

ALBANY LEGISLATURE COMMITTEES, 2009-2010 86/2

11910 SENATE LABOR & COMMERCE

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OFFICE OF THE COMMISSIONER

*Frank H. Murkowski, Governor*

December 30, 2004

Pat Davidson  
Legislative Auditor  
Legislative Budget and Audit Committee  
Division of Legislative Audit  
P.O. Box 113300  
Juneau, AK 99811

RECEIVED  
DEC 30 2004  
LEGISLATIVE AUDIT

RE: Sunset Process and Selected Investigative Issues

Dear Ms. Davidson:

Thank you for the opportunity to review and comment on the findings in your recent audit of the Sunset Process and the Investigative Unit for the Division of Occupational Licensing. Both of these audits were overdue and we greatly appreciate your initiative and thoughtful efforts. Our comments are as follows:

**Recommendation No. 1**

The legislature should consider amending sunset statutes.

The Department sees merit in many of your suggestions for statute changes and will work with you during the next legislative session to gain the desired results.

**Recommendation No. 2**

The Director of the Division of Occupational Licensing should implement changes to address investigative inefficiencies and case management procedures.

The Department basically agrees with your specific recommendations as follows:

1. Restructure the organization of the investigative unit
2. Change case assessment and assignment procedures
3. implement improvements to case management procedures
4. Implement other changes to increase efficiency and effectiveness

We agree that various actions are necessary if we are to achieve our ultimate goal of a timely, efficient and fair investigative process. However, any changes will not come easily or quickly.

Through the director of the division, changes have been implemented over the past two years specific to structure and management with the investigations unit. The director will evaluate the success of these changes and make additional changes and modifications as necessary to continue to evolve the effectiveness of the investigation unit. These changes may include reinstating the investigators' flexible schedule under close management supervision to assure accurate and timely work accomplishments.

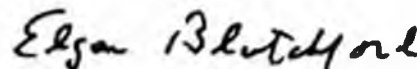
**Recommendation No. 3**

**The director of the Division of Occupational Licensing should consider drafting a policy to guide investigators' use of board members during the investigative process.**

The Department agrees there should be a policy regarding board members involvement in the investigative process, but we are unsure of what that policy should be. Several boards have asked about being exempt from the Administrative Procedures Act (APA) so that they could be more involved in the investigations. These board members are willing to give up their duties as adjudicators to better use their expertise in resolving complaints against others in their professions. They feel that their involvement would help eliminate unnecessary investigations, shorten the time required for closure and decrease the costs associated with investigations. While the APA has removed board members from the investigative process because of the potential problems with impartiality, it is a rather small percentage of the cases where board members actually become the adjudicators. This may be more of a "turf" battle than a legal issue. The division will make additional efforts in an attempt to resolve these conflicting issues and develop sound policy concerning board member involvement in investigative actions.

Again we appreciate the opportunity to comment and we especially appreciate your assistance in improving our services to the public.

Sincerely,



Edgar Blatchford  
Commissioner

cc: Rick Urton, Director  
Division of Occupational Licensing

**SB**

**140**

**SENATE COMMITTEE REPORT**  
**First Committee of Referral**

DATE: 3/10/05

FURTHER: Judiciary

Date of 5-Day Notice: \_\_\_\_\_  
 (in accordance with Uniform Rule 23)

DATE TURNED  
 IN TO OFFICE: \_\_\_\_\_

Labor and Commerce Committee considered SENATE BILL NO. 140

**SB 140 BAN INTERNET SPYWARE**

"An Act relating to spyware and unsolicited Internet advertising."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>Senate Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<b>House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>Betty Davis</i>	<input checked="" type="checkbox"/>			
<i>Ben Stevens</i>	<input checked="" type="checkbox"/>			
CHAIR: <i>C. Beese</i>	<input checked="" type="checkbox"/>			

# Spyware 101



Curtis Clothier  
Data Processing Manager  
Legislative Affairs Agency  
March 22, 2005



# What is Spyware?

- Software that collects personal information, or makes changes to your computer without your knowledge or consent.
  - Personal information can include website visits, or passwords and account numbers.
- Spyware is sometimes accompanied by 'Adware' (software that launches 'custom' advertisements on your computer.)



# Occurrences of Spyware

– In 2003,

- It was estimated that 2 out of 100 support calls concerned spyware ( ).

– In 2005,

- It is now estimated to be 2 out of every 5 support calls concern spyware (IDC).
- 20% of calls to Dell support involve Spyware (Dell)
- 50% of calls to Microsoft involve Spyware (Microsoft).

# Signs of Spyware



- Lots of pop-up ads, sometimes when you aren't surfing the web.
- Homepage or other settings are changed.
- New toolbars appear.
- New icons appear on your desktop.
- Computer slows down or crashes a lot.

File Edit View Favorites Tools Help  
 Back Forward Stop Search Favorites Media Print  
 Address [http://www.google.com](#) System Alert: Microsoft Internet Explorer provided by Legislative Affairs

**Congratulations!**  
 YOU ARE THE 10,000th VISITOR TO THIS SITE.  
 Click to Claim your Prize  
 Close Window

OKI

**the7review.co.uk**

- \* Home
- \* News
- \* Coming Soon
- \* Movie Trailers
- \* Movie Reviews
- \* Box Office
- \* Release Dates
- \* DVD
- \* Movie Posters
- \* Features
- \* Community
- \* Resource
- \* Contact

**Congratulations!**  
 You have won our hour  
 "OK" button to claim it

**Congratulations!**  
 YOU ARE THE 1,000th VISITOR TO THIS SITE.  
 Click to Claim your Prize  
 Close Window

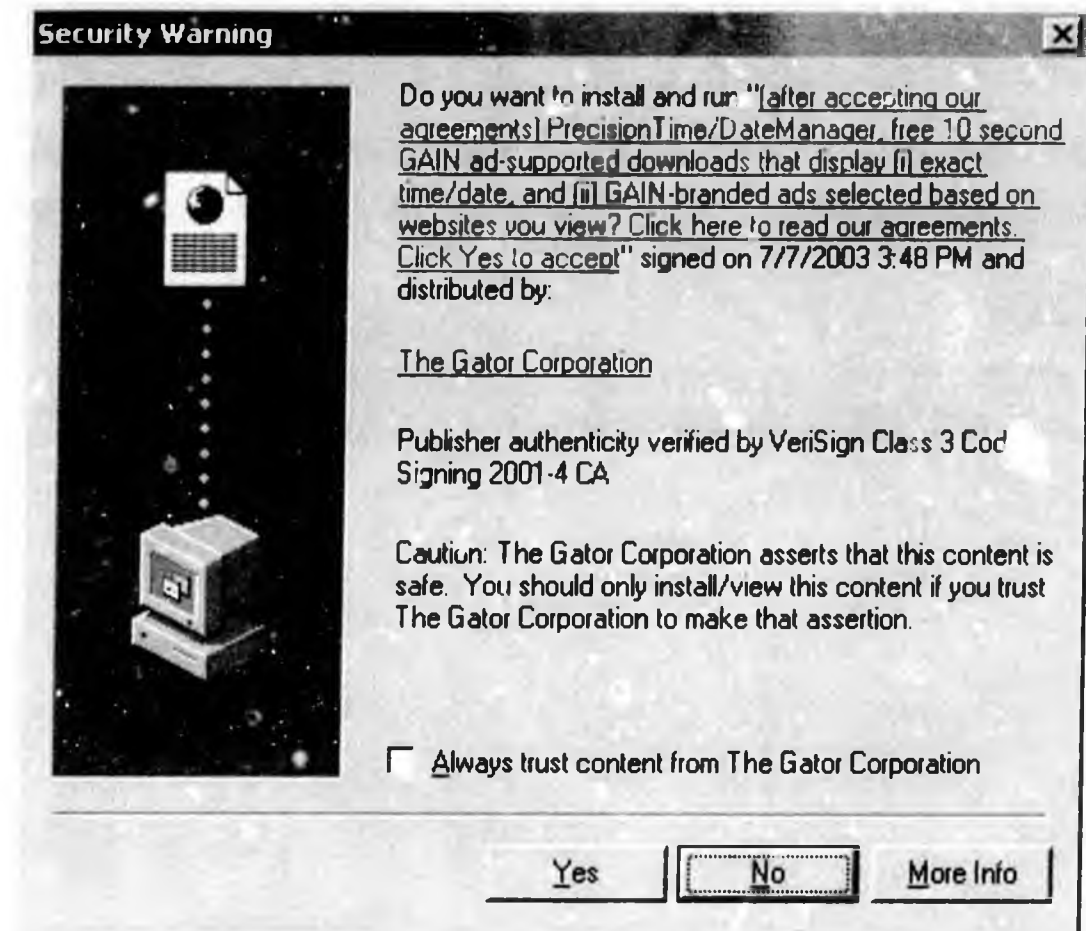
Riding Giants  
 Riding Giant  
 Riding Giants Pr  
 Riding Giants  
 Riding Giants  
 Riding Giants I  
 Riding Giants Quid  
 Hi.F  
 Riding Giants Q  
 Trailer Lo-Res  
 Riding Giants Fan Sites:

Submit your News, Information,  
 Pictures & Scoops on Riding Giants  
 Here: [Gary@the7review.co.uk](mailto:Gary@the7review.co.uk)

Page 1    Sec 1    1/1    At 1"    Ln 1    Col 1    1000    1000    1000

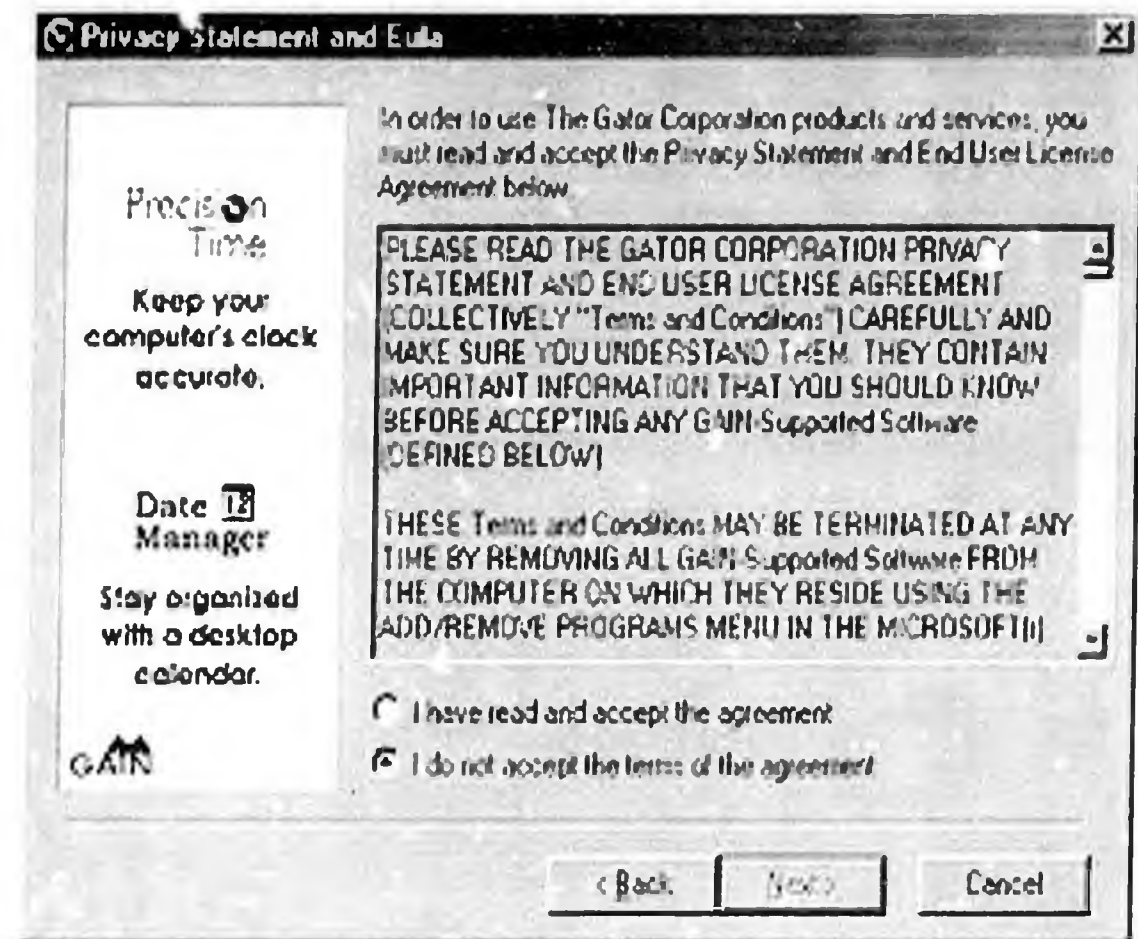
# How does Spyware get installed?

- Often by installing 'free' software, such as:
  - ScreenSavers
  - Weather Info
  - Toolbars
  - Music sharing



# How does Spyware get installed?

Lengthy 'End User Licensing Agreements' that are difficult to read.





# What does Spyware Do?

- Spyware changes your computer's settings and programs.
  - Slows or crashes computer.
- These changes are rarely documented and usually occur without your consent.
- Spyware can be (and often is) used to steal confidential information.

# Good Software versus Bad

- Not all software that collects information is bad:
  - Some computer and software vendors collect information on computer health.
  - Some software comes gives you an option for a 'paid' version of product, versus a 'free' version bundled with advertising.
- *Knowledge and consent* are key.

# How Do You Remove Spyware?

- Usually by running several 3<sup>rd</sup> party Spyware removal tools.



- Some Spyware programs can't be removed without cleaning the machine and starting over.



# At the Legislature (and other agencies)...

- Our defenses include:
  - Current versions of software,
  - Anti-virus systems,
  - Spam Filters,
  - Content filters,
  - Firewalls,
  - Spyware removal tools,
  - and a staff to provide support,



However,

- Data Processing staff work on 4-5 Spyware infected computers a week.
- Each call can take several hours each to fix.
- If the computer is in a ‘remote’ location, the repair may cost several days of downtime.
- Spyware prevention and removal now takes ***more staff time*** than virus and spam issues.



# Solutions? – No Silver Bullet

- Continued focus in 3 areas:
  - Continued **education** of computer users to make them aware of Spyware and act more responsibly.
  - Additional **technological** solutions to spot spyware and prevent it from installing.
  - Anti-spyware **legislation** providing recourse to users.

# What about the future?



- No decline in Spyware.
  - More identity theft.
  - More involvement from organized crime.
- 
- **Question:** Why the increases?
  - **Answer:** Because there is money involved (Advertising, Marketing and Theft).

# In the News Yesterday

March 21<sup>st</sup> 2005



## ■ *The Salt Lake Tribune*

- Utahans May Get Some Relief from Spyware,  
[http://www.sltrib.com/utah/ci\\_2615374](http://www.sltrib.com/utah/ci_2615374)

## ■ *The Annapolis Capitol*

- Maryland Lawmakers' bills would make spyware illegal,  
<http://www.mg.com/news/annapolis/2005/03/21/1110/>

## ■ *Internetnews.com*

- Anti-Spyware Bill Introduced in U.S. Senate,  
[http://www.internetnews.com/bus\\_news/article.php?491731](http://www.internetnews.com/bus_news/article.php?491731)

# Questions



# Organized Crime and the Internet

- January – George Mason University
  - Thousands of Social Security numbers stolen
- January – T-Mobile
  - Thousands of accounts compromised
- February – ChoicePoint Inc.
  - 145,000 consumer credit records stolen
- February – LexusNexus
  - 30,000 social security numbers stolen
- Today – Cal. State University
  - 59,000 social security numbers stolen
- Back

# Research Links

- Microsoft Spyware Information:
  - <http://www.microsoft.com/athome/security/spyware/spywarewhat.mspix>
- Criteria for what Spyware 'is':
  - [http://research.sunbelt-software.com/listing\\_criteria.cfm](http://research.sunbelt-software.com/listing_criteria.cfm)
- Federal Trade Commission:
  - <http://www.ftc.gov/bop/online/pubs/alerts/spywarealrt.htm>
- Google: 16,900,000 hits for "Spyware".



# Sunbelt Spyware Research Center

CounterSpy  
CounterSpy Enterprise

## Home

Software Library Browser  
Software Search  
New Software Submission

## Spyware Security Bulletins

Security Bulletin 20050316

## Spyware: What you should know

Spyware Prevention  
Anti-spyware Resources  
Spyware Checking  
Spyware Information  
Keyloggers  
PC Performance  
Malware  
Organized Cybercrime

## Sunbelt anti-spyware products

CounterSpy  
CounterSpy Enterprise

## Why other anti-spyware programs don't match up to CounterSpy

Ad-Aware  
HijackThis!

## More about spyware

Spyware Worse Than Viruses  
Spyware Security Threat  
Corporate Spyware Infections  
Spyware Explosion  
Enterprise Spyware Solution  
Spyware Cost Of Removal  
Malware Security Breaches

## Spyware knowledge

Spyware Education  
Spyware Research Center  
ThreatNet

## Developers

Our software is detected by  
CounterSpy!  
Listing Criteria

## Spyware in the news

Resource Library

## Listing Criteria

### Sunbelt Software's Definition of "Potentially Unwanted Installations (PUI)"

Sunbelt CounterSpy detects and removes software programs that are potentially unwanted by CounterSpy customers. Broadly, these programs include a range of types of software that incorporate behavior or functionality that, as a result of user feedback and the analysis of the Sunbelt Spyware Research Team, we know our customers may find potentially objectionable.

Defining what is "potentially unwanted" involves a combination of objective and subjective analysis. Since Sunbelt sells CounterSpy to both enterprise and home environments (hence, addressing markets that overlap, but may have different needs), a broad range of criteria are used to define what may not be wanted on a system by the end user or system administrator.

Often, a product may be listed in the CounterSpy database that would be considered innocuous but should be known to the user. For example, many remote control applications are listed in the CounterSpy database, including Sunbelt's own product, Sunbelt Remote Administrator. While remote control programs are almost always used for legitimate purposes, there are genuine nefarious uses for remote control programs, such as spying on passwords and stealing credit card information. These types of applications are made known to the user, but are listed with the default action of "Ignore".

Potentially Unwanted Installations are defined as software that engages in any of the following objectionable practices:

### Distribution & Installation

Installation processes used to deliver software to users' PCs become objectionable when the software...

- installs via automated installation processes (e.g., for ActiveX controls) initiated by or at third-party web sites when the software is not functionally required to view the content of those third-party sites and is not directly and specifically solicited by users
- installs as part of a package or collection of multiple "adware" (advertising) programs, "spyware" programs, or other similar programs that are not directly and explicitly requested by the user
- is bundled with a functionally unrelated, separate host application actually sought by users (i.e., as an "adware" bundle) and installs without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- "stealth installs" or "force installs" on users' PCs without first providing any notice or warning to users prior to installation and without having secured their full, meaningful, and informed consent
- installs via a security exploit or vulnerability
- uses malware to install or facilitate installation
- is installed via a virus, worm, trojan horse, malicious bot, rootkit, or other malware program
- is installed via an auto-updater or similar mechanism for a different, functionally separate program without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- is installed by another functionally separate "adware" program, "spyware" program, or similar program without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- is installed via a hosted instance of Internet Explorer launched by Windows Media Player and the purpose of the installation is anything other than acquiring a license for DRM-protected content that users are attempting to play or access
- uses false, misleading, confusing, deceptive, or coercive text or graphics to induce, compel, or cause users to install the software
- is distributed via pay-per-install affiliate network(s) with a documented track record of consumer complaints, "stealth installations," "browser hijacks," aggressive popups, and/or unfair, deceptive advertising and other practices
- uses other installation methods or techniques that most reasonable persons would find objectionable, unfair, misleading, deceptive, or coercive

### Advertising

Software that displays advertising becomes objectionable when that advertising software...

- displays third-party advertising in pop-ups and windows that the software opens on the users' desktops and which are not part of internet content that users directly choose to visit or view without first providing sufficient notice and choice to users and securing their full, meaningful, and informed consent, or without offering users a means for permanently removing or opting out of the advertising short of purchasing a "pro" version of the product and/or incurring a fee
- embeds third-party advertising banners or messages within itself or other programs or within elements of the operating system itself without first providing sufficient notice and choice to users and securing their full, meaningful, and informed consent, or without offering users a means for permanently removing or opting out of the advertising short of purchasing a "pro" version of the product and/or incurring a fee.
- displays, opens, or embeds advertising on the user's desktop or within other programs that is false, deceptive, misleading, or coercive
- opens advertising windows that are not clearly and conspicuously labeled as originating from the software company itself (to distinguish those ads from normal advertising windows spawned by web sites encountered during normal web surfing) or that provide no mechanism (e.g., a hyperlink) to allow users to get more information about the origin and nature of the advertising as well as how to remove it
- opens advertising windows that are not closeable through normal means or that spawn multiple other advertising windows when closed
- modifies, obscures, or blocks content of viewed web pages "on the fly" for commercial purposes without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- displays, opens, or embeds advertising using other methods or means that most reasonable persons would find objectionable, unfair, misleading, deceptive, or coercive

#### System Reconfiguration

Software that makes changes to users' PCs becomes objectionable when it...

- reconfigures the user's browser home page, search settings, or other user-selectable browser preferences without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures the user's browser home page, search settings, or other user-selectable browser preferences and/or prevents users from restoring their preferences
- installs new advertising-related add-ons (e.g., toolbars, searchbars, et al) to browser and/or desktop without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- modifies or deletes the HOSTS file without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- maliciously modifies or deletes other system configuration files without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- configures advertising-related programs to start automatically with the operating system without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- inserts advertising-related programs into the Winsock Layered Service Provider chain without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures or modifies users' browser and/or TCP/IP network settings to automatically direct or route users' internet traffic to or through a remote host other than the user's default ISP without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures or modifies users' browser and/or TCP/IP network settings to automatically direct or route user's internet traffic to or through a local host for the purposes of advertising and marketing without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- redirects, modifies, interferes with, or blocks users' preferred browsing destinations and searches without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures PCs' dial-up networking settings so as to cause those PCs to establish phone connections to premium rate phone numbers without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- deliberately blocks network access from the PC to internet sites of recognized "anti-malware" or "anti-spyware" software or service providers, both commercial and non-commercial
- reconfigures, modifies, or blocks privacy and security programs (e.g., "anti-malware" programs, "anti-spyware" programs, firewalls) to disable, cripple, impede, or bypass those privacy and security programs without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures other programs or system settings so as to lower security of individual programs or the system as a whole

- installs or uses an auto-updater or similar mechanism without providing a readily accessible means for users to configure or disable that auto-update mechanism
- installs or uninstalls other, functionally separate programs without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- reconfigures users' PCs and software in other ways that most reasonable persons would find objectionable, unfair, misleading, deceptive, or coercive

#### **Data Collection, Transmission, & Sharing**

Software that collects information from and about users as well as other sensitive, confidential information from their systems becomes objectionable and privacy-invasive when that software...

- collects Personally Identifiable Information from users or their PCs and transmits that information over a network connection without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- collects and transmits Personally Identifiable Information from users under false, unfair, deceptive, misleading, or coercive pretenses or circumstances
- collects and transmits data regarding user's internet connection, viewing, and communication habits and behavior for the purposes of advertising and marketing without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- collects and transmits other potentially sensitive or confidential data from users' PCs and network traffic without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- consists of third-party cookie data set by web sites or servers that are part of third-party advertising, marketing, or metrics/measurement networks for the purposes of tracking and monitoring the surfing behavior, habits, and history of users across unrelated web sites.
- Company or Entity responsible for the software provides or sells data collected from users and PCs in non-aggregate form to third-parties without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- collects and transmits data of such a kind and in such a way that most reasonable persons would find such practices objectionable, unfair, misleading, deceptive, or coercive

#### **Uninstallation**

Software should provide a locally installed, readily accessible, fully functional uninstallation mechanism that performs a reasonably clean and complete removal of the software from users' systems. Moreover, software should not resist detection and removal by anti-malware utilities in any way. The software's uninstallation functionality is inadequate when the software...

- installs no readily accessible, easily usable, fully functional uninstallation program or equivalent mechanism (i.e., an "uninstaller") to users' PCs during installation of the software itself
- uses an uninstaller accessible or usable only from web site and/or that requires a network connection to access and use
- uses an uninstaller that leaves significant executable remnants on users' PCs that either reinstall the software or install new software without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- uses an uninstaller that falsely and deceptively claims to have performed a reasonably complete removal of the software from users' PCs
- uses an uninstaller that reinstalls the application or a modified variant, or that installs other software on users' systems without first providing sufficient notice and choice to users and without securing their full, meaningful, and informed consent
- when bundled with a functionally unrelated, separate host application (i.e., as an "adware" bundle), does not automatically uninstall when the host application is uninstalled
- uses an uninstaller that badgers, coerces, or tricks the user into refusing or canceling the uninstallation
- uses an uninstaller that conditions uninstallation on the acceptance of terms that most reasonable persons would find objectionable, onerous, or outrageous
- incorporates, uses, and/or deploys functionality to evade, thwart, undermine, or prevent detection and/or removal by "anti-spyware" and "anti-malware" utilities
- performs or resists uninstallation in such a way that most reasonable persons would find the program's behavior objectionable, unfair, misleading, deceptive, or coercive

#### **Malware (Viruses, Trojans, Worms, Backdoors, Rootkits, Malicious Bots)**

Software should not consist of malware itself, install malware on users' PCs, or facilitate the installation of malware on users' PCs. Software becomes objectionable when it...

- installs worms or trojans horses on users' PCs
- installs virus-infected files on users' PCs
- installs backdoors, rootkits, or malicious bots on users' PCs

- Installs spam bots, zombie programs, or other remotely controllable tools, such as those that enable PCs to participate in coordinated Distributed Denial of Service attacks
- infects files or the PC's file system with a virus
- deliberately and maliciously deletes or corrupts critical system files or other valuable data on or transmitted from users' PCs
- Is itself a virus, worm, or trojan horse
- is itself a backdoor, rootkit, or malicious bot
- is itself a remote administration tool that is designed to be installed without the PC administrator's full knowledge and consent and which is designed to hide its presence from the administrator for potentially malicious purposes
- installs or is itself any form of software that recognized security experts regard as malware

#### **Notice, Disclosure, Choice, & Consent**

Prior to installation, software should provide clear, conspicuous notice and disclosure to users both of the installation of the software as well as key functionality of the software. It should also offer users the clear, conspicuous, and usable choice of canceling the installation and/or opting out of objectionable provisions. Only software that offers clear, conspicuous notice, disclosure, and choice during installation can be said to gain the full, meaningful, informed consent of users. Clear, conspicuous notice, disclosure, and choice is not provided, nor is the full, meaningful, informed consent of users secured when the software:

- provides no clear, conspicuous, meaningful notice to users of installation of software
- does not offer users a clear, conspicuous, usable choice to cancel or opt out of installation through normal means
- disregards, thwarts, blocks, or impedes users' choice to cancel or opt out of installation
- lacks an End User License Agreement and Privacy Policy that is readily accessible before or during installation
- fails to clearly, conspicuously, and meaningfully disclose key terms related to advertising, system reconfiguration, and data collection / transmission practices
- discloses key terms related to advertising, system reconfiguration, and data collection / transmission practices only in an End User License Agreement (EULA) or Privacy Policy or in locations and documents that users are not likely to read during the installation of the software
- fails to clearly, conspicuously, and meaningfully disclose key software functionality and behavior that are otherwise remarkable, onerous, or potentially objectionable
- discloses key software functionality and behavior that is otherwise remarkable, onerous, or potentially objectionable only in EULA or Privacy Policy or in locations and documents that users are not likely to read during the installation of the software
- discloses key license terms and software functionality in language that is not simple, plain, straightforward, direct, unvarnished, and free of euphemisms
- uses textual and/or graphical design elements to obscure or hide, either partially or completely, key textual information designed to provide notice and disclosure to users
- uses false, misleading, confusing, deceptive, or coercive text or graphics to induce, compel, or cause users to install the software
- provides or uses false, deceptive, or misleading information about key license terms, software functionality, or the identity of Company or Entity responsible for the software in Privacy Policy, EULA, pop-up windows, browser windows, dialog boxes, or any other document that might be viewed by users during installation
- uses a EULA or Privacy Policy that includes license terms that are designed to prevent users from using third-party privacy and security programs (e.g., "anti-malware" or "anti-spyware" programs) to control, configure, block, or remove the software from users' PCs
- uses license terms that require users to consent to future unsolicited updates or upgrades, future unsolicited installation of other software, or future unsolicited uninstallation of other software without providing a clear, conspicuous, readily accessible and usable means for the user to cancel, refuse, or opt-out of such updates, upgrades, installations, and removals
- uses a EULA or Privacy Policy that requires users to consent to the terms of EULAs and/or Privacy Policies from other companies that supply "adware," "spyware," or similar software
- conditions use of the software on other license terms that most reasonable persons would find unfair, onerous, objectionable, or outrageous
- provides notice, disclosure, and choice of such a kind and in such a way that most reasonable persons would find that notice, disclosure, and choice to be inadequate, objectionable, unfair, misleading, deceptive, or coercive

Sunbelt CounterSpy will detect software that engages in any single one of the objectionable practices listed above and present that potentially unwanted software to users and administrators for possible removal. Sunbelt Software assesses the "threat" posed by potentially unwanted software and may, depending on the established "threat level," adjust the "Recommended Action" presented to CounterSpy users and administrators from "Delete" or "Quarantine" to "Ignore" or "Report Only." The final decision to remove software, however, is always made by users and administrators.

This document has been a collaborative effort between Eric L. Howes and Sunbelt Software. To contact the Sunbelt Spyware Research Team, please go to [http://www.sunbelt-software.com/contact\\_us.cfm](http://www.sunbelt-software.com/contact_us.cfm)

Last update: 28 Feb. 2005

Note: Sunbelt Software reserves the right to change these criteria without notice.

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# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB 140  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title Ban Internet Spyware RDU Enterprise Technology S  
 Component Enterprise Technology S  
 Sponsor (S) L&C  
 Requester \_\_\_\_\_ Component No. 2082

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 This bill will not have a fiscal impact upon the agency.

Prepared by: Stan Herrera, Director Phone 465-5735  
 Division Enterprise Technology Services Date/Time 3/22/05 7:21 AM  
 Approved by: Michael Tibbles, Deputy Commissioner Date 3/22/2005  
 Agency Department of Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB140-LAW-C&FB-3-21-  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to spyware and unsolicited RDU CIVIL  
Internet advertising." Component Commercial & Fair Business  
 Sponsor Senator Theriault  
 Requester Senate Labor & Commerce Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

This bill amends AS 45.45 (Trade and Commerce - Trade Practices) by adding new sections to prohibit the use of "spyware" that causes "pop-up" ads to appear on a computer when the user accesses a certain website. The Department of Law is currently charged with enforcing Alaska's Consumer Protection Act, AS 45.50.471 et seq., which includes enforcement of AS 45.50.479-.481 relating to electronic mail. We would likely enforce this provision of AS 45.45 in a similar manner, and we do not believe this bill will require additional funds for effective enforcement.

Prepared by: Kathryn Daughetee Director Phone 465-3673  
 Division: Administrative Services Division Date/Time 3/21/05 11:44 AM  
 Approved by: K. Daughetee for Scott Nordstrand, Acting Attorney General Date 3/21/2005  
 Agency: Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB140-DPS-ASTD-3-18-05  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act relating to spyware and unsolicited Internet RDU Alaska State Troopers advertising." Component: AST Detachments  
 Sponsor: Senator Therriault  
 Requester: Senate Labor & Commerce Component No.: 2325

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

Passage of this bill will have no fiscal impact on the Alaska State Troopers.

The bill prohibits spyware pop-up advertisements on computers in our state and helps undermine the economic incentives for spyware providers to sneak onto a user's computer. Penalties for a violation of these provisions are civil.

Prepared by: Lieutenant Todd Sharr Phone: 907-269-4532  
 Division: Alaska State Troopers Date/Time: 3/18/05 3:24 PM  
 Approved by: Commissioner William Tandeske Date: 3/18/2005  
 Agency: Department of Public Safety

# Alaska State Legislature

SENATOR  
**GENE THERRIAULT**  
Mailing Address:  
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Fairbanks, Alaska 99701  
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Fax (907) 488-4271



Senate

While in session  
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Juneau, Alaska  
99801-1182  
(907) 465-4797  
Fax (907) 465-3884  
SENATE DISTRICT F

## SB 140 Sponsor Statement

Spyware, which includes malware, trackware and adware, is the categorical name for any application that may track a user's online and/or offline PC activity and is capable of locally saving or transmitting those findings for third parties either with, or more often without, the computer user's knowledge or consent.

According to reports by the National Cyber Security Alliance, in 2003 nine out of 10 PCs connected to the Internet were infected with spyware. A joint spy audit report by Earthlink and Webroot in October, 2004, detected an average of 26 spyware traces on any given PC. Over a nine-month random computer audit, Earthlink and Webroot detected 82 million pieces of spyware and other potentially unwanted software programs.

Spyware can install tracking cookies that marketers use to monitor online activities to tailor pop-up ads directly to the user. More harmful programs can record keystrokes to get personal information such as Social Security Number, bank account numbers, login names, passwords and credit card numbers that can be used to commit identity theft.

In addition to frustrating users with pop-up ads that are misleading and anticompetitive, the cost of removing unwanted spyware from PCs in homes, businesses, schools, universities and governments is staggering.

Senate Bill 140 would make it unlawful for a person to engage in deceptive acts or practices using spyware, including causing a pop-up ad to be shown on a computer screen knowing, or with reckless disregard, that the ad is the consequence of a user accessing a certain website.

While prosecutions and enforcement may be challenging, SB 140 sends the message that Alaska takes computer invasion seriously and will not leave its citizens without recourse.

# ALASKA STATE LEGISLATURE

SENATOR  
**Gene Therriault**  
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Fairbanks, Alaska 99701  
(907) 488-0857  
FAX (907) 488-4271



While in Juneau  
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Senate  
Senate District 1

**FOR IMMEDIATE RELEASE:** March 10, 2005  
**Contact:** Dave Stancliff, 465-4797

## **State Senator Targets Computer Invaders** *Bill aims to reduce spyware*

JUNEAU—Senator Gene Therriault, R-North Pole, has introduced legislation aimed at reducing the unwanted invasion of spyware on Alaskan's computers. SB 140 was drafted after an extensive review of state and national efforts under way on the issue.

"The cost and frustration caused by those who invade our home and work computers is enormous," Therriault said. "My approach toward reducing unwanted spyware is to cover ground that Congress has thus far not covered."

Spyware is any technology that aids in gathering information about a person or organization without their knowledge. On the Internet, spyware is programming that is put in someone's computer to secretly gather information about the user and relay it to advertisers or other interested parties.

Therriault looked at a wide range of legislation proposed in other states and chose the Utah model as a starting point for legislative consideration. "My staff located Mr. Ben Edelman, a nationally recognized expert associated with the Harvard School of Law, who specializes in the nuances of spyware operation and law. We are working with Mr. Edelman and our legal services to tailor an existing Utah statute to fit our body of law," Therriault said.

SB 140 is a complicated undertaking in several respects. The legislation must have a delicate but well-aimed counter move against spyware tactics. The law must prevent abuses but not damage legitimate companies who operate in a forthright and open manner. It is a challenge Senator Therriault is willing to undertake. "This is not about eliminating just nuisances, it is about protecting the privacy and the legitimate use of computers in Alaska and getting a handle on the enormous cost these unwanted invasions are causing."

###



## Alaska State Legislature

Senate Majority Web: [www.akrepublicans.org](http://www.akrepublicans.org)

Sponsor: Senator Gene Therrault  
Current Version: SB 140  
Contact: Dave Stancliff, 465-4797

### Fact Sheet for: Senate Bill 140

**Short Title:** BAN INTERNET SPYWARE

**Summary:**

- Adds "Deceptive Acts or Practices Relating to Spyware" to "unfair methods of competition" and "unfair or deceptive acts or practices" that are declared to be unlawful.
- Makes it unlawful for a person who is not the owner or authorized user of a computer to engage in the following deceptive acts or practices using spyware:
  - Causing a pop-up advertisement to appear by means of a spyware program under circumstances defined in the bill.
  - Purchasing advertising that violates the prohibition on the use of spyware to customize pop-up advertising.

**Benefits:**

- Prohibiting pop-up advertisements undermines the economic incentives that encourage spyware providers to invade computers.
- Reduces unwanted, unwarranted and often malicious spyware invasions.
- Helps reduce the staggering cost of removing spyware programs.

**Background:**

- Computer users have recently encountered a barrage of unwanted software programs, known as spyware, that attempts to take over their computers. Typically, spyware programs monitor the user's activities to determine what internet websites the user is visiting then displays pop-up advertisements encouraging users to purchase from companies that have paid advertising fees to the spyware provider. These advertisements are misleading, anticompetitive, intrusive and a source of frustration for users who cannot remove the program or locate the entity that created it. The bill is based in part on model Utah legislation.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

WASHINGTONPOST.NEWSWEEK  
INTERACTIVE COMPANY, LLC, et al.,

Plaintiffs,

v.

THE GATOR CORPORATION,

Defendant.

Civil Action No. \_\_\_\_\_

DECLARATION OF BENJAMIN G. EDELMAN

→ I, Benjamin G. Edelman, state and declare as follows:

1. I make this statement under penalty of perjury and from my own personal knowledge.
2. I hold an Bachelor of Arts degree in Economics from Harvard College and a Masters Degree in Statistics from the Graduate School of Arts and Sciences at Harvard University.
3. I am presently employed as a Technology Analyst at the Berkman Center for Internet & Society at Harvard Law School. I have been employed as a technical consultant at the Berkman Center since May, 1998. While employed by the Berkman Center I have published the following: (1) The Effect of Editorial Discretion Book Promotion on Sales at Amazon.com (2001-2002), available at <http://cyber.law.harvard.edu/people/edelman/pubs/Thesis-intro.pdf>; (2) Software Environments for Online Deliberative Discourse (1999-2000), available at <http://cyber.law.harvard.edu/projects/deliberation>; (3) Analysis of Domain Reregistrations Used For Distribution of Sexually-Explicit Content (2002), available at <http://cyber.law.harvard.edu/people/edelman/renewals>; (4) Large-Scale Intentional Invalid WHOIS Data (2002), available at <http://cyber.law.harvard.edu/people/edelman/invalid-whois>; (5) .NAME Registrations Not Conforming to .NAME Registration Restrictions, available at <http://cyber.law.harvard.edu/people/edelman/name-restrictions>; (5) Alternative Perspectives on Registrar Market Share, available at <http://cyber.law.harvard.edu/people/edelman/registrar-choice>; (6) Analysis of Registrations in Alternative Root TLDs (2001), available at <http://cyber.law.harvard.edu/people/edelman/dotbiz> and <http://cyber.law.harvard.edu/people/edelman/dotweb>; (7) and Documentation of Privacy and Security Shortcomings at Buy.com (2000), available at <http://cyber.law.harvard.edu/people/edelman/buy-privacy.html>.

4. I am proficient in Microsoft Visual Basic, Microsoft Visual Basic for Applications, including AccessBasic and WordBasic, Microsoft Visual Basic Scripting, including Active Server Pages, ADO and OLEDB, Mathworks MatLab, Stata, and Splus / R.
5. I was qualified as an expert and provided oral testimony in a lawsuit in United States District Court for the Eastern District of Pennsylvania captioned *Multnomah County Public Library v. United States of America*, No. CIV.A. 01-1322, 2002 WL 1126046 (E.D. Pa. 2002). My work in that case investigated and detailed the design of the Internet, the implementation of computer networks, and the capabilities of proposed methods of filtering access to certain types of Internet content.
6. The Internet is a global network of millions of interconnected computers. The World Wide Web is a portion of the Internet especially suited to displaying images and sound in addition to text. Much of the information on the World Wide Web is stored in the form of "web pages" which can be accessed through a computer connected to the Internet (via a commercial Internet service provider or "ISP") and equipped with a computer program called a "browser." Leading web browsers include Microsoft Internet Explorer and Netscape Navigator. "Websites" are locations on the World Wide Web containing collections of web pages. A web page is identified by its unique Uniform Resource Locator or "URL" (e.g. <http://www.usatoday.com>), and a URL ordinarily incorporates its site's "domain name" (e.g. usatoday.com).
7. I have conducted research regarding the Gator Corp. on several previous occasions and am familiar with its operation.
8. Software written and distributed by Gator Corp. causes the display of pop-up advertisements upon a user's attempt to view certain websites. Gator causes the display of these pop-up advertisements without the permission of or payment to such websites.
9. Gator Corp. distributes a free software application called "Gator." Gator is essentially a "digital wallet." Gator provides users with a mechanism for storing personal information about themselves, passwords, user identification numbers and names, and other data that consumers routinely need to input on electronic forms when they shop for goods or services on the Internet. Gator assists users in filling out such forms without having to retype the previously stored information.
10. Gator Corp. bundles a software program that it calls "OfferCompanion" together with its Gator digital wallet software program, so that persons who download the Gator application onto their personal computers automatically have OfferCompanion downloaded and installed onto their personal computers. In addition, when a person downloads certain popular free software programs, such as KaZaa or AudioGalaxy, OfferCompanion is automatically downloaded and installed onto her personal computer. Because OfferCompanion is bundled with other software programs and downloaded automatically with those other software programs, even sophisticated computer users frequently do not know that OfferCompanion has been installed on their personal computers.

11. Once OfferCompanion is installed on a personal computer, OfferCompanion automatically launches and operates whenever a user invokes her computer's web browser. OfferCompanion communicates frequently with Gator Corp.'s computer servers, monitoring the user's activities on the World Wide Web and transmitting that information over the Internet to Gator Corp.

12. When a computer user visits certain websites Gator Corp.'s remote computer systems transmit to the user's computer one or more advertisements to be displayed directly over the content that the owner of the website intended to be displayed.

13. Gator Corp.'s pop-up advertisements typically appear at approximately the same time that the web page that the user has requested is downloading onto the user's computer and opening on the user's computer screen. As a result of Gator Corp.'s pop-up advertisements, users ordinarily do not see the requested web page in the manner that the website owner intended to display it. Instead, users see the Gator Corp. pop-up advertisement concealing some of the content the website owner intended to be displayed on the requested web page. In order for a user to see the requested web page displayed as intended by the website owner, the user must move her mouse to each pop-up advertisement and click the mouse to close each advertisement, thus delaying access to the site's content.

14. The design of the Gator Corp. software allows Gator to cause advertisements to be displayed on any website desired. The Gator software is capable of placing advertisements even on the websites of Gator's competitors, and it is equally capable of placing advertisements on websites that do not sell advertising or that refuse to permit certain types of advertising.

15. Gator Corp. does not prominently advise users who have downloaded OfferCompanion software that Gator Corp.'s pop-up advertisements will change the display of content on particular websites. Furthermore, the Gator Corp. pop-up advertisements fail to suggest that they are not authorized and supplied by the underlying website.

16. Because Gator Corp.'s advertisements appear on a user's screen simultaneously, or nearly simultaneously, with the downloading and opening of the requested web page of the targeted website, the Gator Corp. pop-up advertisements appear to be an integral and fully authorized part of the original underlying web page.

17. Users may find it difficult or confusing to remove Gator software from their computers. Even if a user invokes the ordinary Windows "uninstall" feature to remove the software program that provided OfferCompanion as a part of a bundle, OfferCompanion remains on the user's computer and continues to function in support of Gator Corp.'s pop-up advertising system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this \_\_\_\_\_ day of June, 2002.

---

Benjamin G. Edelman

# "Spyware": Research, Testing, Legislation, and Suits

Benjamin Edelman

[ [Introduction](#) - [Research](#) - [Legislation](#) - [Pending Suits](#) - [Disclosures](#) ]

## Introduction

A number of firms currently design and offer so-called "spyware" software -- programs that monitor user activities, and transmit user information to remote servers and/or show targeted advertisements. As distinguished from the design model anticipated by [whatis.com's definition of adware](#) ("any software application in which advertising banners are displayed while the program is running"), these spyware programs run continuously and show advertisements specifically responding to the web sites that users visit. Companies making programs in this latter category include [Gator](#) (recently renamed [Claria](#)), [WhenU](#), and [180Solutions](#). Other spyware programs include keystroke recorders, screen capture programs, and numerous additional software systems that surreptitiously monitor and/or transmit users' activities.

Spyware programs have prompted a number of legal challenges, as described in the pending suits section, below. The problem of spyware has also attracted attention from legislators, who have proposed laws to rein in the problem

I have followed these developments generally, I have written about the programs and their effects, and I have been retained as an expert in certain of these suits. This page indexes my research on my own and my work in selected cases.

### Featured Research

- [180solutions & Affiliate Commissions \(NEW\)](#)
- [WhenU Violates Own Privacy Policy \(NEW\)](#)
- [Advertisers Using WhenU \(NEW\)](#)
- [WhenU Spams Google, Breaks "No Cloaking" Rules](#)
- [WhenU Copies 26+ Articles from 20+ News Sites](#)
- [WhenU.com, Inc., v. The State of Utah](#)
- [Documentation of Gator Advertisements and Targeting](#)

## Research as to Spyware Operation, Advertisements and Targeting

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### Gator / Claria GAIN

- [Documentation of Gator Advertisements and Targeting \(May 2003\)](#)
  - o Research showing which advertisements Gator shows when users visit various domain names. Includes advertisement thumbnails and analysis of targeting conditions.
- [WashingtonPost, Newsweek Interactive Company, LLC, et al. v. the Gator Corporation - Edelman Expert Declarations \(June 2002 - February 2003\)](#)
- [Teleflora, Inc. v. Claria. - Edelman Expert Declaration \(May 2004\)](#)
- [Dell's Spyware Puzzle \(June 2004\)](#)
  - o Research showing Dell UK advertising on the Claria network, puzzling because Dell has previously criticized unwanted software on users' PCs.
- [Gator's EULA Gone Bad. \(November 2004\)](#)
  - o Analysis of substance and presentation of Claria's license agreement. The 5,900+ word, 63-page license is presented in a small scroll box with section headings merged into body text. Users who manage to read the license find surprising terms: Users must not run third-party tools (like Ad-Aware or Spybot) to remove Gator, and users must not investigate what personal information Gator tracks and sends.
- [Claria's License Agreement is Fifty Six Pages Long \(June 2004\)](#)
  - o Complete set of screenshots showing the Claria installation process and license agreement, when Claria is bundled with Kazaa. The 5,541-word Claria license requires fifty six on-screen pages, e.g. fifty six presses of the page-down key, discouraging users from meaningfully reviewing the license.

[WhenU Save / SaveNo.v](#)

- WhenU Violates Own Privacy Policy (May 2004)
  - Research showing that WhenU transmits to its servers some of the specific URLs users visit, precisely contrary to WhenU's promises in WhenU's license agreements and in some WhenU software installers.
- Advertisers Using WhenU (June 2004)
  - Research reporting all current WhenU graphical advertisers. Major advertisers include Priceline, J.P. Morgan Chase, Verizon, Merck, and T-Mobile.
- WhenU Security Hole Allows Execution of Arbitrary Software (June 2004)
  - Research finding a flaw in the auto-update system used by certain WhenU software recently available on WhenU's ordinary public web site. Flaw allowed attackers to install any software on PCs of users with the affected WhenU software.
- WhenU Spams Google, Breaks Google "No Cloaking" Rules (May 2004)
  - Research showing web sites created by WhenU in violation of search engine rules, boosting rankings of content favorable to WhenU while pushing critics lower in rankings. Google and Yahoo! responded by removing www.whenu.com and other affected sites from their indexes.
- WhenU Copies 26+ News Articles from 20+ Publishers (May 2004)
  - Research showing that WhenU has copied at least 26 articles from at least 20 different publishers to its main www.whenu.com web server, as well as to at least eleven other official WhenU servers. The articles are provided in full, but without the advertisements that surround article text on the publishers' web sites, without any mention of authorization from the publishers, and without their ordinary copyright notices.
- WhenU's License Agreement is Forty Five Pages Long (April 2004)
  - Complete set of screenshots showing the WhenU installation process and license agreement, when WhenU is bundled with BearShare. Due to placement of the WhenU license is an exceptionally small on-screen window, viewing the entire license requires 45 presses of the page-down key, discouraging users from meaningfully reviewing the license.
- Documentation of WhenU Advertisements and Targeting (forthcoming)
  - Research showing which advertisements WhenU shows when users visit various domain names. Includes advertisement thumbnails and analysis of targeting conditions.
- Quicken Loans and Wells Fargo v. Whenu.com Inc. - Edelman Expert Declarations (July - September 2003)

#### *180Solutions n-CASE and Zango*

- Documentation of n-CASE Advertisements and Targeting (forthcoming)
- The Effect of 180solutions on Affiliate Commissions and Merchants (July 2004)
  - Research showing how 180 software intentionally causes merchants to pay affiliate commissions to 180, even when affiliate commissions are properly payable to other affiliates, or are properly withheld by merchants under the terms and conditions of their affiliate programs.
- 180solutions Installation Methods and License Agreement (July 2004)
  - Research itemizing 180's major installation methods, including drive-by downloads, distribution partners, and installation through security holes. Discussion also tracks failure to show a license agreement and failure to provide an uninstaller.
- Who Profits from Security Holes? (November 2004)
  - Video example of software installation through security holes, installing software from 180solutions and 15+ other companies.
- 180 Talks a Big talk, but Doesn't Deliver (January 2005)
  - Evaluates 180solutions current installation methods and other practices in light of endorsement by an anti-spyware consortium.

#### *DirectRevenue / ABetterInternet*

- Documentation of DirectRevenue Advertisements, Advertisers, and Targeting (forthcoming)



- [DirectRevenue Deletes Competitors from Users Disks \(December 2004\)](#)
  - Packet log excerpts showing the means by which DirectRevenue removes certain competitors' programs from users' hard disks.

### Spyware Generally

- [Methods and Effects of Spyware \(PDF\) - Response to FTC Call for Comments on Spyware \(March 2004\)](#)
  - I explain how spyware works, including presenting specific personal information transmitted by both Gator and WhenU. (The WhenU transmissions are particularly notable because these transmissions seem to violate WhenU's own privacy policy.) Other sections of the document discuss installation methods of spyware (with special consideration of the technical methods used in drive-by downloads), frequency of advertisement display, and performance and security effects of spyware.
- [A Close Reading of Utah's Spyware Control Act - FAQ-style analysis of the bill, a prominent letter of opposition, and related media coverage. \(March 2004\)](#) See also [WhenU.com, Inc., v. The State of Utah](#), [WhenU's challenge to the Spyware Control Act](#).
- [Grokster and Claria Take Licenses to New Lows \(October 2004\)](#)
  - Shows installation of software even when users press "Cancel" to decline installation. Notes that license agreements stretch to the tens of thousands of words, and to hundreds of on-screen pages.
- [Who Profits from Security Holes? \(November 2004\)](#)
  - Video example of software installation through security holes, installing software from 180solutions and 15+ other companies.
- [Video: Ebates Installed through Security Holes \(December 2004\)](#)
  - Video showing software from Ebates installed through security holes, contrary to affiliate networks' policies.
- [Media Files that Spread Spyware \(January 2005\)](#)
  - Listing of programs installed after a misleading pop-up displayed by a Windows Media file.
- [Investors Supporting Spyware \(January 2005\)](#)
  - Listing of major investment firms helping support the operation of large US-based spyware companies.

### Legislation Regulating Spyware

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In the listings below, the  icon indicates links to my original research and analysis;  indicates local versions of content originating elsewhere; and other links point to content hosted elsewhere.

- [Proposed US federal legislation](#)
  - [Safeguard Against Privacy Invasions Act - Rep. Mary Bono - H.R. 29 \(formerly H.R. 2929\)](#)
    - Status: Reintroduced, January 2005. (Previously passed by full House.)
    - Prohibits certain specific practices except with user authorization. Requires notice, consent, and uninstall capability for certain information collection and advertising programs. Leaves many key details to the Federal Trade Commission. Grants enforcement power only to the FTC. Preempts existing state laws about spyware.
    - [My full analysis and critique](#). See also my earlier [initial analysis and critique](#).
  - [Software Principles Yielding Better Levels of Consumer Knowledge - Sen. Conrad Burns and Sen. Ron Wyden - S.2145](#)
    - Status: Introduced, February 2004. Hearing held, March 2004.
    - Requires notice (with representative examples of advertisements and estimated display frequency) and uninstall capability (presence in Add/Remove Programs listing). Enforcement by FTC and state attorney generals.
  - [Computer Software Privacy and Control Act - Rep Jay Inslee - H.R.4255](#)



- based triggering mechanisms that cover web sites with advertisements.
- Status: Introduced, House, January 2005.
- New York: [Senate S07141](#)
  - According to the bill's [summary](#), the bill creates a crime of unlawful dissemination of spyware, ordinarily a class A misdemeanor and a class E felony for repeat offenders. Unlawful dissemination of spyware takes place when a person "having no right to do so" installs software ("including but not limited to a keylogg[er]") to gather and transmit personal information or data without a user's knowledge or explicit authorization.
  - [Slashdot Discussion](#)
- Utah: [Spyware Control Act](#), introduced by Rep. [Stephen H. Urquhart](#), signed by Governor [Olene Walker](#) on March 23
  - [Spyware Control Act](#) - reformatted, indented
  - [A Close Reading of Utah's Spyware Control Act](#) - FAQ-style analysis of the bill, a prominent letter of opposition, and related media coverage.
  - [Letter of Opposition \(PDF\)](#) from AOL, Amazon, the Association for Competitive Technology, AT&T, the American Electronics Association, the Business Software Alliance, c|net, the Computer & Communication Industry association, eBay, Google, the Information Technology Association of America, the Internet Commerce Coalition, Intraware, MCI, Microsoft, NetCoalition, Novell, Orbitz, the Software & Information Industry Association, Verizon, and Yahoo!
  - [WhenU.com, Inc., v. The State of Utah](#) - Case Documents - Suit filed by a company subject to the Act, seeking that the act be declared void and invalid.
  - Bill status: Signed into law by Governor [Olene Walker](#) on March 23, 2004. Challenged by [WhenU](#) in [WhenU v. The State of Utah](#). Preliminary injunction granted, enjoining enforcement of the bill, June 22, 2004.
- Virginia:
  - [HB 1729: Prohibited Software and Actions](#) introduced by [John Cosgrove](#)
    - Prohibits collection of personally identifiable information through intentionally deceptive means. Prohibits modifying certain Internet settings, misrepresenting that software has been disabled or is necessary, inducing a user to install software by misrepresenting necessity for security, privacy, or file viewing.
  - [HB 1304: Invasive Technologies](#), introduced by [L. Scott Lingamfelter](#)
    - Beginning in 2006, would require public bodies to conduct a privacy impact analysis when authorizing or prohibiting the use of invasive technologies including spyware.
- Other legislation
  - Australia: [Spyware Control Bill](#) - Requires notice and consent prior to installation of certain software. [Computerworld coverage](#).
    - Status: Slated to go before Parliament in September 2004.
  - Netherlands: Plans for an anti-spyware bill reported in the media, e.g. [this article](#) in [Digital Media Europe](#).

The National Conference of State Legislatures maintains [2004 Legislation Relating to Internet Spyware or Adware](#).

## Pending Suits against Designers of Spyware

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### *Claria*

Claria's activities have prompted a number of legal challenges. This section attempts to chronicle key suits to the best of my ability, but this section is unlikely to be comprehensive; a thorough search of Google, LexisNexis, and/or Westlaw will likely yield additional cases and additional

information as to recent updates. Send suggested additions to [Ben Edelman](#).

- o Facing complaints from the [Internet Advertising Bureau](#) as to Gator's activities, then including banner ads that tended to [cover](#) web site operators' own banner ads, Gator in 2001 sued the IAB and subsequently settled. Gator has subsequently sued Virtumundo (since settled), L.L. Bean, and PriceGrabber ([citation](#)).
- o In 2002, Gator was sued by a group of media companies including the New York Times and Washington Post in the US District Court for the Eastern District of Virginia. A preliminary injunction was issued, enjoining Gator's targeting of plaintiffs' web sites. The case settled before trial, and the terms of the settlement are confidential. I served as a technical expert for the plaintiffs. See [my declarations and selected other case documents](#).
- o In 2002, Weight Watchers sued competitor DiscreetDrugs.com, which had reportedly used Gator to cause its advertisements to appear when users requested the Weight Watchers web site. Also in 2002, Weight Watchers sued competitor DietWatch.com, which had also reportedly used Gator to cause its advertisements to cover the Weight Watchers site. A permanent injunction was issued by the US District Court, Southern District of New York, enjoining certain DietWatch activities and granting \$25,000 of damages.
- o Gator was subsequently sued by Extended Stay America ([District of South Carolina](#)), Hertz ([opinion as to Gator's requested stay of proceedings](#)) ([New Jersey District Court](#)), Lending Tree ([Western District of North Carolina](#)), Metrodate (representing a class of targeted web sites), Overstock.com, Quicken Loans, Six Continents Hotels ([Northern District of Georgia](#)), TigerDirect ([Southern District of Florida](#)), UPS ([Northern District of Georgia](#)), and Wells Fargo, among others. A footnote in the [Hertz opinion](#) provides citations to the majority of these cases.
- o In 2003, Gator moved for consolidation of these cases as well as Gator's declaratory judgment actions against L.L. Bean, Virtumundo, Extended Stay America, PriceGrabber.com, and Tiger Direct. Gator asked that these cases be consolidated in the US District Court for the Northern District of California. (See [Schedule of Matters for Judicial Panel on Multidistrict Litigation, PDF page 7](#).) Instead, these cases were consolidated to the Northern District of Georgia, as detailed in the [Multidistrict Litigation Transfer Order \(PDF\)](#).
- o In 2004, the German division of Hertz obtained a preliminary injunction prohibiting Claria from using pop-up ads to cover Hertz's site. See [news coverage](#).
- o In 2004, Teleflora sued Claria. I serve as an expert for Teleflora, and I filed an initial declaration in this matter.
- o In 2004, L.L. Bean sued Nordstrom's, JC Penney, Atkins, and Gevalia, each of which used Claria to display pop-up ads that cover L.L. Bean's site. See [press release](#), [news coverage](#). Claria countersued L.L.Bean. Gevalia and Atkins settled with L.L. Bean. L.L. Bean complaints: Nordstrom's, JC Penney, Atkins, Gevalia.
- o According to Claria's SEC S-1 filing of April 8, 2004, Claria has settled suits brought by Extended Stay America, PriceGrabber.com, LendingTree, and UPS.
- o In June 2004, the Georgia Court hearing Gator's multidistrict litigation ordered that the Metrodate case (a class action of targeted web sites) be remanded to state court.
- o In July 2004, Claria was sued by Interlinx, LLC, as to Claria's targeting of budgetlife.com. The case was filed in the US District Court for the Eastern District of Michigan.
- o In August 2004, the clerk of the court hearing Gator's multidistrict litigation reported that the MDL proceedings were closed because all the MDL cases had been settled (reportedly save for Teleflora).

#### WhenU

WhenU has been sued by 1-800 Contacts, Overstock.com, Quicken Loans, U-Haul, Weight Watchers, and Wells Fargo. See [summary judgment order \(PDF\)](#) in U-Haul case (dismissing claims against WhenU) and [preliminary injunction order \(PDF\)](#) in 1-800 Contacts case (granting preliminary injunction enjoining WhenU from delivering certain pop-up advertisements).

1-800 Contacts has also sued (and obtained a preliminary injunction enjoining) Vision Direct, a

competitor which used WhenU to cause its advertisements to appear when users requested the 1-800 Contacts web site.

In 2004, WhenU sued the state of Utah seeking that Utah's Spyware Control Act be declared void and invalid.

I serve as a technical expert in the Quicken Loans and Wells Fargo matter; I filed two declarations in this matter and provided oral testimony. I serve as a technical expert in the Utah matter; I filed a declaration in this matter and provided oral testimony.

#### *180solutions*

DMNews reports that Weight Watchers sued 180solutions and eDiets as to eDiets covering Weight Watchers' site using 180solutions software.

180solutions sued two distributors of its software for installing its software without users' consent, which 180 claims was contrary to the distributors' contract with 180. [News coverage](#).

#### *Others*

In May 2004, Overstock.com sued SmartBargains, Inc. [Press release](#).

In December 2004, Avenue Media sued DirectRevenue as to "systematic[] delet[ion]" of Avenue's software from users' hard disks. [Discussion and case documents](#).

## **Related Suits**

[Return to top](#)

*New.net v. Lavasoft*: Claim by designer and distributor of controversial NewDotNet addressing software against designer of software that, upon a user's request, removes NewDotNet and other programs deemed adware. Alleges false advertising, unfair competition, trade libel, and tortious interference with prospective economic advantage. [Complaint](#).

## **Disclosures**

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I serve or served as an expert in some of cases referenced above, and I continue to accept inquiries as to other matters in which I might be of assistance.

This research is a work in progress. Suggestions are welcomed and appreciated.

---

Last Updated: January 19, 2005 - [Sign up for notification of major updates and related work](#).

**Dave Stancliff**

**From:** Pam Greenberg [pam.greenberg@ncsl.org]  
**Sent:** Wednesday, February 02, 2005 11:09 AM  
**To:** Dave Stancliff  
**Subject:** Spyware Legislation

Dave,

I am writing in response to your question earlier today about spyware legislation. As you may know, NCSL does not promulgate model legislation or endorse specific state legislation. However, we do have a list of spyware legislation and links to the bills at <http://www.ncsl.org/programs/lis/spyware05.htm>.

You may want to look in particular at the California law at [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_1401-1450/sb\\_1436\\_bill\\_20040928\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1401-1450/sb_1436_bill_20040928_chaptered.html). The enacted version of this legislation overcame IT industry opposition, but was criticized by some as "toothless" -- see, e.g., <http://www.privacyrights.org/ar/SB1436Letter.htm>.

The Utah law also covered the capture of personal information, but also takes aim at pop-up advertising that might obscure or interfere with another company's ads or trademarks. It was criticized by industry as too broad, and a court issued an injunction against its enforcement, so I would not recommend the 2004 Utah bill as a model. However, if you share concerns about popup advertising and trademark protection issues, you may want to review a new Utah bill that makes amendments to the Utah Spyware law -- see <http://www.leg.state.ut.us/~2005/bills/hbillint/hb0104.htm>.

→ You had also asked about federal legislation. Ben Edelman, a law student who has been tracking spyware issues, has a list of and links to federal legislation on his web site at <http://www.benedelman.org/spyware/#legislation>. There is speculation that Congress may pass spyware legislation this year, preempting state spyware laws, and the most-talked about bill is the SPY ACT, H.R. 29 (<http://thomas.loc.gov>).

Another controversial question that often arises is the issue of penalties and enforcement. The enacted version of the California law is silent on penalties. Other states' bills would declare violations of the spyware laws a misdemeanor (VA H.B. 2739 and NE LB 316) or a felony for when damages of \$1,000 or greater occur (VA H.B. 2215). NY provides that violations are a misdemeanor, but those with previous spyware convictions can be charged with a felony. Arizona HB 2414 and Washington HB 1012 give the Attorney General authority to bring actions on behalf of consumers. Washington's bill would also allow individuals to sue for damages, as would the New Hampshire legislation.

In addition, some groups recommend that states consider whether existing state and federal laws (e.g., computer trespass or unauthorized computer access laws) might cover spyware offenses. The National Association of State CIOs (NASCIO) notes that Kentucky's computer trespass law, KRS 434.840-860 (<http://lrc.ky.gov/KRS/434-00/CHAPTER.HTM>) might be used against spyware. The Center for Democracy & Technology also has examined the spyware issue, see <http://cdt.org/privacy/spyware/> and recommends baseline online privacy legislation as preferred over legislation aimed at specific types of technology.

I hope this information is helpful. Please let me know if you have questions or if you need additional information.

Pam Greenberg  
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2/2/2005



## Judge: See ya later, Gator

By Stefanie Olsen

[http://news.com.com/Judge+See+ya+later%2C+Gator/2100-1023\\_3-943515.html](http://news.com.com/Judge+See+ya+later%2C+Gator/2100-1023_3-943515.html)

Story last modified Fri Jul 12 13:35:00 PDT 2002

### **A federal judge on Friday ordered software company Gator to temporarily stop displaying pop-up advertising over Web publishers' pages without their permission.**

The order was issued in a lawsuit filed against Gator in June by *The Washington Post*, *The New York Times*, Dow Jones and seven other publishers, which allege the company's ads violate their copyrights and steal revenue.

On Friday, Judge Claude Hilton granted the motion, according to the clerk's office at the federal court in Alexandria, Va., where the suit was filed.

The companies had sought a temporary injunction against Gator preventing it from delivering ads keyed to their sites pending the resolution of the suit, in which they are seeking a permanent injunction against the company and monetary damages for any advertising dollars made from their Web pages.

Terence Ross, attorney for the plaintiffs, said the judge quickly granted the motion, prohibiting Gator "from tampering with the 16 Web sites involved in the litigation during the pendency of the case.

"This really is a clear-cut case in my opinion: Gator is infringing our copyrights and trademarks. The judge came to that conclusion, and a jury will make the same decision in a trial."

By delivering unauthorized pop-up ads, Gator is altering the intended display of the publishers' works, a right that has been recognized by the Supreme Court, Ross has argued.

In early August the judge will set a court schedule, and the case will go to trial before the end of the year, Ross said.

In a statement issued Friday, Redwood City, Calif.-based Gator said that it would honor the judge's request but asked for an expedited trial.

"We are highly confident that once all the facts are presented in the upcoming trial, no court will issue a ruling eliminating a consumer's right to decide for themselves what is displayed on their own computer screens," Gator CEO Jeff McFadden said in the statement.

"Such a ruling would attack a consumer's right to use hundreds of popular software applications that automatically display separate windows while the consumer is surfing the

Internet."

Gator develops software that manages passwords and fills out forms for about 10 million Web surfers who often download the application unwittingly through other popular file-sharing programs. Also bundled in Gator's software is a program called OfferCompanion, which monitors Web surfing behavior and delivers targeted pop-up ads to viewers. For example, a Web surfer may see an advertisement for Ford Motor--delivered by Gator--while visiting Toyota.com.

Gator has been selling such advertising for more than a year and has accumulated several top-tier advertisers, including Target.com. According to Ross, the plaintiffs were stirred to action after the company published marketing material in April essentially promising ad buyers placement on the Web sites of specific publications, including *The New York Times*.

According to the suit, Gator is "essentially a parasite on the Web that free rides on the hard work and the investments of plaintiffs and other Web site owners. In short, Gator sells advertising space on the plaintiffs' Web sites without (their) authorization and pockets the profits from such sales."

The decision does not bar Gator from delivering pop-up ads over other sites. But it could establish a precedent that prohibits third-party software operators from delivering ads that alter another Web page. It also highlights mounting tension over tactics used by Gator and others.

Earlier this year, WeightWatchers.com sued rival DietWatch.com for using Gator to deliver ads to visitors of its site. On June 11, a court granted WeightWatchers a permanent injunction barring DietWatch from serving ads on its site.

Last year, the Interactive Advertising Bureau (IAB) criticized Gator for selling banner ads that obscure those sold by online publishers. Gator sued the IAB, alleging "malicious disparagement" over its statements, but the two parties found common ground when Gator agreed to stop selling banner overlays.

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**SB**

**142**

**SENATE COMMITTEE REPORT**  
**First Committee of Referral**

DATE: 3/16/05

FURTHER: Finance

Date of 5-Day Notice: \_\_\_\_\_  
in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 4/6/05

Labor and Commerce Committee considered SENATE BILL NO. 142

**SB 142 REGIONAL SCHOOL BD LAND/BLDG OWNERSHIP**

"An Act relating to ownership of land, buildings, and other structures by regional school boards; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 142 (L&C)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>Senate Bill:</b>	
<input type="checkbox"/>	Same Title
<input checked="" type="checkbox"/>	New Title
<b>House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
EED	3/18/05			✓	
DOT	4/4/05			✓	

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Bettye Davis</i>	✓			
<i>John E. Ellis</i>			✓	
<i>Joseph A. Lehman</i>	✓			
<i>Don Stans</i>	✓			
CHAIR: <i>Bob Brando</i>	✓			

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

STATEWIDE AVIATION

FRANK MURKOWSKI, GOVERNOR

4111 AVIATION AVENUE  
P.O. BOX 196900  
ANCHORAGE, ALASKA 99519-6900  
(907) 269-0730 Fax (907) 269-0489

May 2, 2005

The Honorable Mark Neuman  
Alaska House of Representatives  
State Capitol, Room 400  
Juneau, AK 99801

Dear Representative Neuman:

Thank you for your questions on SB 142 - ownership of land by regional school boards.

The intent of the Department of Transportation and Public Facilities (DoT/PF) in requesting this legislation is to eliminate a conflict between AS 14.08.151 and our assurances made to the FAA in order to receive Airport Improvement Program (AIP) funding.

AS 14.08.151 has been cited by regional educational attendance area (REAA) schools and school boards as justification for requesting airport land title. Because this request conflicts with our assurance to the FAA to retain "satisfactory property interest," DoT/PF has had to obtain Attorney General's opinions in order to show that there was no legislative intent to compel the State to breach FAA grant agreements.

DoT/PF has leases or letters of non-objection with school entities at the following airports:

Aniak  
Anvik  
Cold Bay  
Bettles  
Galena  
Kaltag

Lime Village  
Noatak  
Pilot Station  
Unalakleet  
Willow

These facilities, ranging from fuel line rights of way to hangars to schools, can be divided into two categories - those which pose some risk to aviation operations, and those posing no risk.

School buildings at Aniak, Bettles and Noatak have been identified as encroaching on aviation operation areas outlined in FAA advisory circulars. DoT/PF has made verbal and written commitments to the FAA to work with REAAs, school boards and the Department of Education to mitigate and/or remove these encroachments when reasonably possible.

All other school facilities are located on land outside of those areas required specifically for aviation operations per FAA advisory circulars, or have been approved by FAA to remain in place in aviation operations areas. At all of the communities listed above, DoT/PF has a contractual relationship with the school entity and has regulatory limitations in causing the facility to be removed from airport property. Additionally, the DoT/PF has no policy, and expects no change that policy, requiring the removal of school facilities from airport land.

While DoT/PF does have a policy restricting new schools or additions to be built in areas encroaching on aviation operating areas, it does allow school entities to lease airport land outside of aviation operation areas if necessary.

We expect the primary benefit of SB 142 will be an end to the bureaucratic entanglements that stem from conflicting statutes. Thank you for your time on this issue.

Sincerely,



Kip Knudson  
Deputy Commissioner for Aviation

## REAA Schools on Airport Land

School	District	Notes
Northway	AK Gateway	
Aniak Middle/High	Kuspuk	
Kaltag	YKSD	Portion of school site/fuel system is on airport land
Bettles	YKSD	School closed
Chalkyitsik	Yukon Flats	Sewage lagoon only is on airport land
Anvik	Iditarod	Fuel line right of way only
Lime Village	Iditarod	Fuel storage only

Called LKSD and LYSD, both districts indicated no schools

Pam Lewis with Aviation Leasing at 451-5266 is DOT contact

## **Fact Sheet: SB 142**

Sponsor: Senate Labor & Commerce Committee

Contact: Jane Alberts, 465-4843

### **Summary:**

- Excludes airport properties from AS 14.08.151(b), which directs the state to convey title to lands used in relation to regional educational attendance area schools when requested to do so by the regional school board.

### **Benefits:**

- Resolves a conflict between AS 02.15.020, which requires the Department of Transportation & Public Facilities to retain "satisfactory property interest" in airport facilities in order to participate in federal grant programs, and AS 14.08.151, which gives regional school boards the opportunity to obtain title to land for regional educational attendance area (REAA) schools.
- Saves the departments of Transportation and Education time, effort and money needed to settle conflicting claims.
- Ensures that DOT&PF will be able to meet Federal Aviation Administration requirements and obtain federal funding for airport projects in REAAs.
- Conforms statute to legislative intent.

### **Background:**

- AS 02.15.020 requires DOT&PF to conform to federal requirements in order for the State to participate in federal grants. The Federal Aviation Administration requires DOT&PF to certify assurances that it has "satisfactory property interest" in the airport to obtain these necessary federal grants. A newer statute, AS 14.08.151(b) gives a regional school board the opportunity to receive title to land used in relation to REAAs. Several regional schools are located on state airport properties, some in close proximity to active runways and airport infrastructure. At various times, regional school boards have requested that DOT&PF convey full title of the airport land to the schools. A mandatory title transfer of this type would violate AS 02.15.020 and breach federal grant agreements. While the Alaska Legislature clearly intended to allow regional school boards the option of greater control over facilities through acquisition of title, no record exists that the Legislature intended to do so at the cost of federal liability, significant loss of federal funding and a degraded state airport system.



Alaska State Legislature

Senator Con Bunde  
Senate District P

Vice Chair: Senate Finance Committee  
Chair: Senate Labor & Commerce Committee

## **SB 142 SPONSOR STATEMENT**

### **Lands Used by Regional School Boards (updated 4/25/05)**

*"An Act relating to ownership of land by regional school boards; and providing for an effective date."*

Currently there exist conflicting statutes regarding ownership of land for state airports. AS 02.15.020 requires that the Department of Transportation and Public Facilities (DOT&PF) conforms to federal requirements if the state wishes to participate in federal grants. A newer statute, AS 14.08.151(b) gives a regional school board the opportunity to receive title to land used in relation to regional educational attendance area schools.

While the Alaska Legislature clearly intended to allow regional school boards the option of greater control of their facilities through acquisition of title, there is no record that the Legislature intended to do so at the cost of federal liability, significant loss of federal funding, and a degraded state airport system.

Several regional schools are located on state airport properties, some in very close proximity to active runways and airport infrastructure. At various times, regional school boards have requested that DOT&PF convey full title of the airport land to the schools. This has caused confusion, staff time in both the Departments of Education and DOT&PF, as well as attorney costs, to defend DOT&PF's title to its airport property.

DOT&PF, acting as a sponsor under federal law, makes extensive use of federal grant funding for airport construction and improvements. The Federal Aviation Administration imposes enforceable grant conditions on the recipients of federal funds. As a condition of acceptance, DOT&PF is required to expend federal grant funds in strict accordance with those federal conditions. FAA requires DOT&PF to certify assurances that it has "satisfactory property interest" in the airport to obtain these necessary federal grants. Under AS 14.08.151(b), a mandatory title transfer of airport property that is subject to FAA grant assurances would violate AS 02.15.020(c) and would breach federal grant agreements. This is because DOT&PF would be required to transfer title to property that the department has assured to the FAA that it would retain in state ownership *for airport purposes*, including the fiscal support of the airport.

There being no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 02.15.020(c), the best interpretation of AS 14.08.151 limits its applicability to non-airport lands.

This bill will benefit the public, the regional school boards, the Department of Education and DOT&PF by clarifying the intent of the conveyance language to exclude airport properties.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB142-DOT-CO-4-4-05  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DOT&PF  
 Title Regional School Board Land/ RDU Administration & Support  
Building Ownership Component Commissioner's Office  
 Sponsor Senate Labor and Commerce  
 Requester Senate Labor and Commerce Component No. 530

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

Prepared by: Nona Wilson Phone 465-3904  
 Division: Legislative Liaison, DOT&PF Date/Time 4/4/05 6:17 PM  
 Approved by: Mike Barton Date 4/4/2005  
 Agency: Commissioner, DOT&PF

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB142-EED-ESS-03-18-05  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Education & Early Development  
 Title: An act relating to ownership of land, buildings, RDU: ESS  
and other structures by regional school boards, and providing Component: School Finance & Facilities  
 Sponsor: Labor and Commerce  
 Requester: Labor and Commerce Component No: 2736

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 00

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

There is no financial impact related to this legislation with the Department of Education & Early Development. Rather this legislation clarifies other structures in transfer of title. And remove the ability to transfer land, buildings, and other structures, located within the boundaries of state airport.

Prepared by: Eddy Jeans, Director Phone: 465-8679  
 Division: School Finance Date/Time: 3/18/05 12:44 PM  
 Approved by: \_\_\_\_\_ Date: 03/18/2005  
 Agency: Education & Early Development

# STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF TRANSPORTATION  
AND PUBLIC FACILITIES  
OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE  
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652  
FAX: (907) 586-8365  
PHONE: (907) 465-3900

March 24, 2005

The Honorable Con Bunde  
Chair, Senate Labor & Commerce  
Alaska State Legislature  
State Capitol, Room 506  
Juneau, Alaska 99801-1182

Dear Senator Bunde:

Senate Bill 142, as proposed, will clarify the intent of existing statute regarding land title conveyance in order to prevent airport properties from being transferred to regional school boards. By rectifying this disparity, SB 142 would exclude airport properties and in-boundary airport perimeters from being transferred to regional school districts applying for title conveyance.

AS 14.08.151(b) reads as follows: *A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.*

An example of the confusion caused by current statute can be cited as when the Yukon-Koyukuk Regional School Board made an administrative claim for school property on the Bettles Airport in 2001. The school in Bettles, constructed in the 1970's, is very close to the active runway, and is, in fact, partially in front of the building restriction line (BRL). A BRL limits construction of improvements near a runway for safety purposes. The school is actually located in an area identified by DOT&PF and the FAA as being needed for future aviation purposes.

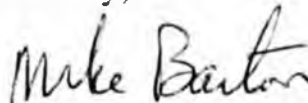
DOT&PF obtained an Attorney General's Opinion, copy enclosed, when it received the claim for title from the Y-K Regional School Board. Said opinion, dated 12/11/01, concluded that there was no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 02.15.020(c). The opinion further stated: "...AS 14.08.151(b) should not be interpreted to require conveyance to an RSB of the State's interest in a State airport." Our estimate of staff time devoted to this task, as well as to the AG's involvement, is approximately 250 hours. The costs for staff time and the AG's opinion is approximately \$17,500.

The difficulty encountered in 2001 is not exclusive. In 1986 the Aleutian Region School District requested conveyance of the existing school site at the Cold Bay Airport. Eight years later, in 1994, the Lake and Peninsula School District requested conveyance of the school site at Iliamna Airport. In both cases, DOT&PF required the assistance of the Attorney General's Office to deny the RSBs' requests for title.

DOT&PF has been working with the legislature to resolve the conflict between these statutes since 1987. Passage of this legislation would solidify the ability of the department to protect the integrity and safety of the State's 258 rural airport properties as well as maintain, operate, expand and manage airports according to FAA guidelines and federal grant requirements.

I urge your prompt and favorable action on this measure.

Sincerely,



Mike Barton  
Commissioner

Enclosure

# MEMORANDUM

State of Alaska

Department of Law

TO: Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and  
Public Facilities

DATE: December 11, 2001

FILE NO: 665-99-0090

SUBJECT: Rural Schools and Airport  
Land Title

FROM: Leone Hatch **LH.**  
Assistant Attorney General  
Transportation - Fairbanks

You have asked whether a regional school board<sup>1</sup> (hereinafter "RSB") which operates on airport property may require the Department of Transportation and Public Facilities (hereinafter "the Department") to transfer title to the land and buildings which it occupies to the RSB pursuant to AS 14.08.151(b) (Lexis 2000). While there is some uncertainty, the better answer to your question is no. Title may not be transferred on demand. We have reached this conclusion because the Alaska Legislature could not have intended to create a conflict with federal funding requirements, risk federal enforcement, and place federal participation in the State's airport system at risk.<sup>2</sup>

A mandatory title transfer of airport property (which is subject to FAA grant assurances) to an RSB pursuant to AS 14.08.151(b) would violate AS 2.15.020(c)

<sup>1</sup> The Alaska Supreme Court has noted that RSB's "are independent entities which have been given broad powers." *Northwest Arctic Reg'l Educ. Attendance Area v. Alaska Public Service Employees Local 71*, 591 P.2d 1292, 1298 (Alaska 1979), *overruled on other grounds, Alaska Commercial Fishing & Agric. Bank v. O/S Alaska Coast*, 715 P.2d 707, 709 n.5 (Alaska 1986); *see also, U.S. ex rel. Norton Sound Health v. Bering Strait School Dist.*, 138 F.3d 1281 (9<sup>th</sup> Cir. 1998). A title transfer to an RSB is not a mere administrative change of title between sister state agencies.

<sup>2</sup> It is also possible that AS 14.08.151(b) could be held to be federally preempted insofar as it applies to airports subject to federal grants. In general, when the federal government legislates in an area in which it is constitutionally entitled, directly conflicting local legislation is preempted through the operation of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. *E.g., Gude v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). However, there are issues with this approach that make the outcome in this situation uncertain.

Legal Opinion

Joseph L. Perlman, P.E., Commissioner  
Department of Transportation and Public Facilities  
Subject: Rural Schools and Airport Land Title

December 11, 2001  
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(Lexis 2000) and would breach federal grant agreements. This is so because the Department would be required to transfer title to property which the Department, acting as sponsor for federal funding, has assured to the FAA that it would retain in State ownership for airport purposes, including the fiscal support of the airport. Automatic transfer of airport land to an RSB could subject the State to federal liability and enforcement as well as endanger future federal funding. If the Department cannot in good faith make title assurances to the FAA, there may be no future grant funding for airports vulnerable to RSB defeasance.

### Background

Various RSB's operate facilities situated on airport property. In 1978, the Legislature granted RSB's the option of acquiring title to state property being used by a school.<sup>3</sup> The Department has informed me that many, if not most, of these school facilities were constructed on airport property prior to the 1978 legislation. These schools are occupied under lease, use permit, or are in holdover status. AS 02.15.090 (Lexis 2000); AS 14.08.151(a) (Lexis 2000). The Yukon-Koyukuk RSB has made an administrative claim for Bettles airport property. That claim is under consideration pending the issuance of this opinion.

### Statutory Authority

Two state statutes essentially frame the potential conflict: AS 02.15.020(c) and AS 14.08.151(b). The older statute, AS 02.15.020,<sup>4</sup> essentially authorizes (and compels) the State to conform to federal requirements if the State wishes to participate in federal grants:

(c) The department may accept federal money and money from other public and private sources to accomplish in whole or in part any of the purposes of this chapter. All federal money accepted under this chapter shall be

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<sup>3</sup> § 2 ch 124 SLA 1975; am §§2, 3 ch 147 SLA 1978; am § 46 ch 6 SLA 1984 (codified at AS 14.08.151 (Lexis 2000)). The relevant language was adopted into subsection (b) in 1978.

<sup>4</sup> § 4A - C ch 123 SLA 1949; am § 1 ch 14 SLA 1968 (codified at AS 02.15.020 (Lexis 2000)). The relevant language was adopted into subsection (c) in 1949, with slight revisions in 1968 recognizing that the Territorial Commission had become a department of the State.

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
Subject: Rural Schools and Airport Land Title

December 11, 2001

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accepted and expended by the department upon the terms and conditions prescribed by the United States.<sup>5</sup>

The more recently enacted is AS 14.08.151.<sup>6</sup> In Subsection (b) of this statute, the legislature authorized RSB's a means by which to obtain title to some state property. Subsection (b) provides as follows:

(b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.

#### Statutory Construction

"Interpretation of a statute begins with an examination of its language construed in light of its purpose." Even if a statute appears clear on its face, it is interpreted in the context of the legislature's purpose. The Alaska Supreme Court recently repeated its holding that, "[i]n ascertaining the legislature's intent, we are obliged to avoid construing a statute in a way that leads to a glaringly absurd result."

Alaska statutes in apparent conflict must be read together in the context of legislative intent. If possible, the statutes should be harmonized. If the statutes cannot be reasonably harmonized in light of statutory intent, the earlier statute may be held to have been repealed by implication.<sup>7</sup> However in this case, if the earlier statute is impliedly repealed, there will be direct and adverse consequences to the State's ability to maintain federally funded rural airports.

While the Alaska Legislature clearly intended to generally allow RSB's the option of greater autonomy and control of their facilities through the acquisition of title,

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<sup>5</sup> See, footnote 4.

<sup>6</sup> See, footnote 3.

<sup>7</sup> *Beck v. State of Alaska*, 837 P.2d 105, 116-17 (Alaska 1992).

<sup>8</sup> *Sherbahn v. Kerkove*, 987 P.2d 195, 201 (Alaska 1999) (quoting *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 n.21 (Alaska 1994) (quoting *Sherman v. Holiday Constr. Co.* 435 P.2d 16, 19 (Alaska 1967))).

<sup>9</sup> *E.g., Progressive Insurance Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998).

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
Subject: Rural Schools and Airport Land Title

December 11, 2001  
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there is no indication or record that the legislature intended to do so at the cost of federal liability, significant loss of federal funding, and a degraded airport system.

In this case, the earlier statute, AS 02.15.020(c), enables the Department of Transportation to apply for, accept, and utilize FAA grants for state airport facilities. AS 14.08.151(b) cannot be read to apply to airport land without implying that the Legislature intended to at least partially repeal AS 2.15.020(c)'s mandate that the state accept federal funds and be bound by the conditions thereon. It is unlikely that the Legislature intended to repeal this statute and subject the State to federal enforcement. Nor is it likely that the Legislature intended to endanger either current or future grant funding. The partial repeal necessary of AS 02.15.020(c) in favor of AS 14.08.151(b) to allow RSB's the right to claim title to airport property (discussed below) is an illogical and absurd result, unlikely to have been intended by the Legislature. To avoid the illogical and unintended result, AS 14.08.151(b) should not be read to apply to airport land.<sup>10</sup>

The Alaska Supreme Court, in its only interpretation of AS 14.08.151(b), has suggested a method of construing this statute which will allow it to be harmonized with AS 02.15.020(c) and the state's need to control public airports, maintain federal funding eligibility and honor its federal commitments. *State v. Bering Strait Regional Attendance Area*, 658 P.2d 784 (Alaska 1983). In *Bering* the court held that AS 14.08.151(b) is inapplicable to property which the RSB shared with another user. This opinion rests on the court's reluctance to create a shared title interest without specific legislative directive.

In *Bering*, the Nome City School District occupied a State-owned building which it primarily used for the Nome High School. It sublet an unused portion of the facility to the Bering Strait Regional Educational Attendance Area School District (hereinafter "Bering"). Both entities requested title under AS 14.08.151(b). The State chose to transfer title to the Nome City School District. Bering appealed and the matter eventually rose to the Alaska Supreme Court. The court was troubled by the shared use of the same property and was reluctant to either read AS 14.08.151(b) to require a partial conveyance, or to impose a novel and complex condominium-type relationship upon Nome City School District and Bering in the absence of specific statutory authority. The court held:

In effect, this will result in the creation of a condominium public facility.

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<sup>10</sup> The bulk of the controversy with its attendant potential for litigation could be resolved if the Alaska Legislature would revisit the issue and clarify its intentions.

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
Subject: Rural Schools and Airport Land Title

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There are two problems with this interpretation.

First, it is a departure from the literal language of the statute. The statute refers to buildings, not portions of buildings . . . .

Second, a condominium public facility would be an innovation in this state. Creation of a condominium is legally complex, requiring detailed legal documents specifying, among other things, the responsibilities of the various owners. We believe that if condominium ownership had been intended by the legislature in enacting AS 14.08.151(b) the statute would have expressly so provided and would have furnished some guidance as to the division of responsibilities among the owners.

We thus hold that that the superior court erred in interpreting AS 14.08.151(b) to require a partial conveyance of the complex to Bering Strait.

*Bering*, 658 P.2d at 786 (footnotes omitted)."

Specifically, the *Bering* court refused to create a condominium interest when two parties shared a building. If applied to airport land, AS 14.08.151(b) would bifurcate airport land title by effectively subdividing the airport and subjecting it to potentially conflicting uses and hostile management objectives. This result is not consistent with the holding in *Bering*. It is likely that the Alaska Supreme Court would extend *Bering* to include airport land if given the opportunity.

Airport land must by its nature be committed primarily to aviation purposes and uses. The Department, as sponsor, must maintain an indefeasible fee in land to which the FAA requires a fee interest. *Infra* at 7.

While secondary non-aviation uses can be supported in some circumstances, they are necessarily subordinate to the primary purpose of aviation. In the case of an RSB usage on airport land, there is a double occupancy even more complex than that which the *Bering* court refused to split. In the framework of *Bering*, AS

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" The Alaska Legislature has not moved to alter the statute in response to the Alaska Supreme Court's 1983 interpretation. *Talancon v. State*, 721 P.2d 764, 768 (Nev. 1986) (failure of legislature to amend statute after judicial interpretation of legislative intent inferred ratification of judicial action) cited in *Todd v. State*, 884 P.2d 668, 680 (Alaska App. 1994).

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
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14.08.151(b) should not be interpreted to allow the bifurcation of title to an active airport, thus creating a condominium-like interest.

Pragmatically, AS 14.08.151(b) can be harmonized with AS 02.15.020(c) in the context of *Bering*. *Bering* suggests that before an RSB may obtain title pursuant to AS 14.08.151(b), the RSB usage must be exclusive to avoid a bifurcated title. Because the airport land is subject first to the requirements of transportation and safe aviation usage, the RSB's occupation of airport land is not exclusive, and thus under *Bering*, not subject to fee title transfer pursuant to AS 14.08.151(b).

### Federal Grant Requirements

The FAA<sup>12</sup> maintains an interest in aviation safety, efficient and non-discriminatory airport management in support of the nation's transportation system, and the fiscal responsibility and self-sufficiency of grant-supported airports. It furthers these interests through both direct regulation and grant conditions.<sup>13</sup> The FAA is specifically authorized by federal statute to attach conditions to FAA grants.<sup>14</sup>

The State of Alaska, acting as a sponsor under federal law, makes extensive use of federal grant funding for airport construction and improvement. Pursuant to the Spending Clause of the federal constitution<sup>15</sup> (hereinafter "Spending Clause"), the federal government can and does impose enforceable grant conditions on the recipients of federal

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<sup>12</sup> "The FAA is responsible for the administration and management of the Federal Airport grant-in-aid program under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. §§ 1701 et seq. (superseded by the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2201 et seq.)." *U.S. v. County of Westchester*, 571 F. Supp. 786, 789 (S.D.N.Y. 1983) (citations omitted). The 1970 Act was further amended in 1994 and 1996.

<sup>13</sup> A recent Tenth Circuit Court of Appeals decision noted, "indeed, it is 'difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which congress has provided in the field of aviation.'" *Arapahoe County Public Airport Auth. v. F.A.A.*, 242 F.3d 1213, 1220 (10<sup>th</sup> Cir. 2001) (quoting *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172-73 (1<sup>st</sup> Cir. 1987)).

<sup>14</sup> 49 U.S.C. § 47108(a) (West 1997).

<sup>15</sup> U.S. Const. art. I, sec. 8, cl. 1.

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funds.<sup>14</sup> The adoption of what is now AS 2.15.020 in 1949 allowed the Territory and later the State to bind itself to federal funding requirements, and therefore enjoy the benefit of federal grants.

As a condition of acceptance, the State is required both by this statute and federal case law to expend federal grant funds only in strict accordance with federal terms and conditions. The FAA has a number of title requirements for airports receiving grants.

### Conflicts with Specific Federal Title Requirements

The primary transportation function of the airport is degraded if airport property is not subject to direct airport management and control. The FAA requires the Department to issue and certify<sup>17</sup> assurances that as the sponsoring agency it has a "satisfactory property interest" in the airport to obtain these necessary federal grants.<sup>18</sup> Grant assurances are incorporated into the grant contract. The Seventh Circuit Court of Appeals has noted that discretion to determine what constitutes a "satisfactory property

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<sup>14</sup> E.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *U.S. v. Miami University*, 91 F. Supp. 2d 1132, 1142 (S.D. Ohio 2000). The *Miami* court observed:

Federal grants authorized by Congress create binding contracts between the United States and the recipient, and the United States has the authority to fix the terms and conditions upon which federal funds will be disbursed. Accordingly, acceptance of a federal grant to which conditions are attached "creates an obligation to perform the conditions on the part of the recipient."

*Miami University*, 91 F. Supp.2d at 1142 (quoting in part *U.S. v. Frazer*, 297 F. Supp. 319, 322 (M.D. Ala 1968)) (footnotes and citations omitted).

<sup>17</sup> A person who knowingly and with intent to defraud makes a false statement on a certification required to obtain a federal airport development grant is subject to criminal penalties including fines and imprisonment of up to five years. 49 U.S.C. § 47126(3) (West 1997).

<sup>18</sup> 49 U.S.C. § 47107(c) (West 1997); 14 C.F.R. § 152.103(a)(4)(ii) (2001); 14 C.F.R. § 152.3 (2001) ("Satisfactory property interest" and "Sponsor" defined); 14 C.F.R. § 151.26(d) (2001) ("land" defined in the context of the sponsor's application, which must identify property as either currently or anticipated to be subject to a satisfactory property interest).

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
Subject: Rural Schools and Airport Land Title

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interest" rests with the FAA." Federal regulations specifically provide that land identified in the sponsor's application which is (or is to be) held in fee must be:

free and clear of any . . . other encumbrance that, in the opinion of the [FAA] would create an undue risk that it might deprive the sponsor of possession or control interfere with its use for public airport purposes, or make it impossible for the sponsor to carry out the agreements and covenants in the application . . . .<sup>20</sup>

A title interest that is essentially a statutorily defeasible<sup>21</sup> fee created by AS 14.08.151(b) can certainly "deprive the sponsor of possession." The significance of the

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<sup>19</sup> *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424, 1426 n.2 & n.3 (7th Cir. 1996). The *Hinson* court considered claims that FAA grant assurances were violated when a sponsor, the City of Chicago, lost its lease on land underlying an airport when the lessor, a park district, declined to renew the lease after its expiration. The State of Illinois, as an intervenor, argued that the federal grant requirements required the City to obtain the airport (through condemnation or otherwise) to protect the grant-funded improvements and to continue to operate the airport. The court held that the grant provisions for this particular airport included a specific requirement for reimbursement in the event the lease was lost. The FAA had contemplated the possibility of lost title in this individual case and provided a contractual option other than specific performance. Therefore, the court reasoned, the FAA had acted reasonably and within its discretion in choosing not to seek to force the city to acquire and maintain the airport. While the court recognized the FAA's power to enforce title assurances, it refused to second guess the FAA's enforcement discretion. The *Hinson* court specifically noted that had the FAA wanted to force the sponsor defendant to maintain its title interest, it could well have done so by originally imposing the grant provisions it had employed at nearby Midway Field. *Id.*

<sup>20</sup> 14 C.F.R. § 151.25(c)(1) (2001).

<sup>21</sup> "Defeasible" is defined as:

Subject to be defeated annulled, revoked, or undone upon the happening of a future event or the performance of a condition subsequent, or by a conditional limitation. An estate which is not absolute, i.e., one which is determinable or subject to an executory limitation or condition subsequent. Usually spoken of estates and interests in land. For instance, a mortgagee's estate is defeasible (liable to be defeated) by the mortgagor's equity of redemption.

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defeasance will vary with the location of the RSB's facilities on the airport and the FAA's corresponding willingness, or unwillingness, to declare the property to be excess.<sup>22</sup> However, the FAA's requirement for stable, predictable title is manifestly incompatible with a statutorily created defeasible fee which is not under the sponsor's control.

Excess property initially purchased or developed with an FAA grant may be sold (after approval) at fair market value and the FAA reimbursed proportionately.<sup>23</sup> The FAA may demand reimbursement of its proportion of full fair market value if title is transferred below market, as would be the case with a transfer to an RSB which occupies land which the FAA agrees is excess.<sup>24</sup> Likewise, any alterations to a grant-aided airport's layout plan must be approved by the FAA.<sup>25</sup> An unapproved alteration may cause the FAA to require the Department, at state expense, to restore the airport to its prior utility, even if this requires moving the airport facilities.<sup>26</sup> An "airport layout plan" includes the identification of the airport's boundaries, location of aviation and non-aviation uses, and delineation of the sponsor's title.<sup>27</sup>

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Black's Law Dictionary *available in Westlaw* (2001).

<sup>22</sup> In Bettles, for instance, the facility in question is over the "building restriction line." Defeasance in that case will be a serious matter, potentially implicating airport safety issues as well as more general management and fiscal control.

<sup>23</sup> 49 U.S.C. § 47107(c) (West 1997).

<sup>24</sup> *Id.*

<sup>25</sup> 49 U.S.C. § 47107(a)(16) (West 1997).

<sup>26</sup> *Id.*

<sup>27</sup> 14 C.F.R. § 151.5(a) (2001) reads:

(a) Airport layout plan. As used in this part, "airport layout plan" means the basic plan for the layout of an eligible airport that shows, as a minimum--

(1) The present boundaries of the airport and of the offsite areas that the sponsor owns or controls for airport purposes, and of their proposed additions;

(2) The location and nature of existing and proposed airport facilities (such as runways, taxiways, aprons, terminal buildings, hangars, and roads) and of their proposed modifications and extensions; and

(3) The location of existing and proposed non-aviation areas, and of their existing improvements.

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation and Public Facilities  
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December 11, 2001  
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A loss of title to airport property which is subject to grant assurances without compensation and without FAA concurrence, may breach title assurances. Such a breach could cause the FAA, at its discretion, to demand reimbursement, to demand that the alteration or loss be ameliorated at the sponsor's expense, to refuse further funding, and to take direct legal action against a state in federal court.<sup>24</sup>

### CONCLUSION

There being no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 2.15.020(c), the best interpretation of AS 14.08.151 limits its application to non-airport lands. The Legislature could not have reasonably intended to repeal AS 2.15.020(c) by implication and thus endanger federal funding of airports, potentially subject the State to significant federal enforcement, and actually discourage the Department from allowing RSBs access to appropriate property when it is otherwise in the best interest of the State and the airport to do so. Therefore it is our opinion that AS 14.08.151(b) should not be interpreted to require conveyance to an RSB of the State's interest in a State airport.

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<sup>24</sup> 49 U.S.C. § 47111(f) (West 1997). The Inspector General of the FAA has investigated other FAA Regions and criticized them harshly for failure to insure strict compliance with grant conditions. The FAA has successfully sued sponsors for specific performance and withheld grant funding when confronted with breached grant conditions. For instance, when a New York airport attempted (by statute) to close at night in violation of a grant requirement, the FAA obtained an injunction to force the airport to remain open in the evening. *U.S. v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983). The FAA also lawfully refused to re-certify the same airport for commercial aircraft until the breach was corrected. *New York v. FAA*, 712 F.2d 806, 809 (2nd Cir. 1983). When the San Francisco Airport violated its grant assurances with respect to non-discrimination, the FAA lawfully rejected its grant applications during the years of non-compliance. *City and County of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991), *cert. Denied*, 503 U.S. 983 (1992). A Colorado airport recently had a similar experience. *Arapahoe*, 242 F.3d at 1220.

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES



STATEWIDE OFFICE  
AVIATION LEASING AND  
AIRPORT LAND DEVELOPMENT

FRANK H. MURKOWSKI, GOVERNOR

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FAX TRANSMITTAL

DATE: 3/24/05

TO FAX #: 586-8365

TO: Nona Wilson

SUBJECT: SB 142

FROM: Pamela A. Lewis, SRWA  
Statewide Chief

PHONE: 451-5266

MESSAGE: Here's the AGO opinion dated 12/11/01. Please look at the footnote on page 4 about resolving the conflict!

Number of pages sent: 11 (including transmittal page)



## Alaska State Legislature

**Senate Majority** Web: [www.akrepublicans.org](http://www.akrepublicans.org)

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**Sponsor:** LABOR & COMMERCE  
**Current Version:** SB 142  
**Contact:** Jane Alberts, 465-4843

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### Fact Sheet for: Senate Bill 142

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**Short Title:** REGIONAL SCHOOL BD LAND/BLDG OWNERSHIP

**Summary:**

- Excludes airport properties from AS 14.08.151(b), which directs the state to convey title to land and buildings used in relation to regional educational attendance area schools when requested to do so by the regional school board.

**Benefits:**

- Resolves a conflict between AS 02.15.020, which requires the Department of Transportation & Public Facilities to retain "satisfactory property interest" in airport facilities in order to participate in federal grant programs, and AS 14.08.151, which gives regional school boards the opportunity to obtain title to land/structures for regional educational attendance area (REAA) schools.
- Saves the departments of Transportation and Education time, effort and money needed to settle conflicting claims.
- Ensures that DOT&PF will be able to meet Federal Aviation Administration requirements and obtain federal funding for airport projects in REAAs.
- Conforms statute to legislative intent.

**Background:**

- AS 02.15.020 requires DOT&PF to conform to federal requirements in order for the State to participate in federal grants. The Federal Aviation Administration requires DOT&PF to certify assurances that it has "satisfactory property interest" in the airport to obtain these necessary federal grants. A newer statute, AS 14.08.151(b) gives a regional school board the opportunity to receive title to land and buildings used in relation to REAAs. Several regional schools are located on state airport properties, some in close proximity to active runways and airport infrastructure. At various times, regional school boards have requested that DOT&PF convey full title of the airport land to the schools. A mandatory title transfer of this type would violate AS 02.15.020 and breach federal grant agreements. While the Alaska Legislature clearly intended to allow regional school boards the option of greater control over facilities through acquisition of title, no record exists that the Legislature intended to do so at the cost of federal liability, significant loss of federal funding and a degraded state airport system.

Amendment #1  
To  
SENATE BILL NO. 142

adopted

Offered in Senate Labor and Commerce Committee

Delete lines one and two and replace with:

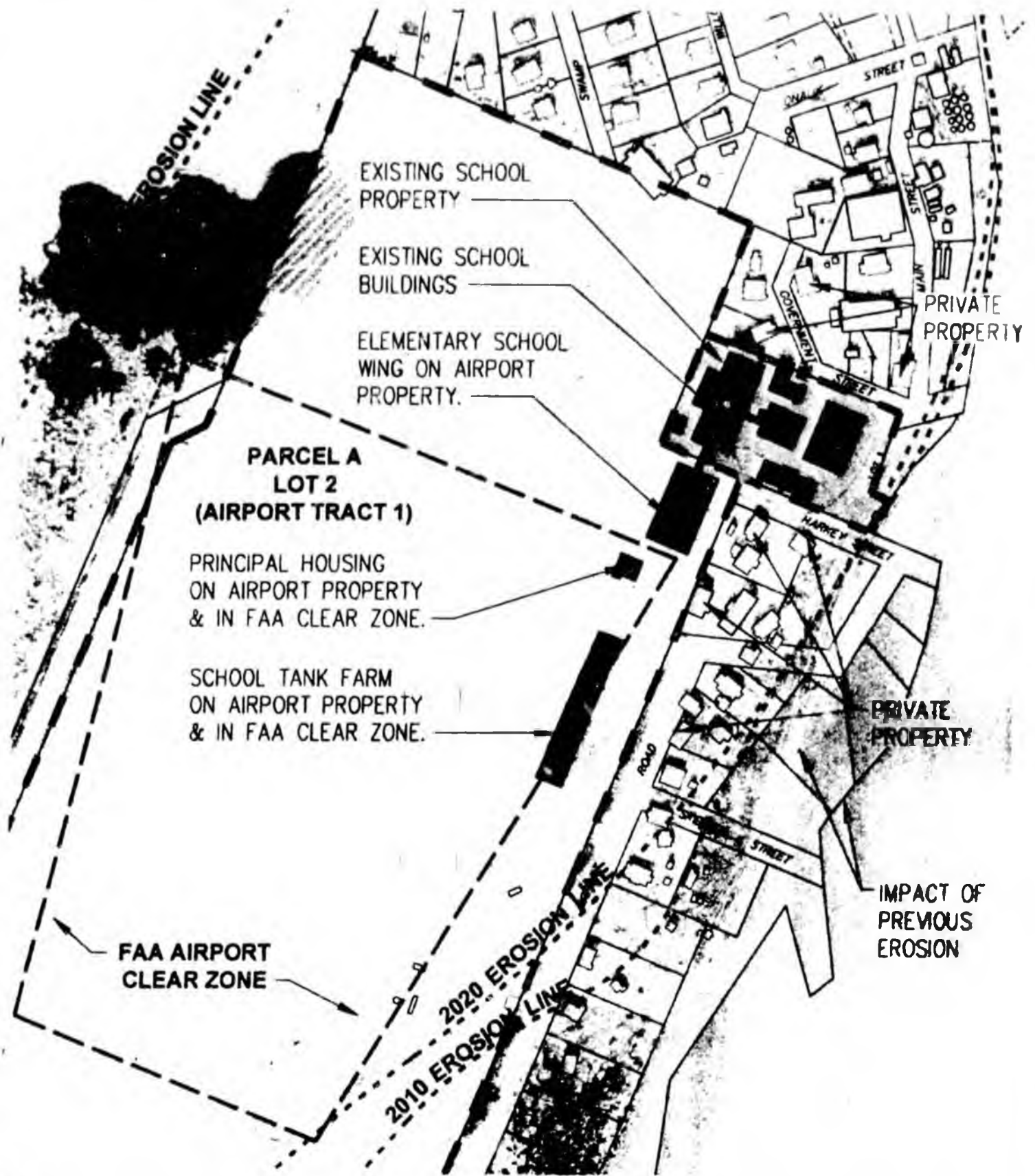
"An Act relating to ownership of land by regional school boards; and providing for an effective date."

Delete lines 12 – 14 and replace with:

"and provided to the commissioner of the department, assume ownership of all land and buildings used in relation to the schools in the educational attendance area, as provided for in AS 14.08.151(b)"

Delete lines 26 – 29 and replace with:

26 (b) Except for land located within the boundaries of a state airport, a [A] regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings



1"=200'

EXISTING SITE BOUNDARY, EXPANSION, AND RIVER EROSION CONSTRAINTS

# NAPAAQTUGMIUT SCHOOL NOATAK, ALASKA

NORTHWEST ARCTIC BOROUGH SCHOOL DISTRICT