BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE

In the Matter of	)	
	)	
LIBERTY MUTUAL GROUP	)	OAH No. 06-0864-INS
	)	Agency Case No. D 06-12

DECISION AND ORDER GRANTING SUMMARY ADJUDICATION

This case relates to Cease and Desist Order D06-12, issued by the Division of Insurance of the Department of Commerce, Community and Economic Development on November 15, 2006. The order forbade Liberty Mutual Group from continuing to operate a particular Owner Controlled Insurance Program for Alyeska Pipeline Service Company ("Alyeska"). It listed seven numbered "Compliance Issues." Liberty Mutual Group appealed the order.

Alyeska, after intervening in the appeal, moved for a summary adjudication that the insurance program at issue in this case does not violate AS 21.36.065. In effect, Alyeska sought dismissal by summary adjudication of paragraph 1 of the "Compliance Issues" in the Cease and Desist Order under review. The Division of Insurance staff opposed the motion. In an interlocutory ruling substantively identical to this Decision and Order, the administrative law judge granted the motion.[1]

After the ruling, the parties reached a proposed settlement of Compliance Issues 2 through 7 of the Cease and Desist Order. They agreed that the proposed settlement, together with this ruling on the sole unsettled issue in the appeal, should be submitted concurrently for approval by the final decisionmaker.

I. Nature of Summary Adjudication

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[2] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If

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[1] Order Granting Alyeska's Motion for Partial Summary Adjudication, May 14, 2007. In a separate interlocutory ruling, the administrative law judge denied summary adjudication on some of the other issues under appeal. Order Denying Liberty Mutual's Motion for Partial Summary Adjudication, May 17, 2007.

[2] *See, e.g., Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.[3]

With respect to Alyeska's attack on paragraph 1 of the Cease and Desist Order, both Alyeska and the division staff agree that no material facts are in dispute.[4] The motion turns solely on a legal interpretation of the breadth of the prohibition in AS 21.36.065.

II. Undisputed Facts[5]

Alyeska operates the Trans Alaska Pipeline System, or TAPS. Since 2002, Alyeska has contracted with Liberty Mutual Group to place and administer an insurance program that provides commercial general liability (CGL) and workers' compensation insurance for Alyeska itself and for several TAPS contractors. The present contract with Liberty Mutual runs until January 1, 2008.

There are five TAPS service providers currently enrolled in this program. They supply maintenance for system's facilities, equipment, and vessels, as well as warehousing, security, lodging, catering, medical response, surveying, monitoring, and ship escort services. They also provide a wide variety of spill response and contingency plan services. At no time have these functions, individually or collectively, entailed the construction or major renovation of a structure, building, facility, or roadway having a contract cost of more than $50 million with a definite term at a geographically defined project site.

The above insurance program for CGL and workers' compensation coverage is an arrangement generally known in the industry as an owner controlled insurance program, or OCIP. Its purpose is to save contractor insurance costs that would otherwise be billed or passed through to Alyeska. By purchasing coverage collectively, Alyeska achieves cost savings.[6]

OCIPs and a closely related arrangement, contractor controlled insurance programs, are a common way to insure large construction projects.[7] Prior to the legislation in 2005 that is discussed below, there were no provisions of Alaska law specific to OCIPs. These programs, at

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[3] *See Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

[4] There are disagreements about two peripheral matters that need not be resolved to decide the motion and that will not be addressed in this order. These are summarized at footnote 1 of the staff's opposition brief.

[5] Most of these agreed facts are distilled from Alyeska's statement of "Facts/Background" in its original motion, which the staff generally accepted in footnote 1 of its opposition brief.

[6] The magnitude of the savings has not been established.

[7] First Div. Ex. 1 at 1 (Sirany & O'Connor, Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups, 22-WTR Construction Law. 30 (2002)). [Some division exhibits are designated "First" or "Second" because the division submitted two exhibit series on this motion rather than numbering its exhibits sequentially.]

least in the construction context, were generally regarded permissible in Alaska, provided they complied with the general laws and rules for insurance.[8] Since before 1995, OCIPs have been used outside Alaska in contexts other than construction, such as for maintenance at nuclear or petroleum industry plants.[9] The division views their use in Alaska for purposes other than insuring construction projects as undesirable.[10]

III. Scope of AS 21.36.065

A. The Statute's Language

Paragraph 1 of the Cease and Desist Order is premised on AS 21.36.065, newly enacted in 2005 and effective June 25, 2005. As finally enacted, this statute reads in relevant part as follows:

> (a) An owner controlled insurance program or a contractor controlled insurance program is subject to both AS 21.39 and AS 21.42, must be approved by the director, and shall be allowed only for a major construction project. Owner controlled and contractor controlled insurance programs are limited to property insurance as defined in AS 21.12.060 and casualty insurance as defined in AS 21.12.070.
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> (b) In this section, an owner controlled . . . insured [*sic*] program does not include
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> (1) builder's risk or course of construction insurance;
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> (2) insurance relating to the transportation of cargo or other property;
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> (3) insurance covering one or more affiliates, subsidiaries, partners, or joint venture partners of a person; or
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> (4) insurance policies endorsed to name one or more persons as additional insureds.
>
> (c) In this section,
>
> (1) "contractor" means a person who meets the definition of "contractor" in AS 08.18.171 and who undertakes the performance of a construction project for a project owner, its agent, or its representative;
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> * * *
>
> (3) "major construction project" means the process of constructing a structure, building, facility, or roadway or major renovation of more than

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[8] *E.g.*, Alyeska Ex. AE (letter from Division of Insurance to Zurich-American Insurance Group, Nov. 4, 1997); First Div. Ex. 2 at 5-6 (Aff't of Sarah McNair-Grove, ¶ 13) ("Prior to the enactment of AS 21.36.065, the division generally reviewed and considered approval of such programs on a case by case basis").

[9] Alyeska Ex. AC (memorandum from Stan Garlington, State of Alaska insurance analyst, to former division director Marianne Burke, Sept. 13, 1995, copying Sarah McNair-Grove).

[10] *E.g.*, Agency Record at 2059 (legislative testimony of Linda Hall, March 30, 2005).

> 50 percent of an existing structure, building, facility, or roadway having a contract cost of more than $50,000,000 of a definite term at a geographically defined project site;
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> (4) "owner controlled insurance program" means an insurance program where one or more insurance policies are procured on behalf of a project owner, its agent, or its representative, by its insurance producer, as defined in AS 21.27.900, for the purpose of insuring the project owner and one or more of the following:
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> (A) the contractor;
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> (B) a subcontractor;
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> (C) an architect;
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> (D) an engineer; or
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> (E) a person performing professional services;
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> (5) "project owner" means a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project;
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> (6) "subcontractor" means a person to whom a contractor sublets all or part of a contractor's initial undertaking.

Within the above statutory structure, the division contends that Alyeska is a "project owner,"[11] the contractor participants in the Liberty Mutual program are "contractors,"[12] and the program is an "owner controlled insurance program" as that term appears in the statute. Since the program plainly does not insure a "major construction project," the division contends that it is precluded by subsection (a) of the statute.

The literal language of the statute is at odds with this interpretation.[13] The only insurance programs the statute says it regulates are "contractor controlled insurance programs" and "owner controlled insurance programs." All agree that the Liberty Mutual program is not the former. As for the latter, while this term is broad enough in its industry usage to encompass the Alyeska program, the statute defines "owner controlled insurance program" more narrowly than its general industry usage. It has been defined in such a way that, in order to be such a program, a program must involve insurance procured on behalf of "a project owner, its agent, or its representative." Of these three choices, the division characterizes Alyeska as a "project owner."[14] However, the statute defines "project owner" as one who engages a contractor to

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[11] Response of division's counsel to query at oral argument, May 4, 2007.

[12] *Id.*

[13] To her credit, counsel for the division was frank in acknowledging this difficulty at oral argument.

[14] It might be more apt for the staff to characterize Alyeska as the agent of the TAPS owners, who are a consortium of oil companies, but the distinction is immaterial for the purposes of this case.

work "on a construction project." This does not describe Alyeska, which has engaged the other members of the insurance program for a variety on ongoing services, not for construction.

The statute also defines "owner controlled insurance program" in such a way that, in order to be such a program, a program must have the purpose of insuring the owner and one or more of five types of service provider. Of these five choices, the staff characterizes Alyeska's service providers as "contractors." But the statute defines "contractor" to include only those who "undertake[] the performance of a construction project." This does not describe the Alyeska contractors, who have undertaken a range of non-construction tasks.

In two respects, therefore, the Liberty Mutual program does not fit within the definition of an "owner controlled insurance program" that the statute supplies. Importantly, the statute has not been written—as it certainly could have been—to *prohibit* programs that do not fit within this definition; instead, it has been drafted so that programs that *do* fit the definition are regulated. By its terms, the statute only regulates "owner controlled insurance programs" and "contractor controlled insurance programs." Programs that are not one of these are outside the apparent scope of the statute. The result of a literal reading of the statute is not absurd: it yields a statute that addresses only construction OCIPs, that ensures that construction OCIPs will only be used for large projects, and that requires director approval even for large construction OCIPs. The result is a statute that makes sense but that is limited in breadth of coverage.

B. Legislative History

The division objects to the literal reading because it does not correspond to what the drafters and proponents of the statute thought they were accomplishing.

AS 21.36.065 came into being in 2005 as an amendment to a Governor's omnibus bill on insurance, HB 147. An industry trade group suggested the amendment to Representative Tom Anderson, then the Chair of the House Labor and Commerce Committee. The group provided draft language and a memo from their attorney.[15] The trade group contended that "there has been a disturbing trend toward the use of OCIP's . . . for operations, maintenance and repair work at various facilities around the State."[16] They said that "the proposed legislation prohibits the use of OCIP's . . . outside the construction industry."[17]

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[15] First Div. Ex. 5 at 3-6; First Div. Ex. 6 at 3-7.

[16] First Div. Ex. 6 at 4 (Memo from group's private attorney, Feb. 2, 2005).

[17] *Id.* at 5.

The language the trade group supplied was similar to the language of AS 21.36.065 as finally enacted. It contained a single operative provision, subsection (a), that regulated only "owner controlled insurance programs" and "contractor controlled insurance programs." It defined "owner controlled insurance program" to be a program involving a "project owner" or person acting on behalf of a "project owner" and a contractor, subcontractor, architect, engineer, or person performing professional services. It defined "project owner" and "contractor" in such a way that they were restricted to entities involved in a "construction project." It defined "construction project" narrowly, expressly excluding from the definition "the operation, maintenance or repair of structures, buildings, facilities, or roadways, even if such activities include minor construction activities."[18] Only an OCIP for a "construction project" was subject to the restrictions in subsection (a).

In short, the trade group's proposed legislation was misdrafted. While the surrounding documentation makes perfectly clear the group's intent to "prohibit[] the use of OCIP's . . . outside the construction industry," the group's private attorney wrote language that instead defined non-construction OCIPs out of the scope of the legislation, leaving them unregulated.

This language then apparently went to Legislative Legal Services, who made stylistic changes but, as befits their role, kept the language functionally equivalent to what they had been given as a model. Following this stylistic revision, the provision on OCIPs made its first appearance in the legislature on March 30, 2005 as part of a proposed committee substitute for the Governor's omnibus insurance bill, HB 147.[19] Chairman Anderson placed the committee substitute before the committee as a proposed replacement to a prior version they had been considering, assuring them the agenda item would only take "about five minutes."[20] He quickly listed a number of changes, noting that one of them "addresses the limitations on the use of owner-controlled insurance programs . . . to the construction of large $50 million plus projects of public or private nature over a defined period of time at a specific location or region."[21] His remark, in itself, did not unequivocally state that he proposed to eliminate all non-construction OCIPs. However, he then invited Division of Insurance Director Linda Hall to "come up and just – maybe just give a – kind of closing with this amendment, and then we'll hopefully pass the

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[18] First Div. Ex. 6 at 6-7.

[19] Alyeska Ex. V (transcript, House Labor & Commerce Committee, March 30, 2005); Second Div. Ex. 3 at 2-3 (CSHB 147 (L&C)). Apart from its placement within Title 21, this was essentially the final version of the provision.

[20] Alyeska Ex. V at 3 (Agency Record at 2063).

[21] *Id.* at 3-4.

salt."[22] Representative Crawford, after remarking that "this is awfully quick" and "I'm reading as fast as I can," asked Ms. Hall go over the section on OCIPs again.[23] Ms. Hall stated that some had attempted to expand OCIPs "into other than construction projects, ongoing things that in our mind OCIPs were never intended to do."[24] She noted policy problems with that expansion as one of the "motivations" for the section.[25] Although her testimony did not quite say so in so many words, the clear implication that any careful listener would have drawn was that the new language was meant to prevent non-construction OCIPs. Following this discussion, the Labor and Commerce Committee moved HB 147 to its next committee of referral, with Anderson recommending "do pass" and the other five members giving no recommendation.

In subsequent hearings in one other house committee and two senate committees, Director Hall continued to mention the provision as she briefed legislators on the bill as a whole, and her testimony continued to reflect her understanding that non-construction OCIPs were to be prohibited.[26] There was one direct colloquy with a legislator, in which Senator Green asked Ms. Hall if "the desire" would be that "the program 'should not morph' into an ongoing insurance program," and Ms. Hall affirmed.[27] Otherwise, all characterization of the OCIP language came from the witness. The bill passed both houses without apparent controversy with respect to the OCIP provision. After receiving a bill review letter from the Attorney General that did not address whether non-construction OCIPs would be prohibited,[28] Governor Murkowski signed the bill into law.

C. Why the Legislative History Is Insufficient to Override Plain Meaning

Statutory construction "begins with the language of the statute."[29] When interpreting a statute, a tribunal interprets texts, not "disembodied purposes."[30] The search is for what the

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[22] *Id.* at 4.

[23] *Id.* at 6-7. Rep. LeDoux also remarked on the "last minute" nature of the amendment and the lack of discussion. *Id.* at 8-9.

[24] *Id.* at 7.

[25] *Id.* at 8.

[26] Alyeska Ex. W at 12 (House Finance); Div. Ex. 9 at 6-7 (Senate Labor and Commerce re SB 108, a parallel bill); Div. Ex. 10 at 26-27 (Senate Finance re SB 108).

[27] Div. Ex. 10 at 27. In the summary provided, it is not wholly clear what Senator Green meant by "the program."

[28] Second Div. Ex. 1 at 5. Because it potentially affects the Governor's decision on whether to sign a bill, the bill review letter is relevant legislative history. In this case, the Attorney General did not opine in detail about the OCIP provision, and this aspect of the legislative history is essentially neutral.

[29] *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 537 (Alaska 2002).

[30] *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

legislature "meant by *what it said*," not for what it meant to say.[31] This is because the text, and the text alone, is the law under our constitutional structure. As a federal judge once said in a thoughtful discussion of the role of legislative history:

> Desires become rules only after clearing procedural hurdles, designed to encourage deliberation and expose proposals . . . to public view and recorded vote. . . . It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators.[32]

In Alaska, statutes are always interpreted with an eye to the intent of the legislature, but the exercise remains rooted in the language itself, "with due regard for the meaning that the statutory language conveys to others."[33] If the language of the statute has ambiguity, moreover, there is a sliding scale: "the plainer the language, the more convincing contrary legislative history must be."[34]

The standard usage of legislative history in statutory interpretation is to supply the right meaning for undefined terms. Thus, if a statute prohibited billboards in "bright colors" but did not define the phrase "bright colors," one might examine legislative history to try to ascertain if the legislature meant this to be read broadly enough to apply to billboards painted bright blue.[35] Suppose, however, the legislature had included a definition saying that "in this section, 'bright colors' means red, yellow, or orange." Nothing in Alaska caselaw suggests one could enforce such a statute against a bright blue billboard, regardless of whether legislative witnesses or even legislators observed during committee meetings that blue can be a "bright color" and that bright blue billboards mar the landscape.

The crux of this case is the interpretation of the following language in AS 21.36.065(a): "An owner controlled insurance program . . . must be approved by the director, and shall be allowed only for a major construction project." The division staff advocates that "owner controlled insurance program" be read in this sentence according to its broadest industry meaning: every OCIP "must be approved by the director" and every OCIP is approvable only if

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31 *Id.* (quoting Judge Henry Friendly, a leading scholar in this field).

32 *In re Sinclair*, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (italics omitted).

33 *Tesoro*, 42 P.3d at 537 (quoting prior authority).

34 *Id.* (quoting prior authority).

35 An example of this in practice is the *Tesoro* case, *supra*, where the statute at issue did "not define its critical terms 'authorized employee of the state,' 'representative,' or 'designee.'" This led the Alaska Supreme Court to look to legislative history in order to select from various plausible meanings for these terms. 42 P.3d at 537-38.

it is for a "major construction project." This would be a wholly natural reading, except that the legislature supplied its own detailed definition of "owner controlled insurance program," along with definitions of various subsidiary terms in that definition. These definitions would be superfluous to the statute if they were not used to define the terms in subsection (a). When one replaces the defined terms with their definitions, the requirements of (a) apply only to programs procured for "a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project" (or programs procured for such a person's agent or representative).

To override these definitions, the division staff calls upon the statements of a committee witness who, in the course of reviewing a long and complex bill before several committees, noted that her agency's intent in supporting the OCIP provision was to prevent OCIPs outside the construction context. As a legal matter, "the testimony of witnesses before . . . committees prior to passage of legislation is generally weak evidence of legislative intent."[36] Most legislators did not hear these remarks. No written committee reports, no sponsor statements circulated to all members, and no remarks on the floor alerted the body to the view of supporters of the legislation about what this language meant. In these circumstances, it would demean the legislative process to do anything other than apply the language the legislature enacted, using the definitions the legislature provided.

There is no question, of course, that Representative Anderson, the trade group, and the division failed to achieve their full intent with this provision. The remedy is not to ascribe their intent to the legislature as a whole and ignore the language of the law. The remedy is corrective legislation, carefully drafted.

IV. Alyeska's Other Arguments

Alyeska has also argued that the Liberty Mutual program falls within two of the exceptions in AS 21.36.065(b), and that applying AS 21.36.065 to an existing insurance program would be an impermissible retroactive application and an impermissible impairment of contracts. These arguments, which appear less compelling than the one addressed above, need not be resolved because of the conclusion that the program falls wholly outside the scope of AS 21.36.065 as enacted.

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[36] *Unites States v. UPS Customhouse Brokerage, Inc.*, 442 F. Supp. 1290, 1310 (U.S. Ct. Int'l Trade 2006).

V. Conclusion

Because the insurance program that Liberty Mutual Group has placed to provide CGL and workers' compensation insurance for Alyeska and several TAPS contractors does not fall within the narrow statutory definition of "owner controlled insurance program" in AS 21.36.065, the program is not subject to AS 21.36.065(a). Alyeska's March 13, 2007 motion for partial summary adjudication is granted. Paragraph 1 of the "Compliance Issues" in the Cease and Desist Order under review is dismissed. All other matters at issue in this appeal having been resolved by a settlement approved, concurrently with the Adoption set forth below, by the designated final decisionmaker in this action, this appeal is concluded.

DATED this 19th day of July, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE

In the Matter of:	)	
	)	
LIBERTY MUTUAL GROUP	)	OAH NO. 06-0864-INS
	)	
	)	Agency Case No. D 06-12

DEPUTY DIRECTOR'S
DECISION AND FINAL ORDER

This matter concerns a Cease and Desist Order issued by the Director of the Division of Insurance on November 15, 2006 against Liberty Mutual Group.

Facts

Alyeska Pipeline Service Company (hereinafter referred to as "Alyeska") operates the Trans Alaska Pipeline System (hereinafter referred to as "TAPS"). Since 2002, Alyeska has contracted with Liberty Mutual Group to place and administer an insurance program that provides commercial general liability and workers' compensation for Alyeska and for several TAPS contractors. The TAPS service providers supply maintenance, warehousing, security, lodging, catering, medical response, surveying, monitoring, and ship escort services, as well as spill response and contingency plan services. None of the services involve construction or a major renovation of a structure, building, facility, or roadway having a contract cost of $50 million with a definite term at a geographically defined project site. *Decision and Order Granting Summary Adjudication*, July 19, 2007 at pp. 2-3 (Hereinafter referred to as "*Decision*").

The insurance program for Alyeska and the five TAPS service providers are generally referred to in the industry as an Owner Controlled Insurance Program (hereinafter known as "OCIP"). OCIPs are a common way of insuring large construction projects. Prior to legislation passed in 2005, there were no provisions of Alaska law specific to OCIPs. *Decision* at p. 2.

After significant correspondence between the Division and Alyeska, on November 15, 2006, the Division issued a Cease and Desist order to Alyeska. This action followed. Among the procedural events that occurred in this case, on March 13, 2007, Alyeska filed a motion for summary judgment on the issue of whether its OCIP violated AS 21.36.065.

By order of Director Linda Hall, this matter has been delegated to me as Deputy Director.

In July 2007, the Division and Liberty Mutual entered into a settlement agreement resolving all issues outstanding in this matter, except the issue of whether or not the OCIP violated AS 21.36.065. Alyeska's summary judgment motion was left outstanding, and after briefing among the parties, the ALJ concluded that the OCIP did not violate AS 21.36.065. The ALJ

reads the plain language of AS 21.36.065 not to prohibit OCIPs that do not meet the statutory criteria, but merely to provide for the regulation of those entities.

I have concluded that, while the ALJ's reading of the statute language is not unreasonable, it is not necessarily the only reasonable, nor the best, reading of the statute. The Division's interpretation--that the statute prohibits OCIPs that are not approved by the director--is also a reasonable interpretation, and a better reading, and one that is supported by the legislative history. Given the State of Alaska's law on statutory construction, I believe that the Division's interpretation of the statute is correct, and I affirm Count One of the Cease and Desist order.

AS 21.36.065 states:

> (a) An owner controlled insurance program or a contractor controlled insurance program is subject to both AS 21.39 and AS 21.42, must be approved by the director, and shall be allowed only for a major construction project. Owner controlled and contractor controlled insurance programs are limited to property insurance as defined in AS 21.12.060 and casualty insurance as defined in AS 21.12.070.
> (b) In this section, an owner controlled or contractor controlled insured program does not include
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> (1) builder's risk or course of construction insurance;
> (2) insurance relating to the transportation of cargo or other property;
> (3) insurance covering one or more affiliates, subsidiaries, partners, or joint venture partners of a person; or
> (4) insurance policies endorsed to name one or more persons as additional insureds.
>
> (c) In this section,
>
> (1) "contractor" means a person who meets the definition of "contractor" in AS 08.18.171 and who undertakes the performance of a construction project for a project owner, its agent, or its representative;
> (2) "contractor controlled insurance program" means an insurance program where one or more insurance policies are procured on behalf of a contractor, its agent, or its representative, by its insurance producer, as defined in AS 21.27.900, or the purpose of insuring the contractor and one or more of the following:
>
> (A) the project owner;
> (B) a subcontractor;
> (C) an architect;
> (D) an engineer; or
> (E) a person performing professional services;
>
> (3) "major construction project" means the process of constructing a structure, building, facility, or roadway or major renovation of more than 50 percent of an existing structure, building, facility, or roadway having a contract cost of more than $50,000,000 of a definite term at a geographically defined project site;
> (4) "owner controlled insurance program" means an insurance program where one or more insurance policies are procured on behalf of a project owner, its agent, or its representative, by its insurance producer, as defined in AS 21.27.900, for the purpose of insuring the project owner and one or more of the following:

(A) the contractor;
(B) a subcontractor;
(C) an architect;
(D) an engineer; or
(E) a person performing professional services;

(5) "project owner" means a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project;

(6) "subcontractor" means a person to whom a contractor sublets all or part of a contractor's initial undertaking.

Statutory Construction

The Division and counsel for Alyeska correctly note that, under Alaska law, statutory construction is intended:

> to give effect to the intent to the legislature, with due regard for the meaning that the statutory language conveys to others. Statutory construction begins with the language of the statute construed in the light of the purpose of the enactment. If the statute is unambiguous and expresses the legislature's intent, statutes will not be modified or extended by judicial construction. If we find a statute ambiguous, we apply a sliding scale of interpretation, where 'the plainer the language, the more convincing contrary legislative history must be.'

Tesoro Petroleum Corp. v. State of Alaska and Bruce M. Botelho, 42 P.3d 31, 537 (Alaska 2002). While legislative history may inform a court's interpretation of an ambiguous statute, where a statute is clear an unambiguous, "and expresses the legislature's intent, a court will not modify it or extend it by judicial construction. *Young v. Embley*, 143 P.3d 936, 944 (Alaska 2006). But, "in cases where the plain language of the statute permits more than one plausible interpretation," *Id.*, Alaska courts use a sliding scale: [T]he plainer the language, the more convincing contrary legislative history must be. *Id*, quoting *Tesoro Petroleum* at 42 P.3d 537 (citation omitted). The Supreme Court of Alaska, has rejected a "mechanical application of the plain meaning rule," *Mueller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996), but has stated that there is a "heavy burden on parties who urge us to adopt an interpretation that appears contrary to a statute's plain language." *Ranney v. Whitewater Engineering*, 122 P.3d 214, 217 (Alaska 2005).

Analysis

The ALJ states that the definition of "owner controlled insurance program" does not apply to Alyeska's Liberty Mutual program. *Decision*, pp. 5-6. Specifically, to be an OCIP, the insurance must be procured by the "project owner" or agent. "Project owner" is defined as one who engages a contractor to work "on a construction project." AS 21.36.065(c)(3). According to this reasoning, because the project is a "maintenance" rather than "construction" project, the Liberty Mutual program is not an OCIP, and is therefore not prohibited by AS 21.36.065. *Id.* I find that the ALJ's interpretation of the statute is a reasonable one, given that the phrase

"construction project" is undefined. But I do not believe that it is the only reasonable reading of the statute, nor the best.

The definition of OCIP applies to a "project owner" that engages the services of a contractor to work on a "construction project." AS 21.36.065(4), (5). As noted above, the term "construction project" is undefined. However, the term "major construction project" is defined in subparagraph (3). All parties agree that the TAPS project is not a "major construction project."

Subsection (a) states that an OCIP is only allowable for a "major construction project." Looking at the statute as a whole, an OCIP may include a construction project, or it may include a major construction project. But OCIPs are only allowed for major construction projects. The difference between the two is significant. Given that Alaska courts "interpret statutes 'so that no part will be inoperative or superfluous, void, or insignificant,'" *Leigh v. Seekins Ford*, 136, P3d 214, 219 (Alaska 2006), *citing*, *City of St. Mary's v. St. Mary's Native Corp.*, 9 P3d 1002, 1008 (Alaska 2000), the difference between a construction project and a major construction project cannot be overlooked or ignored. OCIPs are defined by law to include construction projects. But only major construction projects may be approved by the director.

It is not a stretch to suggest that the maintenance of an aging, approximately 800 mile pipeline is an ongoing "construction project," and that the other services appurtenant thereto--those provided by the TAPS contractors--are routine services that would be provided in a construction project of this nature. I find it significant that earlier language was removed from the bill that would have excluded "maintenance or repair of structures, buildings, facilities, or roadways, even if such activities include minor construction activities" from a proposed definition of "construction project." It is a significant, though not definitive, indication that the legislature intended that such activities may be considered construction projects.

The ALJ did note that Alyeska is not an owner of the pipeline, and reasoned that it could not be a "project owner" as defined by the statute. Again, I find this is a reasonable interpretation. However, the Division's argument that Alyeska is an agent of the pipeline owners and, therefore, stands in the shoes of the project owners, is the better argument, and has support in the principles of agency law. Generally, a common law term used in a statute is generally construed in a manner consistent with the common law definition. *U.S. v. Shabani*, 115 S.Ct. 382, 513 .S. 10, 13, 130 L.Ed.2d 225, 229 1994) *on remand* 48 F.3d 401. Singer, *Southerland Statutory Construction* §§ 50:01-05 (6th Ed. 2000).

For these reasons, it appears that AS 21.36.065 is capable of supporting the construction supported by Alyeska and the ALJ, and the construction supported by the Division. I find that the latter appears to be more consistent with the wording of the statute. However, the statute is ambiguous, and the only tool available to resolve the ambiguity is legislative history.

That legislative history is clear that the intention of the statute is to proscribe OCIPs other than those that meet the criteria set forth in AS 21.36.065(a). Director Hall on several occasions spoke to committees in both houses and expressed her view that this was both the intent and the meaning of the language. In addition, the Labor and Commerce Committee Chair noted that revisions to bill were intended to address "the limitations on the use of owner-controlled

insurance programs . . . to the construction of large $50 million plus projects of public or private nature over a defined period of time at a specific location or region." *Decision* at p. 6. The bill was heard in three other legislative committees. No countervailing opinion was expressed.

The ALJ attempts to minimize the impact of this legislative history by suggesting that the bill language was "industry" language, and minimizing the degree to which the legislators read or were paying attention to the language. That information does not seem relevant to the analysis of either the language or the legislative history, but seems designed to place the statute in a negative light, as an ill-considered and hastily inserted last minute addition to the bill. Criticizing the interest of the supporters of legislation, the legislators who passed it, and questioning whether they paid sufficient attention to the language of the statute is an invitation to begin the statutory interpretation process with the assumption that the job was botched. This error is reflected in the ALJ's statement that if the legislature had intended to ban OCIPs that do not involve major construction projects, it would have done so explicitly. *Decision* at p.5. In my view, they did just that.

Conclusion

For the reasons set forth above, I find that Alyeska's Liberty Mutual insurance program is an OCIP as defined in AS 21.36.065. The OCIP does not meet the requirements of AS 21.36.065(a), and is proscribed by that statute. I reverse the decision of the ALJ with respect to Count One of the Cease and Desist Order, and affirm that count. All other matters related to settlement of the case are affirmed.

DATED this 31st day of October, 2007.

DEPARTMENT OF COMMERCE,
COMMUNITY, AND ECONOMIC
DEVELOPMENT
DIVISION OF INSURANCE

By: _____
Jeffery D. Troutt
Deputy Director