

ALASKA STATE LEGISLATURE  
**SENATE JUDICIARY COMMITTEE**

June 7, 2001  
1:47 p.m.

**MEMBERS PRESENT**

Senator Robin Taylor, Chair  
Senator Dave Donley, Vice Chair  
Senator John Cowdery  
Senator Gene Therriault  
Senator Johnny Ellis

**OTHER LEGISLATORS PRESENT**

Senator Jerry Ward  
Representative Scott Ogan  
Representative Jeanette James  
Representative John Coghill

**MEMBERS ABSENT**

All Members Present

**COMMITTEE CALENDAR**

Current Status of Katie John Case

**WITNESS REGISTER**

Carl Rosier  
President  
Alaska Outdoor Council  
8298 Garnet St.  
Juneau, AK

Ron Somerville  
Natural Resources Consultant to the  
House and Senate Majorities  
Alaska State Capitol  
Juneau, AK 99801-1182

Ted Popely  
Legislative Counsel  
Majority Legal Office  
716 W 4th Ave. Ste. 540  
Anchorage, AK 99501-2133

Lynn Levensgood  
Alaska Wildlife Conservation Alliance  
931 Vide Way  
Fairbanks, AK

**ACTION NARRATIVE**

**TAPE 01-35, SIDE A**

Number 001

**CHAIRMAN ROBIN TAYLOR** called the Senate Judiciary Committee meeting to order at 1:47 p.m. Present were Senators Cowdery, Donley Therriault, Ellis and Chairman Taylor. Also present were Senator Ward and Representatives James and Coghill. Representative Ogan arrived at 1:48 p.m.

[THE FOLLOWING IS A VERBATIM TRANSCRIPT.]

CHAIRMAN TAYLOR: ... hear an address, by the Attorney General's Office or the Administration and by interested citizens, on the current status of the Katie John appeal, which, to quote the Governor, 'is all about state sovereignty.' We have contacted, and had contacted, prior to this meeting, at about 11:45, 11:50, today, the Attorney General's Office and the Attorney General to inquire if he was in and was available, and he was. We then announced this meeting and called back only to find out that he has left the building and he is on a Boy Scout hike and will not be able to complete that until late into the evening tonight or early tomorrow morning. We then requested the administration - specifically talked to Mr. Mike Abbott - if there was not someone else in the Attorney General's Office, Joanne Grace or one of the other fine attorneys that has worked on the Katie John case and others for years and are here in the community, if they could not be made available to brief the committee on the current status of this case.

As we all know from the news, the Ninth Circuit Court of Appeals rendered a decision against the State of Alaska on this issue and the period of time is now running during which the State of Alaska, through the Administration, would bring an appeal to our United States Supreme Court. What we were hoping for today was at least some indication from the administration as concerns the status of that appeal, and their briefing schedule and how they are progressing. In the past, they have sometimes requested additional funds from the legislature for those purposes on various appeals, and the timing could not be better than to utilize the opportunity for the legislature to be in special session in Juneau with

Legislative Budget and Audit meeting tomorrow morning, to take the opportunity to find out if the administration has sufficient funds and has sufficient briefing been done and is prepared to move forward.

When we contacted the Governor's Office, and that's one reason we've been delayed for about 15-20 minutes, to talk with Mr. Abbott, I asked that if the Governor was available maybe he could address the committee, or someone that he would delegate within his staff. And, though he is in the building and available, he will not address the committee either, nor has he authorized anyone on his staff to do so.

As this is a matter of significant import, and I would like to - I distributed to the committee an article that was drafted by the Governor and appeared in the March 3rd, 2000, Friday issue, of the Anchorage Daily News, in their Metro section, and I'll quote from that, it said, 'With passage of the Submerged Lands Act, Congress affirmed a constitutional doctrine giving states control over all natural waters.' I'm only going to paraphrase this. The Governor then said quote, 'No governor of any state would or should ever voluntarily relinquish this authority back to the federal government. As Alaska's governor, I believe it is my clear responsibility, even in face of a difficult political battle, to vigorously defend this important aspect of state sovereignty. That was certainly my position as a candidate for this office six years' ago, and it was my position in 1995 when I fought in court a federal attempt to take this authority from Alaska. It remains my firm stand today, as I appeal the same case to the Ninth Circuit Court of Appeals, and to the Supreme Court if necessary. That case is Katie John v. United States.

It's our fervent hope that the Governor is still maintaining that same position and is going to be good to his word on that issue and the commitment that he has made to Alaskans on that issue and, the purpose of our hearing today was, again, to find out what is the status of that appeal and how are we proceeding.

With that, we have on-line ....

SENATOR ELLIS: Mr. Chairman?

CHAIRMAN TAYLOR: Yes, go ahead.

SENATOR ELLIS: I have a question for you before we proceed. I understand - you mentioned about the timing of the court and the ticking of the clock - I understand that but what I don't understand is why you scheduled this meeting in such a way that

it's delayed the work of the [Senate] Transportation Committee by some amount of time on the subject of the special session, cruiseship pollution. Couldn't we have had this meeting after [Senate] Transportation's worked on the bill we're supposed to be working on here today?

CHAIRMAN TAYLOR: Well it's an important issue and this was the best window of opportunity to have a hearing before the committee work started conflicting members because, as you know, many of the members who serve right here on the [Senate] Judiciary Committee also serve on both the Transportation Committee and also the [Senate] Resources Committee, each of which have to take that bill up. And, we felt since the Attorney General was in the building and the Governor was also available, that we could have a quick briefing and then move on as opposed to try and schedule a hearing at a later date when we'd have a lot of conflict within the membership. That was the primary reason.

SENATOR ELLIS: I just thought the House - or Senate - Transportation was scheduled to meet at 1:00 and they've put off their meeting until [3:00]. It's only two hours but folks do want to go home from the special session and achieve the cruiseship pollution bill so I think the scheduling of this meeting - it's an important topic but probably unfortunate timing.

SENATOR DONLEY: Mr. Chairman?

CHAIRMAN TAYLOR: Senator Donley.

SENATOR DONLEY: I think it's amazingly unfortunate that since the Governor got to choose the date of this special session, the Attorney General wouldn't be available and be in this building at all times during the legislative special session that the Governor chose to call. That's what I find really amazing.

CHAIRMAN TAYLOR: With those angst and frustrations out, let's proceed on and take some testimony and hopefully the administration is still considering whether or not to send someone down. They said they had - I thought it was fascinating that they said they had discussed this very topic and whether or not they would appear at a hearing this morning - Mr. Abbott's words. So, with that, Mr. Carl Rosier, are you on-line?

MR. CARL ROSIER, Alaska Outdoor Council: Yes I am, Mr. Chairman.

CHAIRMAN TAYLOR: Mr. Rosier, in the Governor's statement made March 3rd of 2000, he very clearly stated that no state would or should ever voluntarily relinquish this authority and he

specifically talked about the state's ability to manage natural resources. Could you tell the committee what resources he may have been discussing?

MR. ROSIER: Well, I'm sure he's referencing the fish and game resources of this state and, of course, I'm quite familiar with the Governor's statement back, a little over a year ago, on this and I'm really pleased the committee is, in fact, moving ahead with a hearing on this because this is probably one of the most important and most crucial issues on the agenda at the present time.

CHAIRMAN TAYLOR: Mr. Rosier, can you tell us whether or not you've had any briefing on the Katie John appeal and, if so, what the recommendations or prognosis that you've received might have been on that appeal to the U.S. Supreme Court?

MR. ROSIER: We have not had any briefing on the appeal. That's probably the best kept secret going but we keep getting bits and pieces. Of course, the rumor mills are quite busy on this and we keep hearing these rumors that, you know, basically, [indisc.] has mounted a tremendous effort, pressure - effort here to [indisc.] in fact appeal on this. We've certainly written letters to the Governor and have had no response so far from the Governor's Office one way or the other. [Indisc.] individuals in the Governor's Office who will remain unnamed, who could shed virtually no light on this and they had nothing to do with this. They were not in the loop and were not informed on the issue so, basically everybody's been kind of reacting, so to speak, to the rumor mill, to apparently what the Governor's position is going to be. And, what I'm saying is the Governor has not made up his mind. Others have said that in response to questions of why he might not, that this case has already been sent to the Supreme Court and has been returned by the Supreme Court so there was no real need to go beyond the Ninth Circuit decision. I think the public needs to be - understand that the case did go to the federal Supreme Court at one point in time but it was sent back for a lower court review. There was no ruling or anything else. It was just sent back for a lower court review. So, it's the best kept secret in the world here at the present time as to what the Governor's position is going to be.

CHAIRMAN TAYLOR: Okay, thank you. Other questions? Yes. I might note for the record that not only do we have the Senate Judiciary Committee present, that being Senators Therriault, Donley, Ellis, Cowdery and myself, Chair, but also that we have Senator Jerry Ward as a guest and members of the House Judiciary Committee, Representative Scott Ogan, Representative John Coghill, and Representative Jeanette James. Excuse me, Jeanette, and

Representative Ogan, you had a question.

Number 733

REPRESENTATIVE OGAN: Thank you, Mr. Chairman. Now Carl, just for the record, you're a former Commissioner of the Department of Fish and Game. Is that correct?

MR. ROSIER: That's correct.

REPRESENTATIVE OGAN: And Carl, in your opinion, if Katie John is not appealed, what do you predict for the consequences on the fisheries in Alaska would be?

MR. ROSIER: I think it will be totally disastrous. I think what you see right now happening is you've got individual incidences of what the federal subsistence board has taken action that goes far beyond anything associated with any biological management, strictly political decisions - my point specifically is such things as the Kenai Peninsula, the fact that they designated the entire Kenai Peninsula rural on this thing. The recent closure of the Kuskokwim and the Yukon Rivers - you know, the whole sport fishing and commercial fishing, they're closing without any data or information on this and, of course, right now we have a [indisc.] number of proposals here for Southeastern Alaska that's going to affect both recreational as well as commercial fisheries here in regards to the demand by some individuals in Sitka wanting to re-establish coho as a subsistence species and basically close out the commercial and recreational harvesting of these over a large area of Southeastern Alaska so it's the same type of management in my view that we saw happening prior to Statehood. The decisions get made, the perfunctory public hearings are held. They are ignored. The regulations come out and restrict according to whatever the bureaucrats want.

REPRESENTATIVE OGAN: Thank you, Mr. Chairman. Carl, I don't know if you would agree with this statement but I find it kind of curious that we are here on basically a state sovereignty issue over cruise ships and managing cruise ships on navigable waters and yet we can't get a commitment from the Governor on whether or not he's going to appeal for sovereign rights to manage our fisheries. Do you find that kind of a perplexing dichotomy as I do?

MR. ROSIER: Well, I certainly do and while I consider the cruise ship issue to be an important one that we should be finding a resolution to here, this issue of Katie John is, in my mind, got a great deal more importance as an issue affecting not just a few people but all of the people of the state quite frankly.

CHAIRMAN TAYLOR: Well Carl, thank you very much. Other questions? Representative James.

REPRESENTATIVE JAMES: Carl, I have a question. It has been brought to my attention that in the Yukon River, which I have a lot of folks involved in that in my area, that I agree you already made the statement that the federal subsistence board shut down the fishing before they even had an idea about how many fish they were going to have. But, I understand another provision that they have suggested is that if you don't have an address on the Yukon River that you will not be able to be involved in subsistence. You know, I'm thinking of that because of the rampart area where they closed the school last year and all those folks have moved away. [Is] that going to mean that they're not entitled to subsistence? Do you think that the federal government has thought far enough ahead as to what they're doing or what would be your take on that?

MR. ROSIER: Well, in all seriousness I doubt it very much. I think that basically they're - as I've looked at the actions of the federal agencies on this, basically they've looked at their subsistence priority and I think that, in announcing the closure, they talked about - well, it's a priority and that's what we're going, you know that's what we're going to manage for and the - with everything else, I know that that's not important. We've either got a priority or we don't have a priority and that's how they're basing their decisions.

REPRESENTATIVE JAMES: Thank you.

CHAIRMAN TAYLOR: Any further questions? Ron, I just wanted to remind you of the Governor's article, which I read earlier, and ask you this one last question where he said, 'As I appeal the same case to the Ninth Circuit today' - Ninth Circuit Court of Appeals, he then said, 'And to the Supreme Court if necessary.' Do you have any reason to believe the Governor has changed his mind or is going back on that commitment?

MR. ROSIER: Well, I'm really uneasy. Again, I'm reacting somewhat to kind of the rumor mills that are out there because there hasn't been any definitive statement that's been put out by the administration so, you know, the rumors that we hear are not good rumors and I don't know whether that's someone's high paranoia level but believe me, the bulk of what we're hearing off of the street is that in direct questions on this, the Governor has refused to answer the questions and has generally talked around the subject. We've given no real indications of really supporting that statement and that earlier release that you're referencing there

Senator.

CHAIRMAN TAYLOR: Yea, well thank you very much. I note that Ron Somerville has arrived. Ron, would you please come forward? Ron, we're discussing the current status of the Katie John appeal and the fact that the time is running. It is my understanding it runs in August. Could you give us first your full name please?

MR. RON SOMERVILLE, Resource Consultant, House and Senate Majorities: Yes, Mr. Chairman, my name is Ron Somerville. I am the Resource Consultant to both the House and Senate Majorities. In response to your question, yes it is in the first part of August. I think it's August 5th or 2nd, something like that.

CHAIRMAN TAYLOR: And can you give us a little of your background? What is your resume, so to speak, briefly?

MR. SOMERVILLE: Well, I'm virtually a lifelong Alaskan. I've worked 24 years for Fish and Game and I have spent forever on D-2 legislation and joined the Governor's Task Force in 1974, in fact. I have worked of course, now, this is the seventh year with the legislature as a resource consultant. One of the issues we've dealt with, of course, has been the subsistence issue.

CHAIRMAN TAYLOR: Ron, the concern that we have at this point is the Governor made a statement in 2000 - March of 2000 - where he wrote a Metro article himself. He wasn't quoted by someone else. These were his actual words where he said he stood firm in his commitment to appeal the Katie John case to the Ninth Circuit Court of Appeals and the direct quote that he had, in here, was '... and to the Supreme Court if necessary.' Now that Katie John has come down from the Ninth Circuit and the only appeal available is that to the U.S. Supreme Court, have you had any discussions on behalf of the Legislature, the Majorities that you work with, with the Attorney General recently on this very subject?

MR. SOMERVILLE: Yes, Mr. Chairman. A week ago I met with the Attorney General on three or four subjects that the Legislature claims as a high priority, one, of course, being the Katie John case. At the time, he indicated to me that the Governor had not made a decision to appeal the Katie John case.

CHAIRMAN TAYLOR: It sounded very strong in this article the Governor wrote that he had made that decision and had committed not only at that time, but also that he stated that was his position in '95 and when he ran for office and that this was a very important thing to him and I can't imagine a clearer statement than the one made there. Are you indicating that as far as the Attorney General

knows at this point that that decision is up in the air or that he's taking that back somehow?

MR. SOMERVILLE: Well, Mr. Chairman, and you understand as well as anybody that that's what he told me as purely a representative from the Legislature the Governor could have made a decision the Attorney General wasn't free to tell me. The Attorney General did say that the Governor is in a hell of a bind, if I might say, because apparently the Alaska Federation of Natives made it really clear that they don't want the appeal and that, as he indicated, that they did not support a constitutional amendment if, in fact, the Governor went forward with the appeal. So, the question, I'm sure, in the Governor's mind is where do we stand then if we appeal and win it or appeal and lose it without the support of the Native community. In fact, when we get some resolution of this issue, that's about as much as the Attorney General felt free to offer me but he did say at the time that the decision had not been made - as of a week ago.

CHAIRMAN TAYLOR: Okay. Ron, were you here for the testimony of Mr. Carl Rosier?

MR. SOMERVILLE: Mr. Chairman, I just caught the tail end of it. I'm sorry I was in Auke Bay when I got the call to come.

CHAIRMAN TAYLOR: Well, in the statement the Governor also stated no governor of any state would or should ever voluntarily relinquish this authority - navigable waters authority back to the federal government. What happens if this case is not appealed?

MR. SOMERVILLE: Well, it's an interesting scenario because we have a state supreme court decision, the Totemof case, which says that the federal government has personally no jurisdiction in the state navigable waters. I posed the question to the Attorney General's staff. I said what if this is not appealed? Is the state bound by the Ninth Circuit Court ruling in light of the Supreme Court's ruling? In other words, if somebody goes out and violates the federal law, or the state law - vice versa, can they still be cited by the other party - the feds or the state, as it may be? Are we bound by the state supreme court decision or not? I didn't get an answer to that. It's not clear.

CHAIRMAN TAYLOR: Well the Governor actually said in that March 3rd article, quote, 'The state supreme court has ruled exactly the opposite of federal court and unanimously said the State of Alaska controls all navigable waters. Is it fair to say - was the Governor making an accurate statement there when he said that the Katie John appeal is about quote, 'state sovereignty'?

MR. SOMERVILLE: Mr. Chairman, I know that there was a meeting recently as a result of the Millennium Agreement with 64 of the tribal governments that the Governor has established, you know, the government-to-government relationship and this issue came up. I think Mr. Popely is on-line. He might be able to answer whether or not the Governor feels bound by the Supreme Court's decision, because I think that was part of the discussion. I was not there at that.

CHAIRMAN TAYLOR: Well thank you, Ron, for that. Further questions? Yes, Senator Therriault.

SENATOR THERRIAULT: And the final decision date is August 5th did you say?

MR. SOMERVILLE: Mr. Chairman, I'd have to look it up but it's the first - it's the second or fifth of August, I believe. It's 90 days from the date that the decision was rendered.

SENATOR THERRIAULT: Well there's been some discussion of whether the Legislature has any different standing than it did with previous court cases and whether the Legislature, or [Legislative] Council, on behalf of the Legislature, could somehow continue the case. Are we basically in the same situation where it's the Governor and only the Governor that can press the case in court?

MR. SOMERVILLE: Mr. Chairman, Senator Therriault, my understanding in talking to staff, again, is something you could probably pose to your legal counsel Ted Popely, but what I've been told is the Legislature does not have standing to appeal this case. I mean it's similar to the Venetie case and at other times the legislature's attempted to intervene in this type of litigation. Interestingly, one party that might have the option of responding to this negative ruling, as far as we're concerned, is the federal government. I mean the feds were targeted along with the state and the federal government's original position on this issue was that they had no jurisdiction in the state navigable waters. That thus changed subsequently to the fact that they said, well where we have a reserve water right we do have some interest in thus title, interest in order to regulate for subsistence purposes. I'm just raising that as - the only other party that we know of that might even have a remote chance of appealing if the Governor doesn't is the federal government. Mr. Chairman, if I might - one question that has been posed by a couple of legislators is what happens if it's not appealed? Is this whole case dead? Not necessarily. It just means that some private party, the state at some future date, has to go through the whole process again. If some party on the

Yukon, for instance, or Kuskokwim chooses to go out and violate the federal governments dictate here of no commercial sport fishing, and fishes in what they believe are state waters, they're arrested, they then could go through the same process. The unfortunate part is you'd have to build the same record, you'd have to go through the same thing to the Ninth Circuit Court - the district court, the Ninth Circuit Court and then hopefully on to the Supreme Court.

Number 1481

CHAIRMAN TAYLOR: You mean that would mean years and years and years of additional litigation if this matter is not now appealed. Representative James? I'm sorry. Senator Therriault are you done?

SENATOR THERRIAULT: Yes.

CHAIRMAN TAYLOR: Thank you. Representative James.

REPRESENTATIVE JAMES: Yea, Ron, on that piggy-backing on your discussion there, it appears to me that the situation that we have on the Yukon River drainage, as it is, if the federal government is going to disallow some of even the subsistence fishermen in that area, that they might be a party that would be dissenting on this issue and might be a very valid challenge. Would you, because they are disallowed, because they don't have an address on the ...?

MR. SOMERVILLE: Yes Representative James, that's correct. I mean it's possible that more than likely would be other parties but you're right, that is a possibility.

REPRESENTATIVE JAMES: They could join in with others? [No response.]

CHAIRMAN TAYLOR: Thank you very much Ron. We'll turn to - oh, I'm sorry, Senator Cowdery?

SENATOR COWDERY: Not through Ron - I just, I've heard maybe Senator Donley can clarify, that the Ninth Circuit doesn't have a good track record of the hope of their decisions being held up by the Supreme Court and, if that is so, it just seems absolutely crazy that we don't go forward with this. If Senator Donley or yourself could ....

CHAIRMAN TAYLOR: Senator Donley, could you comment on that for the record?

SENATOR DONLEY: The last time, as I saw Mr. Chairman, is that the cases the Supreme Court has taken on appeal from the Ninth Circuit,

the Supreme Court has overruled the Ninth Circuit in 85 percent of those cases.

CHAIRMAN TAYLOR: 85 percent.

SENATOR DONLEY: That was the last numbers I heard.

SENATOR COWDERY: I don't know what - why we would not already have did this. I mean, obviously the Governor must know, you know we should put political things aside and look out for the people of the state of Alaska and I think it's very important to the state of Alaska.

CHAIRMAN TAYLOR: Mr. Popely - oh, excuse me.

MR. SOMERVILLE: Yes, Mr. Chairman. One thing I'd like to point out is that at instructions of the leadership, we have been contacting other states and just, you know, essentially in friendly debate over the result of this ruling. And other states - I mean 14 of them signed on to an amicus brief and the ruling, as it relates to the reserve water rights issue is of major interest, particularly to the western states. And, if the Governor doesn't appeal this, there's going to be - some states in the West are going to be really concerned about the long term implications of it. I just raise that because it's not just an Alaskan issue, contrary to what some people have said.

CHAIRMAN TAYLOR: So not only does it affect Alaska directly, but it's going to directly have a major impact on at least 14 other states who took the time to file amicus briefs on our behalf in this appeal.

MR. SOMERVILLE: That's correct. Mr. Chairman, I'd also point out that some of the arguments that we've heard recently is that while - if - the fact is it's not appealed, the legislature passes a constitutional amendment, you go back to pre-McDowell and everything is okay, at least we'd like to point out that the federal oversight issue, and I think I pointed out to the committee before and I was director of wildlife when we managed walrus, we had a federal oversight system and it got so burdensome that our game board finally said we quit, we're giving it back because they were requesting us to do things that they couldn't legally do under the law themselves and all I'm saying is once they're there, on the presence of the federal government, the heavy hand is always there and I feel, I would predict that if we don't go forward with this appeal, get it heard by the Supreme Court, get some finality one way or the other, that we'll be back in this situation in another nine or 12 years anyway because, at some point, the federal

government is going to require the state to do something or else you'll be out of compliance. If they put some requirement there and say you have to do this, or you're out of compliance, and the state refuses to do it, you gotta go through this process again. You gotta go to the Supreme Court and find out what Congress intended as far as the territorial jurisdiction of the federal government and that's an argument certainly.

CHAIRMAN TAYLOR: Well thank you very much. Ted Popely, are you on line?

MR. TED POPELY, Legislative Majority Counsel: Yes, Mr. Chairman. Ted Popely, Majority Counsel in Anchorage.

CHAIRMAN TAYLOR: Ted, some questions were raised. The first is when does the time in which the Governor can bring this appeal, when does that time run?

MR. POPELY: Mr. Chairman, under the appellate rules, the supreme court procedure is 90 days from the date of issue of the Ninth Circuit [indisc.] and Ron is correct, August 5th, from my recollection, is approximately the date when the state would have to file its petition or notice of intent to appeal on this case.

CHAIRMAN TAYLOR: Have you had any discussions with the Attorney General's Office on this matter? I mean the Governor was very clear in his stand and I can't imagine him not following through with that commitment but have you had any discussion with them about this matter?

MR. POPELY: Mr. Chairman, I have not had any personal discussions with the Governor's or the Attorney General's staff about this - the decision whether or not to appeal the case. I sat in [indisc.] with the Governor on teleconference and others from his office as the [indisc.] at meetings a couple of weeks ago and the topic did come up and the Governor addressed the group on teleconference, I believe from Juneau, and didn't give an indication one way or the other and he simply [indisc.] that he was considering the topic and would issue his decision in an indefinite time in the future.

CHAIRMAN TAYLOR: You've heard of the testimony of Mr. Ron Somerville and also Carl Rosier.

MR. POPELY: Yes, sir.

CHAIRMAN TAYLOR: And is there anything that you would add to the concerns that they have shared with the committee about the significance of a failure to appeal this matter and what

significance that would have to our state sovereignty?

MR. POPELY: Mr. Chairman, I have nothing more substantive to add. I would reiterate that what you've already heard is true. This case is like all federal appellate cases, an old case. You know, the wheels of justice turn very slowly and in this case it is no different. If this case is not appealed to the Supreme Court it could be a very long time before another litigant raises this identical issue and gets through the district court and the Ninth Circuit level, complete with any remand that may take place as it did in this case and then get it all the way up to a petition for certiorari, which may or may not be granted by the United States Supreme Court. I think the Supreme Court is in a favorable position right now as far as the State of Alaska is concerned to issue the kind of ruling we'd like to see in this case. The timing would be good - that's clear.

CHAIRMAN TAYLOR: Yes, thank you. Representative Coghill?

Number 1800

REPRESENTATIVE COGHILL: Mr. Popely, Senator Therriault brought up the standing of the legislature. I know we have an amicus brief but is there any recourse if this is not appealed to the legislature - I mean is there any recourse to the legislature if this is not appealed?

MR. POPELY: Mr. Chairman and Representative Coghill, unfortunately there is no procedural mechanism that I know of that we would likely succeed on in order to bring this case in the shoes of the administration. It has been handed, repeatedly, from the federal circuit that had denied our interest in pursuing an appeal like this and getting standing. If the Governor makes the decision not to appeal this case, as far as I know, that is it. This case will stand with the full circuit opinion - or the Ninth Circuit - and that is where it will land until there is another case brought by another party. That's [indisc.]. We function only as a major as an amicus in this case, and if the parties in the case don't file an appeal, we go away with the case.

CHAIRMAN TAYLOR: Representative James.

REPRESENTATIVE JAMES: This is - and you just summed up in your final statement a question I was going to ask but, I guess I'll go and ask it anyway - is if there's another infraction and another case brought forward and, of course, this one is from a 1990 case, I believe - isn't it, or is it before that? And so here we are, 11 years later, finally just getting through the Ninth Circuit, so I

suppose that if we did have another case, we could anticipate it to go more than that, but isn't there a possibility of a governor of a state filing a case directly going to the Supreme Court without going through all those other steps to challenge this issue? Can't the Governor do that?

MR. POPELY: Representative James, through the Chair, it's possible there are direct action lawsuits where a state sues the federal government directly to the United States Supreme Court. They are extremely rare and I don't think that this is one of the cases where that would probably succeed. With respect to other states bringing a case of this nature, again, it's highly unlikely that you would find this exact issue on point in another state because this one, really, specifically addresses [indisc.], something that's called dicta, a Supreme Court opinion that would address our issues but the primary issue on appeal and the one that the Supreme Court would be directly ruling on - the one that would be [indisc.] precedential is whether or not the federal government cannot decide control over the status of fish and game in navigable waters where the United States has a reserved water right. There are other issues that can arise with respect to what the federal government's interest is in reserve waters around the country, but of this particular case, probably not. As an example, one of the interesting things that sort of lends itself to this case warranting an appeal, there was a United States Supreme Court opinion that came down after this case was argued in January - the solid waste case, which was addressed by a majority and a dissenting opinion. In the Katie John case, there was a case in Illinois where there was a question about navigable waters and the judges on the Ninth Circuit panel disagreed as to the [indisc.] of that case. On this case, the dissenters felt very strongly that that case was on point and would direct the Ninth Circuit to rule in the state's favor on this case. The majority, unfortunately, did not think so but, from the state's perspective, that certainly is a case that works to our advantage. The United States Supreme Court held in that case that there is a question over the federal government's exercise and jurisdiction in navigable waterways within a state. Unless Congress clearly intended to remove traditional state power by control of those waters, it has to say so very clearly and specifically on how they did not do that in that case. The State of Alaska's argument in that case would of course be that without your recent Supreme Court case law, it's controlling in this case and that's the end of the argument right there. Recently [indisc.] might be off point but, again, the majority of the judges in this case, and I certainly chose not to follow that reasoning.

REPRESENTATIVE JAMES: Thank you.

CHAIRMAN TAYLOR: Thank you. Ted, I have two more questions for you. The first is what used to be called the Glacier Bay suit, followed by this administration. It was then amended and became known by the vernacular of Southeast Waters case. It currently involves all of the waters of Southeast Alaska. That is a direct action suit brought by the Governor directly to the Supreme Court on the issue of submerged lands and the water columns above them. That's our three-mile limit. That's the very same three miles we're worried about all the pollution going into right now. We won't control it if we don't do something about this today. If you could, please, explain to me the logic that would flow from the administration filing a suit directly in the U.S. Supreme Court to protect state sovereignty over Southeast waters, and yet failing to file an appeal on Katie John, which involves the regulation of those very same state waters, navigable waters by the federal government.

MR. POPELY: Mr. Chairman, certainly the reasons that lie behind the Governor's decision on this case is [indisc.]. I can't glean that for you. I don't think anybody in the room probably can. The Attorney General has made it very clear that the Governor's going to make a decision and in litigation of this sort in the past is often a political decision. That's, I think, why you probably called this hearing is to get a better gauge of what the politics are behind what the Governor is going to do in this case. I certainly, as an attorney, can't give you any reasonable arguments for addressing a state jurisdictional matter in one case and choosing not to assert those arguments that are similar in another case. It's going to be a political question that the Governor's going to answer and unfortunately we're going to be stuck with it.

CHAIRMAN TAYLOR: Okay, let me ask you my second question. Each of us who sits here and is elected to office must raise their right hand and be sworn into office and part of that oath requires that we uphold the laws of the State of Alaska and the Constitution of the State of Alaska. The Governor in his article in March indicated the Alaska State Supreme Court has ruled exactly the opposite of federal court and unanimously said the State of Alaska controls all navigable waters and, I guess, first - is that a correct statement, and secondly and impeachment lie for violation of oath of office by any Governor who failed to protect and defend the Constitution and laws of the State of Alaska.

MR. POPELY: Well Mr. Chairman, in response to your first question, that is accurate, meaning the decision in 1996 by the Alaska Supreme Court, unanimous for the Totemof case - exactly the same issue that the Katie John court has issued an opinion in last month

and had contradictory opinions. In fact, as Ron had stated earlier, the State of Alaska has control over those navigable waters, not the federal government, not under our reserve water rights or navigational servitude or other doctrines.

In response to your second question whether it is a peaceful act by the Governor of the State of Alaska in this particular instance to decide not to file a petition for cert, obviously it's a more involved question than I could probably answer right now. There are a lot of interesting questions to be pursued by that, I suppose, and some of them will revolve around whether or not the Governor made this decision for any other reasons. If it's a litigation based decision and he can justify to an appropriate body, then perhaps not. If, on the other hand, it's simply a political decision that he's prepared to defend and enforce what the state's supreme court has determined to be state law, then it's possible. The question of what is our state law to be defended is something else to be discussed. The Alaska Supreme Court's ruling on this case, state law that has to be defended through the exhaustion of all appeals on a federal case like this, I think there's a good argument that it is. So, while I can't give you an exact answer, I'd say it certainly will become an issue. I have no doubt about that.

CHAIRMAN TAYLOR: Thank you, Ted, for that, and I personally have no reason to question or doubt the Governor's word and commitment on this subject and I believe that he was speaking in good faith from the heart when he wrote that article in March of 2000 and I have no reason to believe that he won't follow through with that. Senator Ward, you had a question.

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SENATOR WARD: Yes, thank you. I don't pretend to understand the ruling yet, nor the reasons to do or to not do something. Lawyers will be figuring that out. But I did have a question of you. It was brought up earlier and I'm not quite sure whether it was Ron Somerville or Carl Rosier that brought it up but they said that there was 14 other states that had entered in on an amicus brief. Did the governors of those states have standing to file directly to the highest court because they will be affected?

MR. POPELY: Chairman and Senator Ward, the governors of states like our own are generally the parties to litigation like this, so if there's going to be a lawsuit representing the state as a party, like in our state, the governor would be the person, through the attorney general's office, to bring a case like that. Part of the problem in this case is that the 14 amici, who are other states in

this case, are friends of the court just like the Alaska Legislative Council is to the State of Alaska. To bring a proper case, they would have to be what is called a 'real party in interest'. In other words, they would have to be directly affected by the case by controversy out of which the case arose. In this case, that's the state of Alaska because the incidents related to the Katie John [indisc.] fish and game also heard in Alaska and in violation of what the state felt were state laws and, therefore, the State of Alaska has the standing to bring the case. It's not as simple as another state simply stepping into the shoes of Alaska and becoming the party in interest because although a state like Washington had an interest in a case like this, they're not the party directly impacted by it and, therefore, do not stand in the same shoes as the party, in this case the State of Alaska.

CHAIRMAN TAYLOR: Thank you Ted. Representative James, did you have a further follow-up? I have one witness left.

REPRESENTATIVE JAMES: Okay, I don't want to take up a lot of time but just quickly reading this article again where Governor Knowles said no governor of any state would or should ever voluntarily relinquish its authority back to the federal government, and I'm thinking about the position that the Governor is currently in, which it certainly is a controversial issue in the public. Could we assume, by his statements possibly, making his real commitment here to do this, that he's only forestalling telling us what he's going to do just to kind of tone down the rhetoric out there while people are looking at it differently? What if he'd come out and said he was going to do it or don't, he's going to be shot with arrows. Do you think that that's any rationale for him to go ahead and do this as opposed to the fact that he's committed already he's going to go there eventually?

MR. POPELY: Through the Chair, Representative James, if I understand the question right: do I think that his earlier statements are indicative of what he's going to do on this case right now, and is the delay simply a pretense for some kind of argument that it's a foregone conclusion that he's going to appeal the case? I just don't know the answer to that. I don't have a crystal ball. I don't have inside information into what the Governor is making in this case. I suppose it is possible, from those comments that the Chairman just read to you, that last March the Governor was clear in his position and remains so today and he is simply exercising his duty to listen to what people have to say about this case and we'll follow through with this or whatever to appeal this case within the 90 day time frame. I hope that that is true but I certainly can't give you a definite answer on that.

MR. ROSIER: Mr. Chairman?

CHAIRMAN TAYLOR: Yes, thank you. Go ahead.

MR. ROSIER: Yes, Mr. Chairman, this is Carl Rosier. In regard to the question that Representative James just asked, the only thing that I can think of that would come close to providing some type of an [indisc.] would perhaps be the agreement that the Governor signed with the tribes on this and I hope that some of the lawyers are taking a hard look at that in terms of what commitments were made there.

CHAIRMAN TAYLOR: Okay, thank you very much for that. Were there further questions? Thank you very much, Mr. Popely. We appreciate your good service. Also off-net we have Lynn Levengood. Mr. Levengood?

MR. LYNN LEVENGOOD: Yes, Mr. Chairman, I'm on-line.

CHAIRMAN TAYLOR: Having heard the comments of the previous speakers, and I assume you have - you've been on-line for some time?

MR. LEVENGOOD: Yes, yes, Mr. Chairman. I've been on-line since the beginning of the hearing.

CHAIRMAN TAYLOR: Well, rather than repeat some of those very same statements, if you could though, give us a brief summary of your position on this matter we'd appreciate that.

MR. LEVENGOOD: Thank you. I guess I disagree a little bit with the previous speaker regarding the duty to defend this Alaska sovereignty. That's a sworn duty that our elected officials swear to and to not vigorously defend Alaska sovereignty would be malfeasance or misfeasance or non-feasance. And I'll let you explain that to the people gathered but I think ... [END OF TAPE].

TAPE 01-35, SIDE B

MR. LEVENGOOD: ... whether it's the state law or not, I disagree again. The sovereignty of the State of Alaska is what needs to be defended and I guess I'll go back to when the last special session the Governor called, he was quoted, and it's - article - his press release is that it would be irresponsible to turn our right and our responsibilities to manage Alaska's fish and game to the federal government. Our right was at the heart of Statehood, which we were celebrating on the 40th anniversary, so - I think it is his duty to defend Alaska sovereignty. Sovereignty is the issue and he would

be remiss if he did not appeal this decision.

Let's see, you want to hear other questions. What happens if this case is not appealed? The 1992 U.S. Supreme Court case, New York v. United States, Sandra Day O'Connor wrote the decision and she said, 'If a power is an attribute of state sovereignty, it is necessarily a power that the constitution has not conferred on Congress, and the constitutional authority of Congress cannot be expanded by the consent of a governmental unit whose domain is thereby narrowed, whether that unit is the executive branch or the state.' Applicable to this situation, our elected officials cannot narrow the sovereignty of the State of Alaska. That is textbook, black letter, constitutional law. So, if this case - if our Governor does nothing, he'd have to defend his actions of doing nothing but the issue is not close[d] forever because this is a constitutional issue and, to answer Representative James' question, yes, someone else could bring this sovereignty issue directly - in a direct action to the U.S. Supreme Court.

The case that's currently being done, Mr. Chairman, the submerged lands in Glacier Bay and the Archipelago, is a direct action suit, as you suggested. It also is one - it's a quiet title action. The Attorney General's Office did not make the claim for any fishing rights, they just claimed that the sea beds and the bed of Glacier Bay is state land. Interestingly, two different branches of the federal government, the Department of Interior and the Department of Agriculture, took two different views for the U.S. Government on that issue so it's [indisc.] - the federal government saying two different things at the same time.

As far as the Ninth Circuit goes, they are overturned a vast majority of the time but interestingly a case that no one's talking about and came out after Katie John but before the appeal of Katie John was rendered was a suit that regarded submerged lands of the Kandik (ph) Nation and Black Rivers here in the Interior. The Ninth Circuit - a three judge panel of the Ninth Circuit led by Justice Kleinfelt (ph) who resides in Fairbanks, decided that the Submerged Land Act controlled and that the land beneath those rivers were state lands and that the river was navigable at Statehood. Interestingly, in that case, the person who brought the action was Doyon [Ltd.], who wanted more land selections, more acreage and so they brought the actions against the federal government because the Bureau of Land Management had made the decision that the rivers were not navigable and thereby took some acreage away from the [Alaska] Native Claims Settlement Act, away from the Doyon tribes and so they finally - you know, 15 years later, it was decided that no, those Interior rivers are navigable at Statehood, therefore the Submerged Land Act applies and that's a

Ninth Circuit case which Joanne Grace, of the Attorney General's Office, was the lead attorney, and I think is directly - is controlling over the current issue but no one seems to bring that case up.

CHAIRMAN TAYLOR: Okay, well thank you very much. We appreciate that. Representative - first Senator Cowdery has a question.

SENATOR COWDERY: Oh, I just - I know we're getting late, we got other things to deal with, but I think this is the most important thing that we can deal with and I hope that the Governor can find time, rather than adjourn this, you'd just maybe recess it till set time the Governor, while we're here - we're all here, I think this is a very important issue that he should answer and hopefully will.

CHAIRMAN TAYLOR: With one word he could answer it by just sending a note down saying, yes, I'm going to appeal, and I'm going to keep my word and my commitment that I made both in '95 and again in '2000 on March 3. Mr. Levensgood, I wanted to thank you very much. I have other questions here. We're going to have to kind of be brief if we can on the - Representative Ogan?

MR. LEVENGOOD: Certainly.

REPRESENTATIVE OGAN: Thank you, Mr. Levensgood, Mr. Chairman. Lynn, would you state for the record your occupation? You're a member of the Bar in Alaska, are you not?

MR. LEVENGOOD: Yes, I'm an attorney in private practice here in Fairbanks.

REPRESENTATIVE OGAN: And recently the Governor said on a public radio broadcast, you know, he'd rather just see us amend the Constitution. That would resolve everything and we'd get back state control. It's my opinion that once you amend your Constitution, your statutes and your regulations to conform with federal law, you don't have state control, you simply have federal control with a state name on it. Would you concur with that?

MR. LEVENGOOD: That's absolutely correct and, as a matter of fact, in the document that the organization I work with, the Alaska Wildlife Conservation Association, the time when we sent down to the Legislature, that's one of the issues that we presented. If we did what you ask in your question, that we would merely be the minions of the federal overseers and would be in a quandary that would be impossible to live under.

REPRESENTATIVE OGAN: Very much like what Mr. Somerville said with

[indisc.].

CHAIRMAN TAYLOR: If there are no other questions, I want to thank you again for standing by on the phone Mr. Levengood, and for taking your time today, and for each of those witnesses that have testified. It's not my intent to adjourn this committee but, instead, to recess, and to give the Attorney General and the Governor an opportunity to appear before the committee and resolve this matter for all the people of the state so that when we leave here, we can know that we did something significant. I know that we're all anxious to see movement on the Governor's bill. I want to join in that process and good hard work that you've done, Senator Cowdery. With that, I'll adjourn the meeting and - recess the meeting and then we can convene and move into Transportation. I appreciate the courtesy that the members have given us today. We are recessed [2:39 p.m.].