis for the execution of the proposed contract. The administration is, obviously, keenly aware of both the provisions of existing law and the content of the proposed contract. I have no reason to suspect that the Governor, through mistake, omission, or otherwise, failed to request all the changes to statute necessary to accomplish his goal of making it possible to execute the contract in the form it was in during the last special session.

(2) *If all four bills presented by the Governor were enacted by the legislature, but the legislature subsequently failed to approve the proposed contract, is it possible that the Governor could, nonetheless, execute substantially the same agreement?*

An existing provision of the Alaska Stranded Gas Development Act provides for legislative approval of a contract developed under that Act.

> Sec. 43.82.435. Legislative authorization. The governor may transmit a contract developed under this chapter to the legislature together with a request for authorization to execute the contract. A contract developed under this chapter is not binding upon or enforceable against the state or other parties to the contract unless the governor is authorized to execute the contract by law. The state and the other parties to the contract may execute the contract within 60 days after the effective date of the law authorizing the contract.

Contracts to implement and execute the laws of the state are normally considered to fall within the province of the executive branch under the separation of powers doctrine.

separation of powers grounds, the issue will then be whether that requirement is severable from the rest of the Alaska Stranded Gas Development Act or whether the entire Act falls. A general severability clause has been enacted and appears at AS 01.10.030. The Alaska Supreme Court has found that AS 01.10.030 creates a weak presumption in favor of severability. A specific severability clause included in a bill creates only a slightly higher presumption of severability. (Lynden Transport, Inc. v. State, 532 P.2d 700, pages 712 and 713 (Alaska 1975) A provision is not severable unless it appears that the remainder of the Act can be given legal effect and that the legislature intended the Act to stand in the event the provision is invalid. (Id. at page 713; Vik v. CFEC, 636 P.2d 597 (Alaska 1981))

So, despite the presumption in favor of severability, it is at least possible that the court, having concluded that the requirement for legislative approval is invalid, would go on to decide that the approval provision is not severable from the remainder of the Act. If this is the result the legislature prefers (that the Alaska Stranded Gas Development Act itself fall if the approval provision falls, probably taking the contract with it), when the legislature considers amendments to that Act in the future it could include a provision expressly stating that AS 01.10.030 does not apply and that it is the intention of the legislature that the requirements of AS 43.82.435 not be severed. On the other hand, the legislature could bolster the presumption in favor of severability by added language that specifically states that if AS 43.82.435 is held invalid, the legislature intends that the balance of the Act continue to apply.

TBC:lmb
06-198.lmb

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MEMORANDUM May 18, 2006

SUBJECT: Effect of state contract on the initiative process (Work Order No. 24-LS1940)

TO: Representative Paul Seaton

FROM: Dennis C. Bailey
Legislative Counsel

This memo responds to your question asking what would be the legal basis or effect of a contract attempting to preempt the effect of an initiative. The short answer is that the people may enact legislation to the same extent the legislature has the power to legislate. It is unlikely that a contract with the state could revoke, compromise, or impair the right of initiative. However, assuming the contract is valid, its terms may have the effect of avoiding the application of the initiated law in certain circumstances or for certain periods of time.

Legislation through initiative.

Article XI, sec. 1 of the Constitution of the State of Alaska provides:

> Initiative and Referendum. The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.[1]

The power of the legislature to legislate and the power of the people to legislate by initiative are generally coextensive. Article XII, sec. 11 provides:

> As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of art. XI.[2]

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[1] The right of initiative is limited by article XI, sec. 7 which provides, "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."

[2] The term "clearly inapplicable", as used in article XII, sec. 11, is interpreted in Brooks v. Wright, 971 P.2d 1025, 1029 (Alaska 1999), where the court suggested that the

The right of initiative should be liberally construed to permit exercise of that right, Thomas v. Bailey, 595 P.2d 1, 3 (Alaska 1979). Further, the subject matter limitations that the Alaska Constitution places on initiatives should be narrowly interpreted. Brooks v. Wright, 971 P.2d 1025 (Alaska 1999).

Since the legislature clearly has the power to levy new taxes and change the rate of existing taxes, and since these powers are not excluded by article XI, sec. 7, it appears that the power to levy a new tax or change the rate of an existing tax may be exercised by initiative.

Preemption of tax imposed by initiative.
Your question also asks whether a contract could preempt the effect of a tax imposed by an initiative.

Article IX, sec. 1[3] of the Constitution of the State of Alaska prohibits legislative action (by initiative or by the legislature) which surrenders, suspends, or contracts away the power to tax. Article IX, sec. 4 also provides for exemptions from taxation under conditions and exceptions which may be provided by law. These exceptions would apply equally to law created by the initiative or by the legislature. In other words, a person could receive an exemption from a tax imposed by initiative or by legislative enactment. Likewise, a contract, if valid, could provide for payments in lieu of taxes for a tax enacted by either means. Such a contract would, presumably, address the application to the contracting parties of both existing tax law and future amendments to that law, whether they be accomplished through initiative or legislative enactment. It seems unlikely, however, that ever an otherwise enforceable contract could provide for a tax exemption as such because exemptions must be provided "by law" or "by general law" not by contract. Art. IX, sec. 4.

Finally, you asked for a prediction whether the Alaska Supreme Court would uphold the use of contracting power to "undermine the effect of an initiative." I am reluctant to predict whether the proposed contract and the related legislation in their final form are enforceable, or the effect of the initiative on the terms of the contract.

If I may be of further assistance, please advise.

DCB:ljw:med
06-248.ljw

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framers added that phrase "so that the initiative would not replace the legislature where the legislature's power serves as a check on other branches of government, such as legislative power to define courts' jurisdiction or override judicial rules."

[3] "The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article." Art. IX, sec. 1, Constitution of the State of Alaska.

HB

3005

Alaska State Legislature
Senator Con Bunde
Senate District P
Vice Chair Senate Finance Committee
Chair Senate Labor & Commerce Committee

Sponsor Statement
SB 3005

"An Act relating to contempt of court and to temporary detention and identification of persons."

Written in Alaska's constitution is an acknowledgement of an individual's freedom and an individual's corresponding obligation to our state. Striking a balance between the needs of society to prosecute crime, the rights of a defendant to witnesses on their behalf and the right of an individual to be free from unreasonable arrest is the central issue in SB 3005 Detention of Material Witnesses.

A material witness is a witness whose testimony is crucial to either the defense or prosecution. SB 3005 adds a section to AS 12.50 allowing peace officers to temporarily detain material witnesses at the scene of a crime. SB 3005 outlines that the detention is allowed only when it is necessary to obtain the identification of the witness, to obtain an account of the crime, to protect a crime victim from imminent harm, or for other exigent circumstances.

SB 3005 allows a police officer who has detained a person under these circumstances to photograph the person; serve a subpoena on the person to appear before the grand jury if the person fails to provide valid government-issued identification and; take the person's fingerprints if the person is detained in connection with the investigation of a murder, attempted murder or misconduct involving weapons in the first degree under AS 11.61.190.

Giving peace officers the ability to gain the identification of material witnesses at the scene of a crime protects both the needs of society and the rights of the individual. Material witnesses can be the deciding factor in bringing indictments and prosecuting crime. Alternatively, material witnesses may also provide crucial testimony to defendants' arguments. SB 3005 balances the interests of individuals' freedom with the need to collect information at the scene of a crime.

Alaska State Legislature

Senate Majority Web: www.akrepublicans.org

Sponsor: Rules By Request of THE GOVERNOR
Current Version: SB 3005
Contact: Lauren Rice, 269-0181

Fact Sheet for: Senate Bill3005

Short Title: DETENTION/IDENTIFICATION; CONTEMPT

Summary:

- Increases the penalty for contempt of court for failure to honor a subpoena or refusal to answer as a witness, or to appear before the grand jury.
- Adds a section to AS 12.50 allowing a peace officer to temporarily detain a person under circumstances that give the officer reasonable suspicion that:
  - the person witnessed a crime or was in the vicinity of a crime such as homicide or manslaughter,
  - the person may have information of material aid in the investigation of that crime, and;
  - the temporary detention is reasonably necessary to obtain or verify the identification of the person, to obtain an account of the crime, to protect a crime victime from imminent harm, or for other exigent circumstances.
- Allows a police officer who has detained a person under these circumstances to:
  - photograph the person;
  - serve a subpoena on the person to appear before the grand jury if the person fails to provide valid government-issued identification,
  - take the person's fingerprints if the person is detained in connection with the investigation of a murder, attempted murder or misconduct involving weapons in the first degree under AS 11.61.190.
- Prohibits the peace officer from requiring the person to sign a subpoena issued under this section, and requires the peace officer to advise the person that failure to honor the subpoena is punishable as criminal contempt of court.
- Allows a person receiving a subpoena to request the district attorney to withdraw the subpoena if the person provides a valid government-issued photographic identification prior to the grand jury proceeding.
- Makes it a class B misdemeanor to refuse or resist the taking of photos or fingerprints, and outlines procedures for retaining or destroying them.

Benefits:

- Balances the need to protect individual freedom with the ability to prosecute crime and to provide defendants with witnesses on their behalf.

Background:

- A material witness is crucial to either the defense or prosecution. Unfortunately, material witnesses often refuse to cooperate with law enforcement officials, significantly impeding the ability to bring indictments or prosecute crime. SB 3005 protects material witnesses from unreasonable arrests or confinement and helps ensure the availability of crucial testimony.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION - 3rd Special

Fiscal Note Number: 1
Bill Version: SB 3005
(S) Publish Date: 7/27/06

Revision Date/Time (Note if correction):
Dept Affected: LAW
Title: "An Act relating to contempt of court and to temporary detention and identification of persons"
RDU: CRIMINAL
Component: Criminal Justice Litigation
Sponsor: Governor
Requester:
Component No:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill allows for stiffer penalties for contempt of court when it arises from failure to honor a subpoena or refusal to be sworn or answer as a witness under was in connection with a court proceeding relating to a felony crime or an appearance before the grand jury. It also creates a new Article in the Criminal Code under Chapter 50 (Witnesses). The new article allows a peace officer to temporarily detain a person who witnessed or may have witnessed a crime or the detention is necessary to identify the person, obtain an account of the crime or protect the person from imminent harm or for other exigent circumstances. It allows the peace officer to subject the detainee to certain procedures such as photographs or fingerprints and makes it a class B misdemeanor if the person refuses or resists the taking of photographs or fingerprints. Passage of this legislation will not have a fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director — Phone: 465-3673
Division: Administrative Services Division — Date/Time: 7/27/06 9:55 AM
Approved by: Kathryn Daughhetee for David Marquez, Attorney General — Date: 7/27/2006
Agency: Department of Law

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 3005
(S) Publish Date: 7/27/06

Revision Date/Time (Note if Revision): 7/27/06 11:26 a.m.
Title: An act relating to material witnesses.
Sponsor: Governor
Requester:

Dept. Affected: Administration
RDU: Legal and Advocacy Services
Component: Office of Public Advocacy
Component No: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS *(Attach a separate page if necessary)*

This bill permits a material witness to be detained and fingerprinted at the scene of a crime under certain exigent circumstances. It also amends the penalty statute for contempt.

This bill is not expected to have an fiscal impact on the Office of Public Advocacy.

Prepared by: Joshua P. Fink, Director
Division: Office of Public Advocacy
Phone: (907) 269-3500
Date/Time: 7/27/06 11:26 a.m.

Approved by: Melanie Millhorn, Deputy Commissioner
Agency: Administration
Date: 7/27/2006

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: SB 3005
(S) Publish Date: 7/27/06

Revision Date/Time (Note if correction) 7/27/06 / 11:24 a.m.
Dept. Affected: Administration
Title: An Act relating to material witnesses
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Governor
Requester:
Component No: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill permits a material witness to be detained and fingerprinted under certain exigent circumstances. It also amends the penalty statute for contempt.

This bill is not expected to have an impact on the Public Defender Agency's fiscal operations.

Prepared by: Quinlan Steiner, Director — Phone: (907) 334-4414
Division: Public Defender Agency — Date/Time: 7/27/2006 11:24 a.m.
Approved by: Melanie Millhorn, Deputy Commissioner — Date: 7/27/2006
Agency: Administration

(Revised 3/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: SB 3005
(S) Publish Date: 7/27/06

Revision Date/Time (Note if correction):
Dept Affected: Corrections
Title: "An act relating to detention of material witnesses"
RDU: Institutional Facilities
Component: Institution Director's Office
Sponsor: Governor
Requester:
Component No: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0
Part-time	0.0	0.0	0.0	0.0	0.0	0.0
Temporary	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS *(Attach a separate page if necessary)*

The department anticipates an extremely small number of potential cases each year that may be impacted by the language contained in the legislation. Due to the small number of potential cases and the fact that a sentence, if imposed, may not exceed 10 days of imprisonment, passage of the legislation should not have a significant fiscal impact on the Department of Corrections.

Prepared by: Sharleen Grubb, Director
Phone: (907) 465-3339
Division: Administrative Services
Date/Time: 7/27/06 10:16 AM
Approved by: Portia C.K. Parker, Deputy Commissioner
Date: 7/27/2006
Agency: Department of Corrections

(Revised 3/7/2005 OMB)

Citation/Title
RCRP Rule 5, RULE 5. PROCEEDINGS BEFORE THE JUDGE OR MAGISTRATE

Rules of Criminal Procedure, Rule 5

WEST'S ALASKA COURT RULES
RULES OF CRIMINAL PROCEDURE
PART II. PRELIMINARY PROCEEDINGS

Current with amendments received through 8/15/2005

RULE 5. PROCEEDINGS BEFORE THE JUDGE OR MAGISTRATE

(a) Appearance Before Judge or Magistrate.

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. Unnecessary delay within the meaning of this paragraph (a) is defined as a period not to exceed twenty-four hours after arrest, including Sundays and holidays.

(2) If

(i) The judge or magistrate commits the arrested person to jail for a purpose other than to serve a sentence, and

(ii) The jail is situated in a different community from the place where the judge or magistrate committed the arrested person to jail, and

(iii) The arrested person is not represented by counsel, and

(iv) The arrested person has not previously had a bail review, and

(v) The arrested person has no date, time and place established for his or her next court appearance,

then the arrested person shall be taken before a judge or magistrate in the community where the jail is located within twenty-four hours of the person's detention in that jail

(aa) in order for bail to be reviewed, and

(bb) in order to determine if the person is represented by counsel, and

(cc) in order for the counsel to be appointed, if appropriate

(3) The responsibility for ensuring that the arrested person is taken before a judge or magistrate as specified in subsections (1) and (2) of this section (a) shall be borne equally by

(i) municipal police officers and municipal jail personnel, and by

(ii) state troopers, state jail personnel, and all other peace officers.

No distinction shall be drawn between cases in which arrest was made pursuant to a warrant and cases in which arrest was made without a warrant.

*342 (4) Whenever the person arrested is taken for examination before a judge or magistrate other than the one who issued the warrant, the complaint and any other statement or deposition on which the warrant was granted must be furnished to the defendant and must be communicated to the judge or magistrate before whom the person arrested appears.

(5) Whenever a person arrested without a warrant is brought before a judge or magistrate, a complaint shall be filed forthwith.

(6) Judges and magistrates shall be available at all times to receive bail, and each judge and magistrate individually shall have authority to delegate this duty to the person admitting the defendant to jail, or to such other person as shall in the determination of a judge or magistrate be qualified for this purpose.

(b) Rights of Prisoner to Communicate with Attorney or Other Person. Immediately after arrest, the prisoner shall have the right forthwith to telephone or otherwise to communicate with both an attorney and any relative or friend. Any attorney at law entitled to practice in the courts of Alaska, at the request of either the prisoner or any relative or friend of the prisoner, shall have the right forthwith to visit the prisoner in private. This paragraph does not provide a prisoner with the right to initiate communication or attempt to initiate communication under circumstances proscribed under AS 11.56.755.

(c) Statement by Judge or Magistrate--Right to Counsel--Bail. The judge or magistrate

(1) shall inform the defendant of the complaint and of any affidavit filed therewith, and

(2) shall require that a copy of the complaint and of any affidavit filed therewith be delivered to the defendant if this has not already been done, and

(3) shall inform the defendant

(i) of the right to retain counsel, and

(ii) of the right to request the assignment of counsel if the defendant is unable to obtain counsel, and

(iii) of the right to have a preliminary examination, and

(4) shall inform the defendant that the defendant is not required to make a statement and that any statement may be used against the defendant. The judge or magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by law and by these rules.

(d) Initial Determination of Probable Cause.

*343 (1) If the defendant was arrested without a warrant, the judicial officer at the first appearance shall determine whether the arrest was made with probable cause to believe that an offense had been committed and that the defendant had committed it. This determination shall be made from the complaint, from an affidavit or affidavits filed with the complaint, or from an oral statement under oath of the arresting officer or other person which is recorded by the judicial officer. The determination shall be noted in the file.

(2) If the defendant was arrested on a warrant for a failure to appear at a prior proceeding, the court shall determine from the file whether the defendant's initial arrest was pursuant to a warrant and, if not, whether at a prior proceeding the court made an initial determination of probable cause as required by subparagraph (d)(1). If there has been no judicial determination of probable cause, the court shall proceed as under subparagraph (d)(1).

(3) If probable cause is not shown, the judicial officer shall discharge the defendant.

(e) Felonies

(1) If the charge against the defendant is a felony, the defendant shall not be called upon to plead.

(2) The judicial officer shall inform the defendant of the right to a preliminary examination. A defendant is entitled to a preliminary examination if the defendant is charged with a felony for which the defendant has not been indicted, unless

(A) the defendant waives the preliminary examination, or

(B) an information has been filed against the defendant with the defendant's consent in the superior court

(3) If the defendant after having had the opportunity to consult with counsel waives preliminary examination, the judicial officer shall forthwith hold the defendant to answer in the superior court.

(4) If the defendant does not waive preliminary examination, the judicial officer shall schedule a preliminary examination. Such examination shall be held within a reasonable time, but in no event later than

(A) 10 days following the initial appearance, if the defendant is in custody, or

(B) 20 days following the initial appearance, if the defendant is not in custody.

With the consent of the defendant and upon a showing of good cause, taking into account the public interest in prompt disposition of criminal cases, the judicial officer may extend the time limits specified in this subsection one or more times. In the absence of consent by the defendant, the judicial officer may extend these time limits only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice.

*344 (f) Misdemeanors.

(1) The judicial officer shall ask the defendant to enter a plea pursuant to Criminal Rule 11.

(2) If the defendant pleads not guilty, the court shall fix a date for trial at such time as will afford the defendant a reasonable opportunity to prepare.

[Amended effective July 15, 1994, July 15, 1995; by Laws 1998, c. 86, § 17, June 13, 1998.]

Note

Note to SCO 1339. Criminal Rule 5(b) was amended by § 17 ch. 86 SLA 1998 to make it clear that the rule does not give a prisoner the right to contact a victim or witness in violation of AS 11.56.755. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Citation/Title
AK ST Sec. 12.30.050, Release of material witnesses

*5105 Alaska Stat. § 12.30.050

WEST'S ALASKA STATUTES
TITLE 12. CODE OF CRIMINAL PROCEDURE
CHAPTER 30. BAIL

Current through the 2005 First Regular Session and First Special Session of the 24th Alaska Legislature

§ 12.30.050. Release of material witnesses

If it appears by affidavit that the testimony of a person is material in a criminal proceeding, and it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer shall impose conditions of release under AS 12.30.020. A material witness may not be detained because of inability to comply with any condition of release if the testimony of the witness can adequately be secured by deposition. Release may be delayed for a reasonable period of time for the deposition of the witness to be taken.

Search this disc for cases citing this section

Citation/Title
AK ST Sec. 12.30.020, Release before trial

*5090 Alaska Stat. § 12.30.020

WEST'S ALASKA STATUTES
TITLE 12. CODE OF CRIMINAL PROCEDURE
CHAPTER 30. BAIL

Current through the 2005 First Regular Session and First Special Session of the 24th Alaska Legislature

§ 12.30.020. Release before trial

(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified b the judicial officer unless the offense is an unclassified felony or class A felony or unless the officer determines that the release of th person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, the community. If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow the prosecuting attorney up to 48 hours to demonstrate that release of the person on the person's personal recognizance or upon the execution of an unsecured appearance bond will not reasonably assure the appearance of the person or will pose a danger to the alleged victim, other persons, or the community.

(b) If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, the judicial officer may

(1) place the person in the custody of a designated person or organization agreeing as a custodian to supervise the person; the court shall, personally and in writing, inform the custodian about the duties required of a custodian, and that failure to report immediately in accordance with the terms of the order that the person released has violated a condition of release may result in the custodian's being held criminally liable under AS 11.56.758;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the person to return to custody after daylight hours on designated conditions;

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 percent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

*5091 (5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash;

(6) require the execution of a performance bond in a specified amount and the deposit in the registry of the court, in cash or other security; the performance bond must be imposed and enforced separately from any appearance bond, and the deposit to be returned upon the performance of the condition of release; or

(7) impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of the alleged victim, other persons, or the community.

(c) In determining the conditions of release under (b) of this section, the judicial officer shall take into account

(1) the nature and circumstances of the offense charged, including the effect of the offense upon the alleged victim;

(2) the weight of the evidence against the person;

(3) the person's family ties;

(4) the person's employment;

(5) the person's financial resources;

(6) the person's character and mental condition;

(7) the length of the person's residence in the community;

(8) the person's record of convictions;

(9) the person's record of appearance at court proceedings;

(10) the flight of the accused to avoid prosecution or the person's failure to appear at court proceedings; and

(11) threats the person has made, and the danger the person poses, to the alleged victim.

(d) A judicial officer authorizing the release of a person under this section shall issue an order containing a statement of the conditions imposed.

(e) The judicial officer shall inform the person of the penalties that may be imposed for a violation of the conditions of release and advise the person that a warrant for the person's arrest will be issued immediately upon a violation or that the person may be arrested without a warrant for a violation of conditions of release as set out in AS 12.25.030(b).

(f) A person who remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. If the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review the conditions. If the conditions are not amended and the person remains in custody, the judicial officer shall set out in writing the reasons for requiring the conditions imposed.

*5092 (g) A judicial officer who orders the release of a person on a condition specified in (b) of this section may at any time amend the order to impose additional or different conditions of release, or to release the person under (a) of this section.

(h) Information offered or introduced at a hearing before a judicial officer to determine the conditions of release need not conform to the rules governing the admissibility of evidence in a court of law.

(i) The court shall issue written or oral findings to demonstrate why conditions provided under (b)(1) of this section needed to be imposed.

(j) If a person remains in custody after review of conditions by a judicial officer under (f) of this section, a subsequent review of conditions may be held at the request of the person. Unless the prosecuting authority stipulates otherwise, a judicial officer may not schedule a bail review hearing under this subsection unless

(1) the person provides to the court and the prosecuting authority a written statement that information not considered at the previous review will be presented and includes a description of the new information;

(2) the prosecuting authority has at least 48 hours' notice before the time set for the review requested under this subsection, and

(3) at least 48 hours have elapsed between the previous review and the time set for the review requested under this subsection.

Amended by Laws 1994, c. 115, § 4, amd. eff. June 18, 1994. Laws 1997, c. 63, §§ 10 to 12, eff. July 1, 1997. Laws 2000, c. 124, § 4, eff. September 4, 2000. Laws 2004, c. 124, §§ 18, 19, eff. July 1, 2004. Laws 2005, c. 65, § 1, eff. July 14, 2005.

Sec. 12.30.050. Release of »material« witnesses.

If it appears by affidavit that the testimony of a person »material« in a criminal proceeding, and it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer shall impose conditions of release under AS 12.30.020 . A »material« »witness« may not be detained because of inability to comply with any condition of release if the testimony of the »witness« can adequately be secured by deposition. Release may be delayed for a reasonable period of time for the deposition of the »witness« to be taken.

Sec. 12.30.060. Penalties for failure to appear.

A person released under the provisions of this chapter who knowingly fails to appear before a court or judicial officer as required shall incur a forfeiture of any security that was given or pledged for the person's release and, if the person was released

(1) in connection with a charge of felony, or while awaiting sentence or pending appeal after conviction of an offense, is guilty of a felony and upon conviction is punishable by a fine of not more than $5,000 or by imprisonment for not more than five years, or by both;

(2) in connection with a charge of misdemeanor, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than the maximum provided for the misdemeanor, or by imprisonment for not more than one year, or by both; or

(3) for appearance as a »material« »witness«, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both.

Sec. 12.30.060. Penalties for failure to appear.

A person released under the provisions of this chapter who knowingly fails to appear before a court or judicial officer as required shall incur a forfeiture of any security that was given or pledged for the person's release and, if the person was released

(1) in connection with a charge of felony, or while awaiting sentence or pending appeal after conviction of an offense, is guilty of a felony and upon conviction is punishable by a fine of not more than $5,000 or by imprisonment for not more than five years, or by both;

(2) in connection with a charge of misdemeanor, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than the maximum provided for the misdemeanor, or by imprisonment for not more than one year, or by both; or

(3) for appearance as a ⏭material⏮ ⏭witness⏮, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both.

ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599
Telephone (907) 786-8500

Mark. Begich,
Mayor

Service since 1921

Alaska State 24th Legislature

Legislators;

This is a letter of support for HB 3007, the Material Witness Bill.

Anchorage and the entire State are growing; and with this growth bring both new and more complex issues in to our communities. The challenge for law enforcement is to keep up with the changes in societal trends that negatively impact public safety and to balance our response to them within the mandates of the law. Sometimes to meet this challenge requires change in our tactics and/or our law. In considering such changes, most of us first look to other jurisdictions to examine how they had responded and if had been effective. And the fact that nearly every state and the federal government have addressed this issue in the adoption of a material witness law is significant and indicative that this law is essential to combat this societal problem.

I know this bill will assist every law enforcement officer in his and her pledge to the citizens we all serve. I support this bill and appreciate your collective efforts to help all Alaskans be a little safer in our changing world.

Walt Monegan
Chief of Police

Municipality of Anchorage

P.O. Box 196650 • Anchorage, Alaska 99519-6650 • Telephone: (907) 343-4431 • Fax: (907) 343-4499 http://www.muni.org

Mayor Mark Begich

Office of the Mayor

July 3, 2006

The Honorable Frank Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Murkowski:

I understand from media accounts that you are considering an initiative to look into youth violence issues in Anchorage. We welcome the State's involvement and look forward to being a part of your efforts.

As you know, my administration has been working with police, prosecutors, judges and legislators on several initiatives to speed up the prosecution of criminals in Anchorage to get them off the streets quicker and better use technology to prevent crime.

Unfortunately, a backlog within the State criminal justice system is preventing the quick prosecution of criminals and their removal from Anchorage streets. An ever increasing number of Anchorage police officers are bringing a corresponding increase in the number of cases to the under-resourced State criminal justice system. Too many of these cases are not being processed in a timely manner, resulting in delays, inadequate sentences and defendants awaiting trial committing more crime. This worsens Anchorage's gang problem.

According to the Anchorage District Attorney's Office, there are more than 2,500 felony cases currently awaiting disposition by the State. At the same time, the number of trials held in Anchorage has dropped dramatically, from nearly 140 in 1986 to about 30 in 2004. Some murder cases awaiting trial date back to 1999. As of January 2006, there were nearly 300 felony trials pending in Anchorage, including 28 homicides.

Below, I have outlined some issues the Municipality considers to be priorities that can be remedied through State leadership and partnering with local governments:

Unclog the court backlog – The Municipality strongly supported your bill passed by the Legislature (SB237) to add Superior Court judges in Anchorage, Kenai, Palmer and Fairbanks, and expand courthouses. Yet, we believe the measure fell short because it failed to fund the additional elements needed to make the entire State criminal justice system work properly – additional prosecutors and public defenders.

As noted, more than 40 new police officers have been added in Anchorage since 2003. These officers are bringing an increasing number of cases to the DA's office. In 2003, 2,322 felony cases were accepted by the DA, 95 percent of them brought by APD. In 2005, that number had jumped more than 10 percent to 2,559. Yet, the DA's office reports that processing just those cases without accepting any new ones would take nine years. While awaiting processing, many defendants are released into the community, only to commit more crimes.

Improve technology so courts and police can share criminal data – Currently, the State court system and APD cannot electronically share some data about criminal defendants, such as bail status. This means when an officer encounters a violator on the street, the officer may not know whether that person is out on bail or has committed other crimes. Numerous other jurisdictions such as Arizona, Wisconsin and Chicago, have state-of-the-art systems to allow for sharing of such information.

A task force, the Multi-Agency Justice Integration Consortium (MAJIC), has been working since 2002 on this problem, but it remains an obstacle to getting criminals off the streets more quickly. My administration supports better technology within the court system to more rapidly process criminals and urges court officials to agree to information sharing with APD.

Ankle bracelets for gang members – Gang members present unique threats to the public because they often ignore probation and parole restrictions and frequently commit other crimes while awaiting disposition of their cases. The Municipality supports state legislation requiring judges to order gang members to wear ankle bracelets as a condition of their release. Removal of the bracelet would automatically send them back to jail. This would enable the police to better monitor gang members.

Stricter penalties for multiple traffic violations – In several high-profile cases recently, drivers who have previously been convicted of traffic violations receive only light punishment, and then go on to commit serious crimes including murder. This is the case with both Mark Elkins and Kris Felber, who both killed innocent Anchorage citizens. We support stricter State laws, perhaps modeled after "three strikes" laws in which drivers with long histories of multiple traffic violations face felonies. These drivers should be removed from the streets before they kill innocent victims.

We also support broadening the felon in possession statute by adding a subsection to AS 11.61.200 that makes it unlawful for a convicted felon to occupy a vehicle with a firearm in it.

Material witness law change - We support Sen. Con Bunde's legislation (SB206) regarding material witnesses, which unfortunately failed in the Legislature this year. This measure would preclude a repeat of last year's Dimond Center frustration faced by police officers as they attempted to gather information at the scene of a shooting and faced uncooperative witnesses.

Federal prosecutor partnership – Processing of gang, drug and gun violations under federal law is quicker and the penalties far more strict than under state law. Former United States Attorney Tim Burgess proposed the Municipality of Anchorage assign city prosecutors to the federal prosecutor, to focus on gang, drug and gun cases. We recently received $100,000 from the U.S. Department of Justice to launch this initiative and are matching it with local taxpayer dollars. We also are seeking $400,000 annually for three years in a federal grant through U.S. Senator Lisa Murkowski and have asked the Legislature for support. Two city prosecutors and support staff would receive specialized training and be assigned to the federal prosecutor's office to focus on gang, drug and gun violations.

Last year, my administration launched a five-part anti-gang initiative which includes: improved intelligence gathering, better focused law enforcement operations, enhanced community education and support, better family support and tougher laws. In addition, the Tri-Borough Commission I have formed with Mat-Su Mayor Tim Anderson and Kenai Peninsula Mayor John Williams will be sponsoring a gang summit this fall with the U.S. Attorney's Office.

I want to stress that while additional laws may be necessary, the most immediate and effective solution is a sustainable revenue stream dedicated to enforcement, to the full functioning of the State Court System and a solid prevention program for our youth.

We would welcome the State's participation in tackling the problems of youth violence in our community. The Municipality of Anchorage requests a seat at the table for any of State effort and I look forward to the opportunity to discuss these issues with you at your convenience.

Sincerely,

Mark Begich
Mayor

CC: Select State Legislators
Anchorage Assembly members