M E M O R A N D U M

DATE: December 20, 1999

TO: Pro Se Subcommittee of Governor's Civil Justice Task Force

FROM: John W. Suthers

SUBJECT: Pro Se Inmate Litigation in Colorado

The volume of pro se inmate litigation and its drain on judicial system resources has been a long standing concern. Legislation has been passed on the federal and state level to attempt to deter frivolous lawsuits by inmates.

Inmates bring pro se civil suits against a variety of individuals and entities. I only have statistics pertaining to pro se inmate suits against the Colorado Department of Corrections and its Executive Director. DOC is presently the defendant in approximately three hundred pro se inmate suits per year. That is down from approximately four hundred suits per year a few years ago. Approximately eighty per cent of the cases are filed in federal court and generally involve a habeas corpus petition, an alleged violation of civil rights, or alleged unconstitutional conditions of confinement. The remainder are filed in state court and typically involve a property issue.

In 1995 and 1998 the Colorado General Assembly promulgated the provisions of Title 13, Article 17.5 of the Colorado Revised Statutes which pertain to inmate litigation. The legislative declaration states:

> The General Assembly declares that the state has a strong interest in limiting substantially frivolous, groundless, or vexatious inmate lawsuits that impose an undue burden on the state judicial system. While recognizing an inmate's right to access the courts for relief from unlawful state actions, the General Assembly finds that a significant number of inmates file substantially frivolous, groundless, or vexatious lawsuits... The General Assembly, therefore, determines that it is necessary to enact legislation that promotes efficiency in the disposition of inmate lawsuits by providing for preliminary matters to be determined by magistrates and to provide for sanctions against inmates who are allowed to file claims against public defendants and those claims were dismissed as frivolous.

The provisions of Title 13, Article 17.5 include a requirement of exhaustion of remedies which prohibits an inmate from bringing a civil action based upon prison conditions under any state statute or constitutional provision until all available administrative remedies have been exhausted. Another provision prohibits an inmate who has brought an action based on prison conditions on three or more occasions which have all been dismissed as frivolous from bringing another such suit unless the inmate has written permission of a judge of the court in which his new action is to be filed. Another provision requires an inmate who files a motion to proceed in forma pauperis (as a poor person) to file an affidavit which includes a copy of the inmate's trust account statement for the six month period immediately preceding the filing of the complain. If the inmate account demonstrates an ability to pay the filing fee, the motion is to be denied. Another provision provides that a court shall stay any state civil action brought by an inmate if there is a federal action or grievance procedure pending that involves the inmate and any of the same issues raised in the state action. Another provision provides that district and county court magistrates may preside over inmate motions and dispose of the inmate's action without the necessity of trial. Another provision provides that any payment of a judgment awarded to an inmate in state court should first go to payment of any outstanding restitution and child support orders against the inmate. Another provision limits recovery of

attorney's fees by inmates. Finally, another provision directs the Department of Law, the Department of Corrections and the State Judicial Department to cooperate to provide a teleconferencing system for conducting proceedings involving inmates. This is to discourage inmates from filing a suit with the motive of getting out of prison to attend court hearings. (Frankly, the federal courts have made much more progress in this regard than the state courts, presumably because of limited resources).

Another provision of Colorado Statute, Section 17-20-114.5 provides that if an inmate brings a federal or state lawsuit in which a judge makes an affirmative finding that the case "lacks substantial justification", the Department of Corrections has the power to deny certain privileges to the inmate for a period not to exceed one hundred twenty days. Privileges which can be denied under the provision include television, radio, entertainment systems, cigarettes (no longer relevant because inmates are prohibited from smoking) and access to canteen. I am told by people in the Department that this sanction has proved relatively ineffective because judges, apparently mindful that privileges can be denied, are extremely reluctant to enter affirmative findings that an inmate lawsuit is frivolous.

Congress has also passed a Prison Litigation Reform Act with a view towards limiting frivolous lawsuits brought by inmates. It has a series of sanctions similar to those provided for under the Colorado State Statute.

The combination of these statutes, in particular the Federal Prison Litigation Reform Act, has resulted in approximately twenty-five per cent reduction in inmate lawsuits over the last several years.

In speaking with people in the Department they are not certain what else could be done to deter frivolous pro se inmate litigation, other than what has already been done. They reiterate that the judges could do a better job of making affirmative findings that inmate litigation is frivolous when requested by the Attorney General's Office, and that the state courts could do a better job, if they had the resources, of providing for teleconferencing which would eliminate the motive of inmates to file state actions for the purpose of getting some time out of prison facilities.

Virtually all the executive staff at Colorado DOC have expressed the opinion to me that frivolous inmate litigation brought by attorneys (whether or not it is perceived to be by judges or juries) is a greater threat to the common good than frivolous pro se inmate litigation.