

ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SJUD 12549

# **Attachment 4**

**Memorandum**

**TO:** Larry Ostrovsky  
**FROM:** Donald C. Shepler  
**DATE:** February 8, 2007  
**RE:** Meeting with FERC Staff

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On February 1, 2007, Antony Scott, Ken Minesinger and I met with senior FERC Staff members. FERC Staff in attendance were: Robert Cupina, Richard Foley, John Katz and Richard Hoffmann. Mr. Cupina is Deputy Director of FERC's Office of Energy Projects, Mr. Foley is a Regulatory Gas Utility Specialist in the Office of Energy Projects, Mr. Katz is an attorney in the Commission's Office of General Counsel and Mr. Hoffmann is the Director the Division of Gas—Environment and Engineering of the Office of Energy Projects.

The meeting was arranged in order to keep the FERC Staff generally informed about the current Administration's activities to facilitate the construction of an Alaskan gas pipeline to the Lower-48.

Antony started the discussion by expressing concern that the FERC's January 31 Report to Congress indicated that the prospects of a certificate application were more remote than a year ago and that the schedule for an Alaskan pipeline had slipped considerably along with the conclusion that the main obstacle to progress on the project is a failure to resolve state issues. He noted that the Previous Administration's draft contract with the major North Slope producers did not contain any commitment to build a pipeline or to dedicate gas to such a pipeline. He further noted that

there were potential state Constitutional issues raised by the contract that would have to be resolved over time through litigation. He offered to provide the Staff with a detailed briefing on the contract if they would like. Staff declined that offer.

Discussion then turned to a general description of what the Administration was contemplating—legislation that would provide a project sponsor with a substantial contribution by the State in exchange with commitments to meet appropriate milestones. We explained to the Staff that we wanted to get their input on what types of milestones there are from the standpoint of FERC's jurisdiction. We noted that the filing of a certificate application was certainly an essential milestone, but were hopeful to identify other, intermediate activities that would evidence commitment to the project through either the level of effort required or the level of expenditures necessary to meet such milestones.

We identified the completion of an open season consistent with all of the requirements that the Commission had established in Order No. 2005 and Order No. 2005-A would evidence good faith by an Applicant. FERC Staff agreed that this was clearly a meaningful milestone. It was noted that under Orders 2005 and 2005-A a sponsor is basically required to delineate a complete project in the open season process. With all of the information that is required Staff indicated they would expect to see a virtually complete "*pro-forma*" tariff—containing good faith estimates of rates, identification of types of services to be offered (essentially "rate schedules") as well as the general terms and conditions that would apply to service on the pipeline.

We asked whether Staff would consider initiation of the Commission's so-called "pre-filing" process (See 18 CFR §157.21) to be a meaningful milestone. Staff was very clear that initiation of this process evidenced a substantial commitment of time and money on the part of an

applicant. This is because it requires the applicant to hire an environmental contractor (at an estimated cost in millions of dollars) to be approved by the FERC and directed by the Staff to conduct the EIA/EIS for the project. Also, all affected state and federal agencies have to have been contacted and have to agree to work with the FERC Staff under the pre-filing process.

After further discussion Mr. Cupina noted that the pre-filing process could be initiated at the same time as initiating the Order 2005 open season. This would save time in the long run according to Mr. Cupina. Mr. Cupina advised that under FERC's regulations use of the pre-filing process for pipeline projects (as opposed to LNG projects) is voluntary. However, most pipeline projects are going this route. The Alaskan project "cries out" for the use of the pre-filing process he said due to the enormous complexity of the project and the number of agencies that will be involved. In addition, he noted that the FERC has to agree to use this process as well. They make their decision based upon whether there is evidence to suggest that the project is "real." Thus, obtaining FERC's agreement to go forward under the pre-filing process is the meaningful milestone that evidences good faith by the applicant.

Mr. Hoffmann noted that the Federal government has an Alaskan pipeline coordinator whose job it is to keep all federal agencies cooperating and suggested that the State should consider a similar office to facilitate cooperation by all State agencies.

We discussed alternative certification routes. The concept of a "conditional certificate" (conditioned upon e.g., obtaining financing or contracts) was "not a good term" at FERC owing to the use of that term for different purposes in the past. We discussed the prospect that the Commission might stifle a project by placing the sponsor "at risk" for all unsubscribed capacity. After some discussion of the potential problem of an applicant making a certificate filing without

having obtained substantial commitments FERC Staff indicated that they would grant waiver of the 30-day acceptance requirement with respect to certificates in the case of an Alaskan project if asked. They said an extension of as much as 5-years would not appear to be a problem (citing experience with an Altamont pipeline project). This would suggest that FERC would actually accept and approve a certificate application where there were few if any Firm Transportation agreements, and allow the sponsor up to 5-years to obtain a "critical mass" of such commitments before having to make the decision of whether or not to accept the certificate. This was a significant suggestion given the potential of less than full subscription of a proposed project.

Before FBRC had the pre-filing process it used to bifurcate certificates and issue a "Preliminary Determination" (referred to as a "PD") on non-environmental issues (i.e. all other aspects of the proposal) and later issue a final certificate once the environmental review was complete. This allowed all issues of rates, services, engineering and the like to be resolved at the same time as the environmental evaluations were on-going. The idea of using a "PD" process was discussed with Staff. They much preferred the pre-filing process but acknowledged that a "PD approach" might also be viable if that was deemed essential by the applicant. This process could also address the potential problem of inadequate subscriptions of capacity.

It was significant that the FERC Staff expressed willingness to work with a certificate applicant to allow more than the normal amount of time to accept the certificate or to go forward with the project.

Our meeting lasted about 2 ½ hours.

# **Attachment 5**

**Memorandum**

**TO:** Don Shepler  
**FROM:** Ken Minesinger  
Howard Nelson  
**DATE:** February 8, 2007  
**RE:** Levelized Initial Recourse Rates

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The State has asked whether the Federal Energy Regulatory Commission has ever approved levelized rates as a pipeline's initial recourse rates. The answer to this question is yes, in several certificate cases over the past 15-20 years.

As the name implies and by way of background, "levelized" rates are designed to achieve a level rate over the life of the pipeline project. By contrast, traditional, non-levelized rates typically begin at a higher level and decline over time as the pipeline's rate base is depreciated. In a recent rate case order involving Kern River Gas Transmission Company, the Commission described levelized rates as follows:

Generally, under Kern River's levelization methodology, annual depreciation recovery in rates starts very low and increases during the levelization period as the return component of the cost-of-service decreases (in tandem with the declining total rate base) to obtain a constant or "level" annual cost of service.<sup>1</sup> In the early years of the

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<sup>1</sup> In discussing Kern River's levelized methodology as set forth in its certificate application, the Commission observed:

[t]he above plant costs recoveries vary from year to year because they are calculated using a present value methodology. The varying plant cost recoveries are analogous to the principle repayment on a fixed rate mortgage on a house. In the early years of the mortgage, most of the payment is applied to the interest and very little goes toward

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levelization period, regulatory depreciation (*i.e.*, the amount of depreciation expense approved for recovery in rates) is less than book depreciation (the product of the approved book depreciation rates times gross plant in service), and the cumulative differences in those amounts are recorded as a regulatory asset.<sup>2</sup> The benefits of using a levelized methodology are that shippers benefit from rates being lower during the early years after the project goes into service, than they would be under a traditional rate design. The pipeline benefits by securing construction loans as well as competing with other well established pipelines in the area charging low rates.

*Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077, at P 40 (2006).

In the early 1990s, the Commission approved levelized rates for the initial recourse rates to be charged by Kern River and by Mojave Pipeline Company. *See Kern River Gas Transmission Co., et al.*, 50 FERC ¶ 61,069, at 61,150 (1990) (authorizing levelized rates for Kern River "in recognition of demand considerations in the marketplace"); *see id.* at 61,152 (authorizing levelized rates for Mojave). The Commission's authorization of levelized initial recourse rates for Kern River and Mojave was based on its prior approval of levelized recourse rates for the "WyCal" project. *See Wyoming-California Pipeline Co.*, 45 FERC ¶ 61,234 (1988).

A recent example where FERC approved levelized initial recourse rates is *Corpus Christi LNG, L.P., et al.*, 111 FERC ¶ 61,081 (2005). There, the Commission stated: "Cheuere Pipeline may design its initial rates based on a levelized cost of service over the entire ... operational life of the project consistent with its sole firm shipper's contract.

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principle [sic], whereas, in the latter years, most of the payment goes toward the principle [sic], and the interest portion is relatively small. 58 FERC ¶ 61,074, at 61,244 n.38.

<sup>2</sup> The regulatory asset is a rate base account that represents invested capital that has not yet been recovered in rates. In the latter years of levelization, when annual regulatory (rate) depreciation begins to exceed book depreciation, the regulatory asset is gradually reduced and, eventually, exhausted. Thereafter, annual regulatory depreciation that exceeds book depreciation will be recorded as a regulatory liability, which will be a reduction to rate base.

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In the alternative, it may design its initial rates using conventional ratemaking practices and offer discounts to the maximum tariff rates, if necessary. Finally, because Cheniere Pipeline has proposed negotiated rate provisions in [its FERC-approved tariff], it may choose to offer negotiated rates to its shipper." *Id.* at P 32.

Other recent examples where FERC has also approved levelized initial recourse rates include, *inter alia*: *TriState Pipeline, L.L.C.*, 88 FERC ¶ 61,328 (1999) ("TriState's proposed recourse rates are levelized.... We will accept the proposed recourse rate design and rates because they are consistent with Commission policy and are reasonable."); *Greenbrier Pipeline Company, LLC*, 101 FERC ¶ 61,122 (2002); *Tractebel Calypso Pipeline, L.L.C.*, 103 FERC ¶ 61,106 (2003), *order issuing certificates, section 3 authorization, and presidential permit*, 106 FERC ¶ 61,273 (2004); and *AES Ocean Express, L.L.C.*, 103 FERC ¶ 61,030 (2003), *order issuing presidential permit and NGA sections 3 and 7 authorizations*, 106 FERC ¶ 61,090 (2004) (approving levelized rates consistent with the term of the shipper's contract).

In sum, levelized rates are a well-established option which the pipeline may use as its initial recourse rates in a FERC certificate proceeding.

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## MEMORANDUM

May 23, 2006

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

**TO:** Representative Les Gara

**FROM:** *tb*  
Theresa Bannister  
Legislative Counsel

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

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

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

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

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

<sup>2</sup> Bradner v. Hammond, 553 P.2d 1, 8 (Alaska 1976).

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

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

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

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

In addition, the attorney general has stated:

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

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

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<sup>3</sup> See Governor's transmittal letter for SB 164 dated April 22, 1995, Senate Journal, pages 1190-1191.

<sup>4</sup> Quoted in Opinion of the Attorney General 1988-2, August 30, 1988.

<sup>5</sup> 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82), at 4 - 5.

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

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

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

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

<sup>7</sup> Enourato v. N.J. Building Auth., 448 A.2d 449, 453 (New Jersey 1982).

<sup>8</sup> Enourato at 453 - 454.

<sup>9</sup> Enourato at 461.

Representative Les Gara

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

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

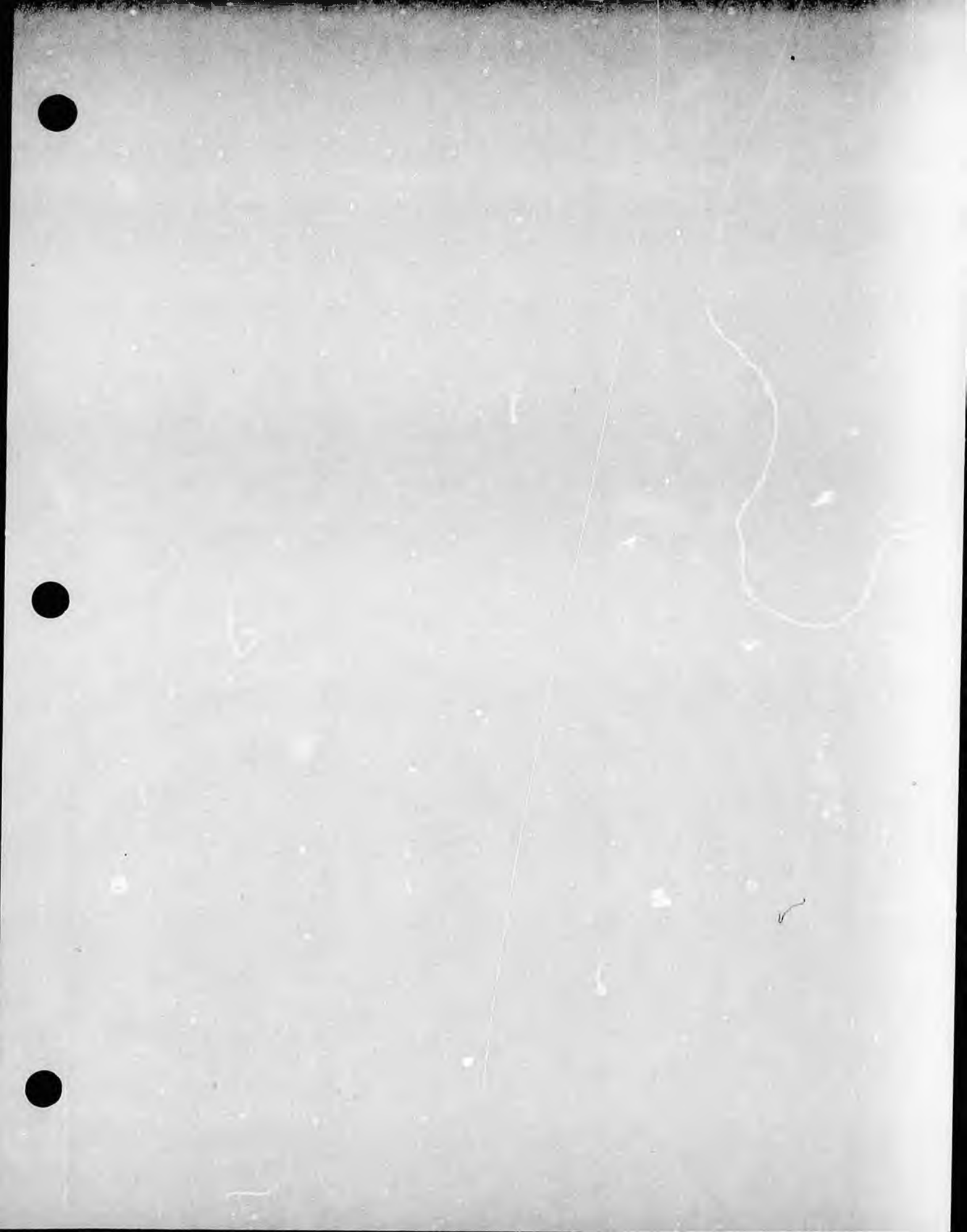
If I may be of further assistance, please advise.

TLB:med

06-392.med

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



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# LEGAL SERVICES

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## MEMORANDUM

April 14, 2006

**SUBJECT:** SB 316, eliminating the opportunity for judicial review of the findings and determination of the commissioner of revenue made under the Alaska Stranded Gas Development Act on which are based legislative review of a proposed contract for payments in lieu of taxes and for other purposes described in that Act (Work Order No. 24-LS1842\F)

**TO:** Senator Hollis French

**FROM:** Jack Chenoweth  
Assistant Revisor

Tam Cook has asked me to respond to your questions about the above-captioned bill.

**IS ELIMINATING THE RIGHT OF REVIEW AT THE ADMINISTRATION LEVEL CONSTITUTIONAL, OR DOES IT DEPRIVE THE PUBLIC OF ACCESS TO COURTS OR SOME OTHER RIGHT?**

The measure asks the legislature to eliminate the opportunity for judicial review of the commissioner of revenue's final findings and decision made under the Alaska Stranded Gas Development Act that serve as the basis for the submission to the legislature of the administration's negotiated contract(s).<sup>1</sup>

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<sup>1</sup> The Stranded Gas Development Act currently provides two opportunities for judicial review.

Under AS 43.82.435, the Act declares that the commissioner of revenue's final findings and decision, the basis of a submission to the legislature for review and legislative authorization of contract execution under AS 43.82.435, are "final agency decisions under this chapter," AS 43.82.430(c); under the state's Administrative Procedure Act, AS 44.62.560(a),

Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. . . .

Separately, the Act expressly authorizes judicial review of provisions of the executed contract:

Elimination of the opportunity for judicial review in advance of the execution of any contract proposed under the Act should, in my view, stand.

Court decisions conclude that administrative decisions are presumably subject to judicial review. However, the court will respect the legislature's decision to limit opportunity for review.<sup>2</sup>

But only to a point.

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

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

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**Judicial review.** A person may not bring an action challenging the constitutionality of a law authorizing a contract enacted under AS 43.82.435 or the enforceability of a contract executed under a law authorizing a contract enacted under AS 43.82.435 unless the action is commenced within 120 days after the date that the contract was executed by the state and the other parties to the contract.

AS 43.82.440.

SB 316 only affects the first of the two provisions. No amendment has been proposed as to the second.

<sup>2</sup> See, in this respect, *Bethel Utils. Corp. v. Bethel*, 780 P.2d 1018 (Alaska 1989):

Unless the legislature provides otherwise, administrative decisions are presumed to be judicially reviewable.

780 P.2d at 1022, citing 5 K. Davis, Administrative Law §§ 28.1; 28.4 (2d ed. 1984).

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

*Murkowski*, 486 P.2d at 357.<sup>3</sup>

Thus, the court has indicated that, while it will "honor" -- in the sense of respect -- "[a] legislative statement of finality," it reserves to itself the review of attendant constitutional questions.<sup>4</sup>

Because AS 43.82.440, another part of the Stranded Gas Development Act, retains the opportunity for judicial review as to an executed contract negotiated under the Act or the enforceability of the contract negotiated under the Act, I conclude that the court would respect the decision of the legislature, in enacting SB 316, to preclude the public from obtaining judicial review of an agency decision made before final authorization of the contract. I say that because, once the contract has been executed, the Act preserves to the public the opportunity to ask the court to consider constitutional questions arising out of a law authorizing the execution of the contract and questions as to the contract's enforcement.

**IF THE RIGHT [OF JUDICIAL REVIEW BASED ON FINAL FINDINGS AND DECISION] IS DELETED, IS THERE ANY MEANINGFUL CHANCE TO GAIN REVIEW AFTER THE CONTRACT IS EXECUTED?**

Yes. Under AS 43.82.440, there is a right of review of the executed contract. The text of the section is set out elsewhere in this memo in a note. This section would not be affected by the amendment proposed by SB 316. Questions involving whether the terms and conditions of a contract are consistent with the state constitution and whether they may be enforced or compliance with them may be compelled can be reached in litigation brought within the period provided by law for initiation of a civil action.

JBC:ljw  
06-199.ljw

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<sup>3</sup> See, also, *Johns v. Commercial Fisheries Entry Commission*, 699 P.2d 334 (Alaska 1985) (rejecting CFEC argument that refusal to hear challenge to the regulations is not judicially reviewable).

<sup>4</sup> In addition, at least one attorney general has concluded, citing the decision in *Murkowski*, that judicial review remains available to ensure that administrative decisions are not made arbitrarily or irrationally. See, in this regard, 1995 Op. A.G. File No. 883-95-0111 (June 14, 1995) (concluding that "court review is always available to protect against arbitrary or irrational administrative action").

**SB**

**110**

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## MEMORANDUM

March 12, 2007

**SUBJECT:** Is it constitutional in Alaska to forfeit a public official's or public officer's pension because the official or officer has been convicted of a felony? (SB 110; Work Order No. 25-LS0725VA)

**TO:** Senator Hollis French  
Attn: Cindy Smith

**FROM:** Dan Wayne  
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the bill.

**1. Accrued state retirement benefits shall not be diminished or impaired.**

Article XII, sec. 7 of the Constitution of the State of Alaska says:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

A right to benefits under a state retirement system vests immediately upon the employee's enrollment in the system.<sup>1</sup> While the retirement system may be changed to permit the pension system to make adjustments, the modifications must be reasonable and any change that results in a disadvantage to employees must be offset by comparable new advantages.<sup>2</sup> Rights that are protected by the constitution include not only the amount of benefits, but also the requirements for eligibility.<sup>3</sup> Both eligibility and amount are at issue in SB 110.

SB 110 would diminish accrued benefits, but only those benefits accrued on or after the date of the criminal offense. An argument can be made that those after-acquired benefits are tainted by the offense, either directly or indirectly, depending on the facts of a case.

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<sup>1</sup> Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981).

<sup>2</sup> Hoffbeck at 1057.

<sup>3</sup> Hoffbeck at 1058.

A state employee, for example, can be terminated instantly upon the discovery of work-related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

**2. Equal rights are guaranteed.**

Article I, sec. 1 of the Constitution of the State of Alaska says:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The court resolves constitutional issues by using a balancing test to weigh the state's interest against the interest of the person or persons impacted by the state's proposed action. The test used depends on the constitutional provision at issue.

[T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.<sup>4</sup>

In this instance it can be argued that persons who may be subject to forfeiture if the bill becomes law -- legislators, legislative directors, and public officers<sup>5</sup> -- are entitled as much as other persons to enjoy the rewards of their own industry, in this case a pension. SB 110 creates a special class of person and denies them something all persons in the state are guaranteed; therefore, in order to survive a challenge if it becomes law, it will

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<sup>4</sup> Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

<sup>5</sup> In the bill, "public officer" means: a public employee, a member of a board or commission, or a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties.

have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

**3. Cruel and unusual punishment is prohibited.**

Article I, sec. 12 of the Constitution of the State of Alaska says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Our courts have found this section entitles a convicted offender to a fair sentence. In fashioning a fair sentence, judges are required to take into consideration a number of things, including the ones listed in this section, but also things like the offender's prior criminal history or lack of one, the need to deter others from offending, and the principle that sentences for like offenders should be similar. Our court is not likely to find that constitutional fairness requirements at sentencing can be relaxed because the state's interest in preserving public trust in government is so great as to outweigh the right of a legislator or public official to a fair sentence; however, in the civil case the person would arguably have less at stake than freedom from incarceration. The court could find that a person's right to a pension is outweighed, in the context of a felony-based pension forfeiture, by the governmental interest at stake.

In a criminal forfeiture, property is taken before conviction occurs and often not returned unless the state fails to prove the criminal case. In SB 110 forfeiture is not automatic. For example, it will not occur unless a hearing officer hears evidence and argument in a new civil proceeding, separate from the criminal case, under the Administrative Procedure Act. The state will have to prove that the conduct upon which the conviction was based was "in connection with the person's official duties."<sup>7</sup>

**4. No conviction shall work corruption of blood or forfeiture of estate.**

Part of art. I, sec. 15 of the Constitution of the State of Alaska says, in part: "No conviction shall work corruption of blood or forfeiture of estate." This stands for the principle that the punishment for a crime should not reach beyond the offender, or affect the right to property that has been acquired legitimately. SB 110 allows some or all of a

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<sup>6</sup> For example, the Alaska Supreme Court has said Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156 (2000).

<sup>7</sup> Under the evidence rules described in AS 44.62.460 of the Administrative Procedure Act, the state would have the burden of proving its case by a preponderance of the evidence.

Senator Hollis French

March 12, 2007

Page 4

pension that would otherwise be forfeited to be awarded to dependents of the convicted person, as the hearing officer determines.<sup>8</sup> This partially addresses the constitutional issue concerning the forfeiture's reach beyond the convicted person, and SB 110 would probably be upheld with regard to that issue. SB 110 also protects from forfeiture benefits accrued before the date of the offense. This makes it less vulnerable to a constitutional challenge on the basis that legitimately acquired benefits are at stake.

You asked if the term "dependent," on page 2, line 23, includes a spouse. The terms "dependent" and "spouse," which appear in the bill in AS 37.10, are not defined in SB 110, and therefore it would be up to the hearing officer or the court to interpret their meaning. Since SB 110 relates to pension forfeiture, to the extent the legislature does not take the opportunity to clarify the term "dependent," a hearing officer or court would likely refer first to words and phrases applicable to the general pension provisions for public employees, codified in AS 39.35.010 - 39.35.680 (defined benefits) and AS 39.35.700 - 39.35.990 (defined contributions). In both instances, "dependent" appears as a modifier of "child" in the phrase, used throughout the chapter, "dependent child"; in the same body of material, AS 39.35, a "spouse" is referred to as a "surviving spouse." The differences between AS 39.35 and the bill's choice of the term "dependent" provides no definitive clue as to what the legislature is intending. At least arguably, it is more likely than not that the hearing officer or court would equate the rights of a "surviving spouse" as at least the equivalent of the rights accorded to a "former spouse" and make some provision for payment of a partial reward to a current spouse. If that is the outcome, then the administrative officer or court would in effect be extending to the "current spouse" the status of a "dependent," notwithstanding the absence of a clear statement on the point.

Rather than leave the outcome to chance, while the bill is under consideration, the legislature should step up and clarify direction on this point.

Finally, in reviewing the bill for this memo it occurred to me that the term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time for filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

If I may be of further assistance, please advise.

DCW:ljw  
07-128.ljw

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<sup>8</sup> SB 110 could be clearer as to whether or not a dependent has the same right to a hearing or an appeal as the convicted legislator does.

# Alaska State Legislature

**SENATOR  
GENE THERRIAULT**

**Mailing Address:**

1292 Sadler Way, Suite 308  
Fairbanks, Alaska 99701  
(907) 488-0857  
Fax: (907) 488-4271



**Senate**

While in session  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 485-4797  
Fax: (907) 485-3884  
SENATE DISTRICT F

**To: Senator Hollis French, Chairman  
Senate Judiciary Committee**

**From: Senator Gene Therriault  
Minority Leader**

**Date: March 7, 2007**

**Re: Request for Hearing on SB 110**

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I respectfully request Senate Bill 110 be scheduled for hearing before the Senate Judiciary Committee.

SB 110 would deny a public pension to a public officer, legislator, legislative director, who is convicted of certain felony offenses in connection with the official duties of their office. The forfeiture of pension provisions would apply to those offenses committed on or after the affective date of this Act.

Thank you for your consideration.

# LEGAL SERVICES

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

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FAX (907) 465-2029  
Mail Stop 3101


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

## MEMORANDUM

March 29, 2007

**SUBJECT:** Constitutional issues related to SB 110  
(Work Order No. 25-LS0725A)

**TO:** Senator Gene Therriault  
Attn: Heather Brakes

**FROM:** Dan Wayne   
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the state if the bill becomes law.

**1. Accrued state retirement benefits shall not be diminished or impaired.**

Article XII, sec. 7 of the Constitution of the State of Alaska says:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

A right to benefits under a state retirement system vests immediately upon the employee's enrollment in the system.<sup>1</sup> While the retirement system may be changed to permit the pension system to make adjustments, the modifications must be reasonable and any change that results in a disadvantage to employees must be offset by comparable new advantages.<sup>2</sup> Rights that are protected by the constitution include not only the amount of benefits, but also the requirements for eligibility.<sup>3</sup> Both eligibility and amount are at issue in SB 110.

SB 110 would diminish accrued benefits, but only those benefits accrued on or after the date of the criminal offense. An argument can be made that those after-acquired benefits are tainted by the offense, either directly or indirectly, depending on the facts of a case. A state employee, for example, can be terminated instantly upon the discovery of work-

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<sup>1</sup> Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981).

<sup>2</sup> Hoffbeck at 1057.

<sup>3</sup> Hoffbeck at 1058.

related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

**2. Equal rights are guaranteed.**

Article I, sec. 1 of the Constitution of the State of Alaska says:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The court resolves constitutional issues by using a balancing test to weigh the state's interest against the interest of the person or persons impacted by the state's proposed action. The test used depends on the constitutional provision at issue.

[T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.<sup>4</sup>

In this instance it can be argued that persons who may be subject to forfeiture if the bill becomes law -- legislators, legislative directors, and public officers<sup>5</sup> -- are entitled as much as other persons to enjoy the rewards of their own industry, in this case a pension. SB 110 creates a special class of person and denies them something all persons in the state are guaranteed; therefore, in order to survive a challenge if it becomes law, it will

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<sup>4</sup> Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

<sup>5</sup> In the bill, "public officer" means: a public employee, a member of a board or commission, or a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties.

have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

**3. Cruel and unusual punishment is prohibited.**

Article I, sec. 12 of the Constitution of the State of Alaska says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Our courts have found this section entitles a convicted offender to a fair sentence. In fashioning a fair sentence, judges are required to take into consideration a number of things, including the ones listed in this section, but also things like the offender's prior criminal history or lack of one, the need to deter others from offending, and the principle that sentences for like offenders should be similar. Our court is not likely to find that constitutional fairness requirements at sentencing can be relaxed because the state's interest in preserving public trust in government is so great as to outweigh the right of a legislator or public official to a fair sentence; however, in the civil case the person would arguably have less at stake than freedom from incarceration. The court could find that a person's right to a pension is outweighed, in the context of a felony-based pension forfeiture, by the governmental interest at stake.

In a criminal forfeiture, property is taken before conviction occurs and often not returned unless the state fails to prove the criminal case. In SB 110 forfeiture is not automatic. For example, it will not occur unless a hearing officer hears evidence and argument in a new civil proceeding, separate from the criminal case, under the Administrative Procedure Act. The state will have to prove that the conduct upon which the conviction was based was "in connection with the person's official duties."<sup>7</sup>

**4. No conviction shall work corruption of blood or forfeiture of estate.**

Part of art. I, sec. 15 of the Constitution of the State of Alaska says, in part: "No conviction shall work corruption of blood or forfeiture of estate." This stands for the principle that the punishment for a crime should not reach beyond the offender, or affect the right to property that has been acquired legitimately. SB 110 allows some or all of a

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<sup>6</sup> For example, the Alaska Supreme Court has said Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156 (2000).

<sup>7</sup> Under the evidence rules described in AS 44.62.460 of the Administrative Procedure Act, the state would have the burden of proving its case by a preponderance of the evidence.

pension that would otherwise be forfeited to be awarded to dependents of the convicted person, as the hearing officer determines.<sup>8</sup> This partially addresses the constitutional issue concerning the forfeiture's reach beyond the convicted person, and SB 110 would probably be upheld with regard to that issue. SB 110 also protects from forfeiture benefits accrued before the date of the offense. This makes it less vulnerable to a constitutional challenge on the basis that legitimately acquired benefits are at stake.

Finally, there are a couple of drafting issues I would like to bring to your attention. The term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time for filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

Also, I recommend the inclusion of the term "spouse" after "dependent" on page 2, line 23, and adding "14.25.075" on page 2, line 19, following "AS 14.25.055."

If I may be of further assistance, please advise.

DCW:ljw  
07-174.ljw

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<sup>8</sup> SB 110 could be clearer as to whether or not a dependent has the same right to a hearing or an appeal as the convicted legislator does.

# LEGISLATIVE RESEARCH REPORT

FEBRUARY 13, 2007



REPORT NUMBER 07.105

## LOSS OF PENSION FOR PUBLIC OFFICIALS UPON CONVICTION OF A FELONY RELATED TO PUBLIC DUTIES

PREPARED FOR SENATOR GENE THERRIALT

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

LAWS REGARDING PENSION LOSS IN OTHER STATES.....	2
<i>Table 1: Pension Revocation Laws in Other States.....</i>	3
PROPOSED LEGISLATION REGARDING PENSION LOSS.....	4
<i>Table 2: Proposed Pension Revocation Bills in Other States.....</i>	4
CONSTITUTIONAL PROVISIONS IN OTHER STATES.....	5

You asked for information regarding the pensions of public officials. Specifically, you wished to know which states currently have a law that denies a public official his or her retirement pension if the official is convicted of a felony in connection with their public office. You asked for examples of this legislation, and if any other states are currently considering similar legislation. You also wished to know, of the states that do have, or are considering, a law that denies a public official his or her retirement pension, how many have a Constitutional provision similar to Alaska's provisions found in Article 12, Sections 6 and 7.<sup>1</sup>

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<sup>1</sup> Article 12, Section 6 of Alaska's Constitution (Merit System) states that "the legislature shall establish a system under which the merit principle will govern the employment of persons by the State." Section 7 (Retirement Systems) states that "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired."

## LAWS REGARDING PENSION LOSS IN OTHER STATES

According to the National Conference of State Legislatures (NCSL), thirteen states currently have laws or constitutional provisions that allow for the denial of pension benefits to a legislator or public official who has been convicted of a crime in connection with the execution of their public duties. The thirteen states are California, Florida, Georgia, Massachusetts, Michigan, Missouri, New Jersey, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Wyoming. We summarize each state law or constitutional provision in Table 1. We provide the full text of each state law or constitutional provision in Attachment A.

**Table 1: Pension Revocation Laws in Other States**

State	Citation	Summary
California	California Code Government Code § 1243	Any elected public officer who takes office, or is reelected to office, on or after January 1, 2006, shall forfeit specified retirement benefits that accrue during his or her term of office if he or she is convicted of a felony arising from official duties, unless the governing body authorizes the public officer to receive benefits.
Florida	Florida Statutes § 112.3173	Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, forfeits all rights and benefits under any public retirement system of which he or she is a member.
Georgia	Code of Georgia § 47-1-20 to § 47-1-22	If a public employee is convicted of a public employment related crime, acting in the capacity of a public employee, the employee's membership in any public retirement system shall terminate on the date of final conviction, and the employee shall not at any time thereafter be eligible for membership in any public retirement system.
Massachusetts	General Laws of Massachusetts Chapter 32 § 15	Provides that any member of the Public Employee Retirement System who has been found guilty of misappropriation of funds or property of any governmental unit in which he or she is employed, or was employed at the time of termination of service, forfeits his retirement allowance. Also provides for forfeiture of a retirement allowance in the case of a member who is convicted of a criminal offense involving violation of the laws applicable to his office or position.
Michigan	Michigan Compiled Laws § 38.2701 to § 38.2705	A member of the public employee retirement system who is convicted of a felony arising out of his or her service as a public employee is considered to have breached the public trust and may forfeit his or her rights to an otherwise vested retirement benefit and all accumulated contributions
Missouri	Constitution of Missouri, Article XIII, Section 3	Any public official who is convicted in any court of a felony which occurred while in office or who has been removed from office for misconduct or following impeachment shall be disqualified from receiving any pension from the state of Missouri.
New Jersey	New Jersey Statutes § 43:1-3 to § 43:1-5	The receipt of a public pension or retirement benefit is dependent on honorable service by a public officer or employee.
Pennsylvania	Pennsylvania Statutes 43 § 22-1311 to 43 § 22-1315	Provides that "no public official or public employee ... shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment."
Rhode Island	General Laws of Rhode Island R.I. Gen. Laws § 36-10.1-1 to § 36-10.1-4	A member of the public employee retirement system who is convicted of a crime related to public office or public employment, such as felony theft, felony embezzlement, and bribery, or any felony where the employee realizes a gain or advantage for themselves, forfeits of all or part of any retirement or other benefit to which he or she is entitled.
Tennessee	Tennessee Code § 8-35-124	If a person who is elected to a public office of this state or any political subdivision thereof, is convicted in any state or federal court of a felony arising out of that person's official capacity, constituting malfeasance in office, that person will forfeit his or her retirement benefits from the Tennessee consolidated retirement system.
Texas	Texas Code Civil Statutes, Article 6220	No person confined to an asylum or penitentiary of the state, at the expense of the state, shall receive a pension. Inmates of the penitentiary shall forfeit their pension while incarcerated.
Virginia	Code of Virginia § 51.1-153	Deferred retirement is not available to a member of the Virginia Retirement System if his or her employer certifies that his or her service was terminated because of dishonesty, malfeasance, or misfeasance in office.
Wyoming	Constitution of Wyoming, Article V, Sec. 6	Allows the Supreme Court of Wyoming, or a special supreme court (designed to act in the place of the court in any case involving the discipline or disability of a supreme court justice), to order the forfeiture of any pension or retirement benefit accrued after an offense that led to the removal of a judicial officer from office.
<b>Sources:</b> Ron Snell, Director of the State Services Division, National Conference of State Legislatures, 303-856-1534, LexisNexis, and individual state web sites.		

## PROPOSED LEGISLATION REGARDING PENSION LOSS

Using NCSL's State Legislation Database on Ethics Issues and *Lexis*, we identified fourteen pieces of legislation introduced recently in ten states that appear to propose denying a public official his or her retirement pension if the official was convicted of a crime in connection with his or her public office. We summarize each bill in Table 2. The legislation listed in Table 2 introduced in 2005 are no longer active; all other bills are active. We provide the full text of each bill in Attachment B.

**Table 2: Proposed Pension Revocation Bills in Other States**

Year Introduced	State	Bill Number	Summary
2005	Connecticut	SB 35	Provides for forfeiture of retirement benefits of state officials or employees committing crimes associated with state employment; penalizes a state official or employee who commits a crime related to his or her state employment.
		SB 93	Allows a court that has sentenced a public official for government corruption to revoke or reduce the public official's retirement or other state benefits.
		SB 483	Provides for forfeiture of the pensions of state employees convicted of felonies against the state.
	New Jersey	A 3753	Provides for mandatory forfeiture of retirement benefits of elected officials convicted of crime involving office held.
		A 3990	Requires that public officers or public employees convicted of crimes involving their office or employment be sentenced to mandatory prison terms and forfeit pension benefits.
	Tennessee	SB 2414	Limits retirement benefits to all state employees or officials convicted of a felony arising out of such person's employment or official capacity.
2006	Illinois	HB 159	Provides that a person who is convicted of any felony relating to, arising out of, or in connection with his or her service as a participating member of any retirement system or pension fund may not receive any benefits provided for in Illinois law.
2007	Connecticut	HB 5980	Provides for forfeiture of pensions and health insurance benefits of public officials and state employees convicted of felonies arising from their official duties; holds public officials and state employees accountable for their actions.
	Hawaii	SB 1070	Provides for forfeiture of a public employee's pension benefits if the employee is convicted of a felony in connection with his or her duties.
		SB 1089	Places a question on the general election ballot of whether public employees' retirement benefits may be forfeited for conviction of a felony related to the employee's duties.
	New York	A 366	Provides that an elected public officer who is convicted of a felony pursuant to article 195 or 200 of the penal law shall forfeit all benefits of his position which are paid by his employer, including salary and that portion of his retirement.
		A 3019	Provides that a member shall forfeit his or her retirement rights and benefits if he or she is convicted of or pleads to certain crimes related to public employment.
		S 1976	Provides that a member shall forfeit his or her retirement rights and benefits if he or she is convicted of or pleads to certain crimes related to public employment.
		Oregon	HB 2492
<b>Source:</b> National Conference of State Legislatures, State Legislation Database on Ethics Issues, <a href="http://www.ncsl.org/programs/ethics/ethicsbills.cfm">http://www.ncsl.org/programs/ethics/ethicsbills.cfm</a> ; LexisNexis; and individual state web sites.			

## CONSTITUTIONAL PROVISIONS IN OTHER STATES

Using *Lexis*, we searched the constitutions of the states identified in Tables 1 and 2 for provisions similar to those found in Article 12, Sections 6 and 7 of Alaska's constitution, which restricts the diminishment of pay or retirement benefits.<sup>2</sup> We identified four states—Illinois, Michigan, New York, and Pennsylvania—with similar provisions to those found in Alaska. Please use caution when considering this information, as there can be a great deal of disparity between the state constitutions with respect to references to public employee benefits. We include, as Attachment C, copies of the constitutional provision from each of these four states, as well as any case notes offered by our source of this information, *Lexis*.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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<sup>2</sup> We searched the Constitutions of California, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, New York, New Jersey, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Virginia, and Wyoming.

# FISCAL NOTE

**STATE OF ALASKA**  
**2007 LEGISLATIVE SESSION**

Fiscal Note Number: SB110-DOA-RB-03-22-07  
 Bill Version: SB110  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_  
 Title An act relating to Public employees retirement  
benefits

Dept. Affected: Administration  
 RDU Centralized Administrative Services  
 Component Retirement and Benefits

Sponsor Senators Therriault, Dyson, Wagoner, Bunde  
 Requester \_\_\_\_\_

Component No. 64

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

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services		0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	58.8	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>58.8</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>	0.0	0.0	0.0	0.0	0.0	0.0
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<b>CHANGE IN REVENUES ( )</b>	0.0	0.0	0.0	0.0	0.0	0.0
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**FUND SOURCE** (Thousands of Dollars)

1029-PERS	58.8	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>58.8</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 (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

**POSITIONS**

Full-time					
Part-time					
Temporary					

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

An Act denying public employee retirement pension benefits to legislators, legislative directors, and public officers and employees who commit certain offenses, and adding to the duties of the Alaska Retirement Management Board and to the list of matters governed by the Administrative Procedure Act concerning that denial."

Costs are attributed to Sec.310(d) which stipulates benefits may be awarded to a dependent or former spouse. This requires the creation of a second account and the costs are a one-time programming cost.

Prepared by: Melanie Millhorn, Director  
 Division: Retirement and Benefits  
 Approved by: Rachael Petro, Deputy Commissioner  
 Agency: Department of Administration

Phone 465-2200  
 Date/Time 3/22/07 4:15 PM  
 Date 3/23/2007 2:45pm

# LEGAL SERVICES

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

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

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

## MEMORANDUM

March 12, 2007

**SUBJECT:** Is it constitutional in Alaska to forfeit a public official's or public officer's pension because the official or officer has been convicted of a felony? (SB 110; Work Order No. 25-LS0725VA)

**TO:** Senator Hollis French  
Attn: Cindy Smith

**FROM:** Dan Wayne  
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the bill.

1. Accrued state retirement benefits shall not be diminished or impaired.

Article XII, sec. 7 of the Constitution of the State of Alaska says:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

A right to benefits under a state retirement system vests immediately upon the employee's enrollment in the system.<sup>1</sup> While the retirement system may be changed to permit the pension system to make adjustments, the modifications must be reasonable and any change that results in a disadvantage to employees must be offset by comparable new advantages.<sup>2</sup> Rights that are protected by the constitution include not only the amount of benefits, but also the requirements for eligibility.<sup>3</sup> Both eligibility and amount are at issue in SB 110.

SB 110 would diminish accrued benefits, but only those benefits accrued on or after the date of the criminal offense. An argument can be made that those after-acquired benefits are tainted by the offense, either directly or indirectly, depending on the facts of a case.

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<sup>1</sup> Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981).

<sup>2</sup> Hoffbeck at 1057.

<sup>3</sup> Hoffbeck at 1058.

FROM: [illegible]  
TO: [illegible]  
SUBJECT: [illegible]

[illegible text]

[illegible text]

FROM: [illegible]  
TO: [illegible]  
SUBJECT: [illegible]

RECEIVED

THE STATE

STATE OF ALASKA  
LEGISLATIVE AGENCY  
DIVISION OF RESEARCH SERVICES

STATE OF ALASKA  
LEGISLATIVE AGENCY  
DIVISION OF RESEARCH SERVICES

LEGAL SERVICES

STATE OF ALASKA  
LEGISLATIVE AGENCY  
DIVISION OF RESEARCH SERVICES

A state employee, for example, can be terminated instantly upon the discovery of work-related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

**2. Equal rights are guaranteed.**

Article 1, sec. 1 of the Constitution of the State of Alaska says:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The court resolves constitutional issues by using a balancing test to weigh the state's interest against the interest of the person or persons impacted by the state's proposed action. The test used depends on the constitutional provision at issue.

[T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.<sup>4</sup>

In this instance it can be argued that persons who may be subject to forfeiture if the bill becomes law -- legislators, legislative directors, and public officers<sup>5</sup> -- are entitled as much as other persons to enjoy the rewards of their own industry, in this case a pension. SB 110 creates a special class of person and denies them something all persons in the state are guaranteed; therefore, in order to survive a challenge if it becomes law, it will

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<sup>4</sup> Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

<sup>5</sup> In the bill, "public officer" means: a public employee, a member of a board or commission, or a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties.

have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

**3. Cruel and unusual punishment is prohibited.**

Article I, sec. 12 of the Constitution of the State of Alaska says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Our courts have found this section entitles a convicted offender to a fair sentence. In fashioning a fair sentence, judges are required to take into consideration a number of things, including the ones listed in this section, but also things like the offender's prior criminal history or lack of one, the need to deter others from offending, and the principle that sentences for like offenders should be similar. Our court is not likely to find that constitutional fairness requirements at sentencing can be relaxed because the state's interest in preserving public trust in government is so great as to outweigh the right of a legislator or public official to a fair sentence; however, in the civil case the person would arguably have less at stake than freedom from incarceration. The court could find that a person's right to a pension is outweighed, in the context of a felony-based pension forfeiture, by the governmental interest at stake.

In a criminal forfeiture, property is taken before conviction occurs and often not returned unless the state fails to prove the criminal case. In SB 110 forfeiture is not automatic. For example, it will not occur unless a hearing officer hears evidence and argument in a new civil proceeding, separate from the criminal case, under the Administrative Procedure Act. The state will have to prove that the conduct upon which the conviction was based was "in connection with the person's official duties."<sup>7</sup>

**4. No conviction shall work corruption of blood or forfeiture of estate.**

Part of art. I, sec. 15 of the Constitution of the State of Alaska says, in part: "No conviction shall work corruption of blood or forfeiture of estate." This stands for the principle that the punishment for a crime should not reach beyond the offender, or affect the right to property that has been acquired legitimately. SB 110 allows some or all of a

<sup>6</sup> For example, the Alaska Supreme Court has said Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156 (2000).

<sup>7</sup> Under the evidence rules described in AS 44.62.460 of the Administrative Procedure Act, the state would have the burden of proving its case by a preponderance of the evidence.

pension that would otherwise be forfeited to be awarded to dependents of the convicted person, as the hearing officer determines.<sup>8</sup> This partially addresses the constitutional issue concerning the forfeiture's reach beyond the convicted person, and SB 110 would probably be upheld with regard to that issue. SB 110 also protects from forfeiture benefits accrued before the date of the offense. This makes it less vulnerable to a constitutional challenge on the basis that legitimately acquired benefits are at stake.

You asked if the term "dependent," on page 2, line 23, includes a spouse. The terms "dependent" and "spouse," which appear in the bill in AS 37.10, are not defined in SB 110, and therefore it would be up to the hearing officer or the court to interpret their meaning. Since SB 110 relates to pension forfeiture, to the extent the legislature does not take the opportunity to clarify the term "dependent," a hearing officer or court would likely refer first to words and phrases applicable to the general pension provisions for public employees, codified in AS 39.35.010 - 39.35.680 (defined benefits) and AS 39.35.700 - 39.35.990 (defined contributions). In both instances, "dependent" appears as a modifier of "child" in the phrase, used throughout the chapter, "dependent child"; in the same body of material, AS 39.35, a "spouse" is referred to as a "surviving spouse." The differences between AS 39.35 and the bill's choice of the term "dependent" provides no definitive clue as to what the legislature is intending. At least arguably, it is more likely than not that the hearing officer or court would equate the rights of a "surviving spouse" as at least the equivalent of the rights accorded to a "former spouse" and make some provision for payment of a partial reward to a current spouse. If that is the outcome, then the administrative officer or court would in effect be extending to the "current spouse" the status of a "dependent," notwithstanding the absence of a clear statement on the point.

Rather than leave the outcome to chance, while the bill is under consideration, the legislature should step up and clarify direction on this point.

Finally, in reviewing the bill for this memo it occurred to me that the term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time or filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

If I may be of further assistance, please advise.

DCW:lhw  
07-128.lhw

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<sup>8</sup> SB 110 could be clearer as to whether or not a dependent has the same right to a hearing or an appeal as the convicted legislator does.

**SB**

**112**

# Alaska State Legislature



Senator Hollis French

## Letter of Intent

### *SB112 - Statute of Limitations for Sexual Offenses*

SB 112 creates a one year period in which civil action may be brought against all felony sexual assault of a minor cases that are currently time barred by Alaska statute of limitations laws.

In 2001, the Alaska Legislature passed House Bill 210, an act that removed the statute of limitations for all felony sexual assault cases. This act makes any sex assaults that take place after October 1, 2001 free of any statute of limitations. The bill passed unanimously in both bodies.

Unfortunately, HB 210 left one class of victims out: those who were assaulted while the old statute of limitations was in effect. SB 112 cures this injustice by allowing victims of legitimate claims the opportunity to have their day in court.

Experts have found there are several reasons that a victim, especially a child, will not report sexual abuse. Multiple studies have shown:

- Victims of childhood sexual assault are often extremely embarrassed by the abuse, and may not disclose the crime against them until adulthood.
- Children who are victims will often fail to report sexual abuse due to fear of the consequences; a child may also feel guilty for reporting the perpetrator or fear retaliation from his or her abuser.
- It can take months, even years, before a victim understands the connection between the problems they are experiencing as an adult and the abuse they experienced as a child.
- There are many effects that untreated childhood sexual abuse can delay into adulthood. Long-term effects that are frequently reported and associated with

sexual abuse include depression, self-destructive behavior, anxiety, feelings of isolation, poor self-esteem, difficulty in trusting others, tendency toward revictimization, substance abuse, and sexual maladjustment.

- Among victims of sexual assault, an inability to trust is common. This inability can prevent many victims, especially children, from disclosing the abuse.
- Many victims of childhood sexual abuse have repressed all memory of the abuse for years, it is often only under the guidance of professional counseling or therapy that the victim may come to realize that a crime against them took place.

Regardless of the reason it was not disclosed, the abuse remains illegal. SB 112 allows past victims of sexual abuse the same rights they would have under today's law, the right to file charges against their perpetrators no matter when the abuse occurred.

A handwritten signature in black ink, appearing to read "Hollis French", with a stylized flourish at the end.

Senator Hollis French

# Alaska State Legislature



Senator Hollis French

## Sponsor Statement

### *SB 112 – Statute of Limitations for Sexual Offenses*

SB 112 creates a one year period in which civil a action may be brought against felony sexual assault and sex abuse cases that are currently time barred by Alaska statute of limitations laws.

Alaska law was amended in 2001 to remove the statute of limitations for all felony sexual assault and sex abuse cases. Unfortunately, with this change, one class of victims remains left out: those who were assaulted while the old statute of limitations was in effect. SB 112 cures this injustice by allowing victims with legitimate claims the opportunity to have their day in court.

Experts have found there are several reasons that a victim, especially a child, will not report sexual abuse right away. Numerous studies have shown it can take years for a victim to fully realize that they were abused and to understand the effect the abuse has had on their life.

Sex abuse and sex assault is illegal, regardless of the reason it was not disclosed. SB 112 allows past victims the same rights they would have under today's law; the right to file suit against their perpetrators no matter when the abuse occurred.

# LEGAL SERVICES

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

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

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

## MEMORANDUM

March 30, 2007

**SUBJECT:** Application of the constitutional prohibition against ex post facto laws to SB 112 (Work Order No. 25-LS0577C)

**TO:** Senator Hollis French  
Attn: Allison Biastock

**FROM:** Dennis C. Bailey *DCB*  
Legislative Counsel

You have asked how constitutional prohibitions against ex post facto laws apply, if at all, to SB 112. The U.S. Const. art. I, § 10, and Alaska Const. art. I, § 15 prohibit ex post facto laws.

SB 112 changes the statute of limitation for acts constituting sexual offenses set out in AS 09.10.065(a), which allows a person to "bring an action at any time for conduct that would have violated certain sexual offenses." Although the action is defined by the kind of conduct that would be a crime, AS 09.10.065(a) allows for civil, not criminal, action. This conclusion is supported by AS 09.10.010, which provides that the chapter applies to civil actions.

Most of the many Alaska cases addressing the ex post facto issue address criminal matters. Some hold the view that the constitutional prohibition against ex post facto laws only apply to criminal laws. One commentator noted, "It applies only to criminal matters, although retroactive civil statutes have sometimes been held unconstitutional on some other ground, usually as a taking of property rights without due process of law." LaFave, *Criminal Law, Ex Post Facto Laws*, Sec. 2.4 at pages 97-98. There is authority from other jurisdictions finding that the constitutional prohibition against ex post facto laws applies only to criminal laws. *In re Rabideaux*, 306 N.W. 2d 1 (Wis. 1981), app. dismissed, 454 U.S. 1025, 70 L.Ed.2d 469 (1981) (ex post facto prohibition did not apply to attorney disciplinary proceedings because the law is neither criminal nor punitive; no ex post facto prohibition except in criminal proceedings or matters where penalty or punishment is imposed); *See also Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005) (ex post facto prohibition did not apply to deportation proceedings). However, my research, though not exhaustive, failed to find an Alaska case that definitively states that the constitutional ex post facto prohibition only applies in the criminal setting. Even the Alaska Attorney General's office opinion, expressing the opinion that ex post facto laws only apply in criminal matters, did not use an Alaska case as authority for its opinion.

"Ex post facto laws and retrospective or retroactive laws are easily distinguished. Every ex post facto law must necessarily be retrospective, but not every retrospective law is an ex post facto law. *Ex post facto laws relate to crimes and criminal statutes only.*" 16 B Am. Jur. 2d Constitutional Law § 645 (2004) (emphasis added).

2005 Alas. AG LEXIS 5 (Alas. AG 2005)

The Alaska Supreme Court has expressed doubt whether the ex post facto restriction is limited to criminal laws. In *Danks v. State*, 619 P.2d 720 (Alaska 1980), the Alaska Supreme Court cited with approval the Black's Law Dictionary definition of an ex post facto law as a law "passed after the occurrence of a fact or commission of an act that retrospectively changes the legal consequences or relation of such fact or deed."<sup>1</sup> In a 2006 case, the Alaska Supreme Court expressly acknowledged that it is not clear whether the ex-post facto clause applies to civil statutes.

An ex post facto law is a law "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." n62 *It is unclear whether the ex post facto clause applies to purely civil statutes.* n63 However, because the slayer statute is arguably punitive, there is at least a plausible argument that it could apply in this scenario.

[Footnotes:]

n62 *Danks v. State*, 619 P.2d 720, 722 n.3 (Alaska 1980) (citing BLACK'S LAW DICTIONARY 520 (5th ed. 1979)).

n63 Compare *Allen v. State*, 945 P.2d 1233, 1237 (Alaska App. 1997) ("[T]he ex post facto clause prohibits the retrospective application of laws that 'alter the definition of crimes or increase the punishment for criminal acts.' ") (citing *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)) with *Underwood v. State*, 881 P.2d 322, 327-28 (Alaska 1994) (analysis by court implies that ex post facto clause could apply to civil statute). Retroactive civil legislation must include an express statement of retroactivity within the statute. AS 01.10.090.

*Blodgett v. Blodgett (In re Blodgett)*, 147 P.3d 702, 711 (Alaska 2006) (emphasis added).

The Alaska Supreme court has also applied a vested-rights analysis in a non-criminal context to determine whether a retroactive statute violates the prohibition against ex post facto laws:

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<sup>1</sup> In *Danks*, the court held that the license of a defendant convicted of DWI for the third time could be revoked for three years under former AS 28.15.210(c), even though that statute was enacted after Danks' first two DWI convictions. The court found that such a law did not violate the ex post facto prohibitions.

In determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *See Norton [v. Alcoholic Beverage Control Bd.]*, 695 P.2d [1090 (Alaska 1985),] at 1092; see also *Black's Law Dictionary* 1317-18 (6th ed. 1990) (A "retrospective" or "retroactive" law is generally defined as a law which "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.") (citation omitted). . . . *See Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n.12 (Alaska 1989) (a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law).

*Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994) (no vested right in a permanent fund dividend to prohibit change in qualification date).<sup>2</sup>

In other Alaska cases, the Alaska Supreme Court held that in criminal cases an extension of the statute of limitations was a procedural change which did not violate the ex post facto prohibition. *State v. Creekspaum*, 753 P.2d 1139 (Alaska 1988) (extension of a criminal statute of limitations before the original period of limitation has run is not an unconstitutional ex post facto law under the constitutions of either Alaska or the United States). In *State v. Hawkins*, 39 P.3d 1126 (Alaska 2002), the Alaska Supreme Court upheld a retroactively applied criminal law requiring the registration of sex offenders. In that case, the Court held that where the legislative intent was to impose a continuing requirement on sex offenders to register in the state the criminal statute was not an ex post facto law. △△

The Alaska Supreme Court also upheld the current provision making certain felons ineligible for dividends against an ex post facto challenge. *State v. Anthony*, 816 P.2d 1377 (Alaska 1991). The court found it important to distinguish between "a statute enacted for valid regulatory purposes rather than simply to punish individuals for their past conduct." *Anthony*, 816 P.2d 1377, at 1378. Moreover, it was significant to the court that the statute's stated purpose was other than punitive. When the statute in question is, as the court characterized the dividend denial provision, "compensatory rather than punitive," the court determined there would be no ex post facto violation. *Id.*

In conclusion, I am unable to predict how the Alaska courts will apply the constitutional prohibition against ex post facto laws to SB 112. It is possible that the Alaska courts will

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<sup>2</sup> The court may also apply a due process analysis to a retrospective law, including the concept of vested rights, to determine whether a retrospective law is unconstitutional. *See Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) (vested property rights are protected against state action by the provisions of the Fourteenth Amendment of the Constitution of the United States and by sec. 7 of art. I of our state constitution); *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092-1093 (Alaska 1985)

**Senator Hollis French**

**March 30, 2007**

**Page 4**

conclude that ex post facto prohibitions only apply to criminal laws, or the courts may closely scrutinize retrospective laws affecting civil claims to determine whether the civil provisions in SB 112 violate the prohibition against ex post facto laws.

If I may be of further assistance, please advise.

DMB:ljw

07-181.ljw



**STATE OF ALASKA  
OFFICE OF VICTIMS' RIGHTS**

March 29, 2007

Senator Hollis French  
Alaska State Legislature  
State Capitol  
Capitol Room 417  
Juneau, Alaska 99801-1182

RE: Letter of support of Senate Bill 112

Dear Senator French:

The Office of Victims' Rights (OVR) fully supports SB 112 introduced this legislative session.

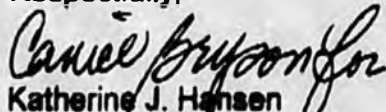
There is a great need to permit sexual assault and sexual abuse victims, who would otherwise be barred by the pre-2001 statute of limitations, an opportunity for redress through civil legal action.

SB 112 acknowledges the unique nature of sexual assault and sexual abuse crimes. It is often difficult for these crime victims to receive appropriate acknowledgement and redress for the harms perpetrated on them.

The OVR agrees there should be a one-year period for these victims, who would otherwise be time-barred, to file a civil action against their felony sexual assault and sexual abuse perpetrators. This is an appropriate measure to ensure these victims have an opportunity to be made financially whole, and to ensure that the perpetrators are held financially accountable.

Thank you for allowing OVR the opportunity to provide input on this important bill. Please contact me if OVR can provide any further assistance.

Respectfully,

  
Katherine J. Hansen  
Interim Victims' Advocate

LEXSEE 141 P3D 719



Positive

As of: Mar 27, 2007

**CATHOLIC BISHOP OF NORTHERN ALASKA, Petitioner, v. JOHN DOES 1-6,  
Respondents.**

Supreme Court No. S-11295, No. 6035

SUPREME COURT OF ALASKA

*141 P.3d 719; 2006 Alas. LEXIS 122*

August 18, 2006, Decided

**PRIOR HISTORY:** [\*\*1] Petition for Review from the Superior Court of the State of Alaska, Fourth Judicial District, Bethel, Dale O. Curda, Judge. Superior Court No. 4BE-03-177 CI.

**COUNSEL:** Robert B. Groseclose and Mila A. Neubert, Cook Schuhmann & Groseclose, Inc., Fairbanks, for Petitioner Catholic Bishop of Northern Alaska.

James M. Gorski, Hughes Thorsness Powell Huddleston & Brundin, PC, Anchorage, for Petitioner Society of Jesus, Oregon Province.

Kenneth S. Roosa, Cooke, Roosa & Valcarce, LLC, Anchorage, and John S. Hedland, Hedland Brennan Heide- man & Cooke, Anchorage, for Respondents.

**JUDGES:** Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

**OPINION BY:** CARPENETI

**OPINION:**

[\*720] CARPENETI, Justice.

**I. INTRODUCTION**

Six unnamed plaintiffs allege that they were sub- jected to childhood sexual abuse by a Catholic priest in the 1950s, 1960s, and 1970s. They filed suit against the priest's former employers in 2003. The defendants filed a motion to dismiss based on the statute of limitations. The superior [\*\*2] court held the motion in abeyance pend-

ing further discovery. The defendants petitioned for re- view and we granted their petition in order to clarify the law that applies to this case.

We conclude that *AS 09.10.065* does not revive civil claims that were time-barred before the effective date of the statute, October 1, 2001. We return the case to the superior court for further proceedings.

**II. FACTS AND PROCEEDINGS**

In June 2003 the six plaintiffs, as John Does, filed suit against the Catholic Bishop of Northern Alaska (CBNA) and the Society of Jesus, Oregon Province (Jesuits) alleging that they suffered sexual abuse at the hands of a Jesuit priest, Father Jules Convert. CBNA has owned various Catholic Church facilities throughout northern and western Alaska, including those where the plaintiffs claim to have been abused, since its incorpora- tion in 1952. The Society of Jesus is a Catholic order that oversees priests throughout the world; its Oregon Prov- ince includes Alaska. The CBNA coordinated staffing decisions, including those involving Father Convert, with the Jesuits.

The plaintiffs allege that Father Convert sexually molested them at church [\*\*3] facilities. The specific allegations vary, but generally involve Father Convert selecting plaintiffs as altar boys, inviting them to be alone with him, and then sexually fondling them. The plaintiffs also allege that defendants knew of Father Convert's abuse, that they actively concealed it by mov- ing him from parish to parish, and that they knowingly failed to report it to parishioners or law enforcement. CBNA and the Jesuits admit that Father Convert worked

throughout Alaska and the Yukon Delta from 1942 to 1978.

In the current version of their complaint, n1 the plaintiffs argue that the defendants are liable under various theories. First, they maintain that the defendants are vicariously liable for the actions of Father Convert under *respondeat superior* and agency theories. Second, they allege that the defendants are directly liable because they negligently hired and supervised Father Convert. Finally, they argue that the defendants entered into a fiduciary relationship with the plaintiffs by undertaking to care for them as minors and by "holding themselves out as shepherds and leaders of the Roman Catholic Church." Therefore, according to the plaintiffs, the defendants' failure [\*\*4] to disclose Father Convert's alleged sexual misconduct amounted to fiduciary fraud and a breach of fiduciary duty. The plaintiffs also argue that the defendants' failure to inform the public of Father Convert's abuse tolls the statute of limitations and estops them from invoking it as a defense.

n1 The plaintiffs amended their complaint four times to add additional plaintiffs and claims.

The CBNA moved to dismiss the complaint under Alaska Civil Rule 12(b)(6); the Jesuits later joined the motion. The CBNA argued that the plaintiffs' claims were barred by the two-year statute of limitations for tort actions; n2 although the statute of limitations [\*721] was tolled until the plaintiffs reached the age of majority, n3 the youngest plaintiff turned eighteen over twenty years before the suit was filed. The CBNA also discussed AS 09.10.065, which eliminates the statute of limitations for sexual abuse claims. First, CBNA noted that AS 09.10.065 was enacted after the [\*\*5] plaintiffs' claims were already time-barred and asserted that the statute did not apply retroactively to revive claims which had lapsed before its enactment. Second, it argued that this provision was irrelevant to the plaintiffs' claims because it only applied to actual perpetrators of sexual abuse, and not to employers or other vicariously liable parties. In addition, the CBNA argued that the discovery rule, which tolls the statute of limitations until a person discovers or reasonably should have discovered the essential elements of his cause of action, was inapplicable to the plaintiffs because they knew facts that should have prompted them to start investigating their claims against the defendants within the statutory period. The CBNA also argued that the doctrine of laches bars the plaintiffs' actions, since they could have brought suit when key witnesses, including Father Convert, were still alive and before the loss or destruction of relevant records. In support of this argument, the CBNA submitted the affidavit of Richard Case, a Jesuit priest and Chancellor for the

CBNA, which states that the priests and bishops who were Father Convert's contemporaries are deceased (excepting [\*\*6] one Jesuit superior now in failing health in Washington) and that existing CBNA records do not mention any sexual abuse or misconduct.

n2 AS 09.10.070 provides in relevant part:

(a) Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment; (2) for personal injury or death, or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery; (4) upon a statute for a forfeiture or penalty to the state; or (5) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years of the accrual of the cause of action.

n3 AS 09.10.040 tolls the statute of limitations while the plaintiff is either incompetent due to mental disability or is a minor.

In opposing the motion [\*\*7] to dismiss, the plaintiffs first raised a procedural issue. Citing the lack of discovery and the fact that the CBNA's motion to dismiss included external materials -- namely the Case affidavit -- they argued that the court should dismiss the motion and then allow the defendants leave to refile it as a summary judgment motion after discovery, or that the court allow the plaintiffs to delay filing their opposition to the motion until a month after discovery was completed. In addition, before the superior court heard oral arguments on the motions, the plaintiffs submitted the affidavit of their own expert, Patrick Wall, a former Catholic priest and expert on canonical requirements for record keeping. This affidavit maintained that the CBNA's search of its records had not been sufficiently diligent and that there likely was relevant information in church archives.

The plaintiffs also responded to the CBNA's statute of limitations arguments, maintaining that: (1) AS

09.10.065 applied to any civil action based on a claim of sexual abuse, including those against employers through operation of *respondeat superior* and aided-in-agency principles; and (2) their [\*\*8] claims were saved by the discovery rule. The plaintiffs essentially argued that they lacked information about the defendants' supervision of Father Convert and what church officials knew or should have known about his behavior, and therefore requested discovery so that they could determine whether there was sufficient evidence to allow their claims under an exception to the statute of limitations.

Superior Court Judge Dale O. Curda held a hearing on the motion to dismiss and issued an order holding the motion to dismiss in abeyance until completion of discovery. In the order Judge Curda stated that because both sides had submitted significant outside materials, namely the Case and Wall affidavits, he was required to convert the motion to dismiss [\*722] into a motion for summary judgment according to Civil Rule 12(b) and our decision in *Martin v. Mears*.<sup>n4</sup> Concluding that conversion of a motion to dismiss into a motion for summary judgment entitles the parties to a reasonable opportunity to clarify the facts of the case, Judge Curda declined to rule on the motion until the parties completed discovery.

<sup>n4</sup> 602 P.2d 421 (Alaska 1979). In *Martin* we held that Civil Rule 12(b) required the conversion of motions to dismiss to motions for summary judgment where affidavits or items beyond the pleadings are "presented to and not excluded by the court." *Id.* at 426.

[\*\*9]

The CBNA and the Jesuits petitioned this court for review, arguing that the external affidavits were not relevant to their statute of limitations argument. They posited that since the statute of limitations issue involved pure questions of law which were not fact dependent it was amenable to immediate appellate review. We granted the petition for review.

### III. STANDARD OF REVIEW

We review trial court decisions regarding motions to dismiss *de novo*,<sup>n5</sup> deeming all facts in the complaint true and provable.<sup>n6</sup> As complaints must be liberally construed, grant of a motion to dismiss is disfavored.<sup>n7</sup> To survive a motion to dismiss, a complaint need only allege "a set of facts consistent with and appropriate to some cause of action."<sup>n8</sup> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief.<sup>n9</sup>

<sup>n5</sup> See *Nunez v. Am. Seafoods, Inc.*, 52 P.3d 720, 721 (Alaska 2002) (grant or denial of motion to dismiss reviewed *de novo*).

<sup>n6</sup> *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253 (Alaska 2000).  
[\*\*10]

<sup>n7</sup> *Id.*

<sup>n8</sup> *Id.* at 253-54 (internal quotations omitted).

<sup>n9</sup> *Id.* at 254.

We review questions of law, including the interpretation of statutes and regulations, according to our independent judgment.<sup>n10</sup> "When construing the meaning of a statute under this standard, we look to the meaning of the language, the legislative history, and the purpose of the statute and adopt the rule of law that is most persuasive in light of precedent, reason, and policy."<sup>n11</sup>

<sup>n10</sup> *Therchik v. Grant Aviation*, 74 P.3d 191, 193 (Alaska 2003).

<sup>n11</sup> *Marshall v. First Nat'l Bank of Alaska*, 97 P.3d 830, 834 (Alaska 2004) (internal citations and quotations omitted).

### IV. DISCUSSION

The CBNA<sup>n12</sup> makes three general arguments. First, it maintains that AS 09.10.065, which eliminates the statute of limitations for sexual abuse claims, [\*\*11] does not apply to the plaintiffs because the effective date of that statute is October 1, 2001, long after the statute of limitations had run in this case. The CBNA argues that neither AS 09.10.065 nor any of its predecessor statutes revived time-barred claims.<sup>n13</sup> As detailed in Part IV.A.3, we agree.

<sup>n12</sup> The Jesuits settled with the plaintiffs after submitting an opening brief in this appeal. In its reply brief, the CBNA adopted at least some of the arguments made by the Jesuits. Thus, for the purposes of this appeal we impute to the

CBNA arguments made by the Jesuits in their opening brief.

n13 As explained below, *AS 09.10.065*, former *AS 09.10.060(c)*, was amended in 2001 and 2003.

Second, the CBNA argues that *AS 09.10.065* does not apply to vicarious liability claims against non-perpetrators. It argues the legislature intended to lift the statute of limitations only for claims against actual [\*\*12] abusers, and that accordingly, the plaintiffs cannot use this statute as a basis for their suit. Because we conclude that *AS 09.10.065* does not apply retrospectively, we need not reach this issue.

Third, the CBNA maintains that the discovery rule does not apply to save the plaintiffs' claims. Because this argument involves factual issues the resolution of which requires further development in the superior court, we decline to reach this argument.

#### A. Alaska Statute 09.10.065 Does Not Revive Time-Barred Civil Claims.

##### 1. The legislative history of *AS 09.10.065*

Before 2001, *AS 09.10.060(c)* -- the predecessor to *AS 09.10.065* -- provided for a three-year statute of limitations for actions for damages against perpetrators of sexual abuse:

[\*723] A person who was the victim of sexual abuse may not maintain an action for recovery of damages against the perpetrator of the act or acts of sexual abuse based on the perpetrator's intentional conduct for an injury or condition suffered as a result of the sexual abuse unless an action is commenced [\*\*13] within three years. In this subsection, "sexual abuse" means an act committed by the defendant against the plaintiff maintaining a cause of action if the defendant's conduct would have violated a provision of *AS 11.41.410-11.41.440* or *11.41.450-11.41.458* at the time it was committed.  
n14

n14 Former *AS 09.10.060(c)*. This provision was enacted in 1990. Ch. 4, § 1, SLA 1990.

In 2001 the legislature repealed and reenacted *AS 09.10.060(c)*. n15 For ease of reference, we refer to the repeal and reenactment as an amendment. The amendment eliminated the three-year statute of limitations and allowed a plaintiff to bring an action for sexual abuse "at any time":

(c) Notwithstanding other provisions in this chapter, a person may bring an action at any time for the following acts:

- (1) felony sexual abuse of a minor;
- (2) felony sexual [\*\*14] assault . . . .

This amendment took effect on October 1, 2001. n16

n15 Ch. 86, § 1, SLA 2001. This chapter also repealed and reenacted *AS 12.10.010*, covering time limitations on criminal prosecutions for offenses including felony sexual abuse of a minor.

n16 Ch. 86, § 1, SLA 2001.

When it was introduced as House Bill (H.B.) 210, the 2001 amendment initially dealt only with statutes of limitations applicable to criminal prosecutions. Representative Meyer, the bill sponsor, explained that the bill was motivated by developments in forensic technology, including DNA testing, which made it possible to prove beyond a reasonable doubt that a sexual assault had occurred even twenty years after the crime. n17 The first mention of lifting the statute of limitations for civil claims of sexual abuse came from Representative Berkowitz, who observed that while H.B. 210 would allow the state an unlimited window of opportunity to prosecute sex offenders, victims of such crimes [\*\*15] would remain bound by existing statutes of limitation. n18 At his suggestion, the house adopted language lifting the civil statute of limitations, but at no point did the house consider whether the language revived time-barred civil claims or had any retroactive effect. n19 Moreover, when Representative Meyer presented the bill to the Senate Judiciary Committee, he again focused on the criminal provisions, and the senate did not engage in any significant discussion about the effect of the amendment lifting the civil statute of limitations for sexual abuse. n20

n17 4/9/01 House Judiciary Comm. Minutes.

n18 *Id.*

n19 *See id.*

n20 5/2/01 Senate Judiciary Comm. Minutes.

In 2003 the legislature again amended this provision. The amendment differentiated between felony and misdemeanor sexual abuse, adding a three-year statute of limitations for misdemeanor abuse, and recodified AS 09.10.060(c) as a separate provision, AS 09.10.065. This [\*\*16] statute provides that:

(a) A person may bring an action at any time for conduct that would have, at the time the conduct occurred, violated provisions of any of the following offenses:

- (1) felony sexual abuse of a minor;
- (2) felony sexual assault; or
- (3) unlawful exploitation of a minor.

(b) Unless the action is commenced within three years of the accrual of the claim for relief, a person may not bring an action for conduct that would have, at the time the conduct occurred, violated the provisions of any of the following offenses:

- (1) misdemeanor sexual abuse of a minor;
- (2) misdemeanor sexual assault;
- (3) incest; or
- (4) felony indecent exposure.

Although this amendment was enacted on June 6, 2003, it was made retroactive to October 1, 2001 "to the extent permitted by the state and federal constitutions." n21

n21 Ch. 40, § 4, SLA 2003.

[\*724] **2. The presumption against retrospective legislation**

*Alaska Statute 01.10.090* provides [\*\*17] that "[n]o statute is retrospective unless expressly declared therein." This statute creates a presumption against retrospective legislation, n22 and we have noted that "[s]tatutes are not

to be applied retroactively unless the language used by the legislature indicates the contrary." n23 The CBNA maintains that this principle prevents retroactive application of AS 09.10.065. It asserts that the legislature intended for the 2001 amendment to take effect on October 1, 2001, and that the plaintiffs' claims are time-barred because they lapsed well before that date.

n22 *Eastwind, Inc. v. State*, 951 P.2d 844, 846 (Alaska 1997).

n23 *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 187 n.8 (Alaska 1980) (citing *City & Borough of Juneau v. Commercial Union Ins. Co.*, 598 P.2d 957, 958-59 (Alaska 1979); *Davenport v. McGinnis*, 522 P.2d 1140, 1142 (Alaska 1974); *Stephens v. Rogers Constr. Co.*, 411 P.2d 205, 208 (Alaska 1966)). See also *Hood v. State Workmen's Comp. Bd.*, 574 P.2d 811, 813-814 (Alaska 1978) ("[S]tatutes are presumed to operate prospectively and will not be given a retroactive effect, unless by express terms or necessary implication, it clearly appears that was the legislative intent.").

[\*\*18]

The plaintiffs respond that the broad language of the 2001 and 2003 amendments demonstrates that the legislature intended to revive lapsed claims. First, they argue that language introduced in the 2001 amendment (which continues through to the current AS 09.10.065) suggests that the legislature intended for this provision to revive lapsed claims. Specifically, they note that while the former provision referred to "perpetrators" and set a three-year statute of limitations, the new language allows individuals to "bring an action at any time for the following acts," and then lists various criminal offenses. They maintain that this distinction reflects a legislative choice to significantly broaden the reach of this statute to revive lapsed claims.

In addition, the plaintiffs argue that it is significant that the 2001 amendment explicitly indicated that it did not revive certain time-barred *criminal* claims:

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

**APPLICABILITY.** The extension of the statute of limitations for felony sexual assault provided in sec. 2 of this Act [which