ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE
March 16, 2001
3:47 pm

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Pete Kelly
Senator Robin Taylor
Senator Kim Elton

MEMBERS ABSENT

Senator Rick Halford
Senator Georgianna Lincoln

COMMITTEE CALENDAR

SENATE BILL NO. 121
"An Act adding, for purposes of the Alaska Right-of-Way Leasing Act, a definition of 'substantial change' as applied to an amended right-of-way lease application; and providing for an effective date."

HEARD AND HELD

#SB125
SENATE BILL NO. 125
"An Act prescribing a definition of 'damages' that a landowner may claim for injury to or interference with the owner's use of property by a person entering upon the land under the state reservation of oil, gas, mineral, material, or related interests, addressing the determination of the form, amount, and security of the surety bond determined by the director of lands to secure the landowner payment for damages, directing preparation of notice to the landowner for subsurface activities on the land, and setting a limitation on actions against a landowner resulting from entry upon land under the state reservation of interests."

SCHEDULED BUT NOT HEARD
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SENATE JOINT RESOLUTION NO. 15
Relating to imports of salmon from Chile.

MOVED SJR 15 OUT OF COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 10(FSH)
Relating to the management of the Bering Sea/Aleutian Islands and Gulf of Alaska groundfish fisheries and the protection and restoration of the Steller sea lion.

MOVED CSHJR 10 (FSH) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

SB 121 - No previous action to record.

SJR 15 - No previous action to record.

HJR 10 - No previous action to record.

WITNESS REGISTER

Ms. Annette Kreitzer
Staff to Senator Leman
State Capitol Bldg.
Juneau AK 99811
POSITION STATEMENT: Provided sponsor statement for SB 121.

Mr. Jim Eason
Foothills Pipe Lines Ltd.
3100 707 Eighth Ave. S.W.
Calgary, Alberta T2P 3W8
POSITION STATEMENT: Commented on SB 121.

Mr. Bill Britt
State Pipeline Coordinator
Department of Natural Resources
411 W 4th Ave., 2nd Floor
Anchorage AK 99501
POSITION STATEMENT: Commented on SB 121.

Mr. Ian Fisk
Staff to Senator Austerman
State Capitol Bldg.
Juneau AK 99811
POSITION STATEMENT: Commented on SJR 15.

Mr. Paul Shadura, II
Kenai Peninsula Fishing Association
P.O. Box 1632
Kenai AK 99611
POSITION STATEMENT: Supported SJR 15.

Mr. Jerry McCune
United Fishermen of Alaska
211 4th St., #110
Juneau AK 99811
POSITION STATEMENT: Supported SJR 15.

Representative Drew Scalzi
State Capitol Bldg.
Juneau AK 99811
POSITION STATEMENT: Sponsor of HJR 10.

ACTION NARRATIVE

TAPE 01-21, SIDE A
Number 001
#SB121

SB 121-RIGHT-OF-WAY LEASING ACT

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee meeting to order at 3:47 pm and announced SB 121 to be up for consideration.

MS. ANNETTE KREITZER, Staff to Senator Leman, sponsor, of SB 121 said that commercialization of North Slope gas is a legislative priority. She explained SB 121 provides certainty to any person with rights-of-way under the state's Right-of-Way Leasing Act. She explained:

> If a person files an amendment to the pipeline application, that supposes a net increase in the amount of acreage leased for the right-of-way that is 10 percent greater than the original application. That is sufficient change subjecting the amendment to all the provisions of AS 38.35. If a person files an amendment to a pipeline application that proposes changes to the design of the pipeline that would use less effective environmental or safety mitigation measures or less advanced technology than in the original application, that is a substantial change subjecting the amendment to all the conditions of AS 38.35. When the state calculates whether or not additional state acreage must be part of the 10 percent calculation, it must exclude acreage attributable to an amendment of an existing right-of-way across federal lands originally issued by the federal government whether or not the state or the federal government administers the land. Likely, that would involve an applicant aligning with the federal and state rights-of-way. The

state must also not count land under a federal right-of-way grant that has been transferred to the state for its administration.

Section 2 is a conforming amendment to the commissioner's analysis and public hearing section of the Right-of-Way Act. SB 121 continues the public process, but does not [indisc].

MR. JIM EASON, Foothills Pipe Lines Ltd., testified in support of SB 121 with the following:

Let me begin by describing Foothills and summarizing its role in efforts to commercialize Alaska's North Slope gas reserves. Foothills is jointly owned by Westcoast Energy Ltd. and TransCanada PipeLines Limited, the two major players in the Canadian gas pipeline business. Canadian gas accounts for almost 20 percent of all gas consumed in the United State and all of that gas currently moves through pipelines owned in whole or in part by TrnasCanada and Westcoast. Foothills corporate mission is very specific - to build and operate the Alaska Natural Gas Transportation System, better known as the Alaska Highway Pipeline Project. Foothills was a leader in this project, which was conceived twenty-five years ago and we remain just as committed today to completing that project.

The Alaska Highway Pipeline Project was approved in accordance with the Alaska Natural Gas Transportation Act of 1976 in the U.S., the 1078 Northern Pipeline Act in Canada and the 1977 Agreement Applicable to the Northern Natural Gas Pipeline between the two countries. As approved, the Alaska Highway Pipeline Project is a 4,800-mile international pipeline project commencing at Prudhoe Bay and terminating in the Midwest and California market areas. It is important to note that the southern part of this pipeline has been constructed and is in full operation.

A substantial amount of work in addition to constructing the pre-built portion of the project has been completed by the Alaska Highway Pipeline Project sponsors to date. Significantly, among other permits in the U.S. the Project holds a federal right-of-way grant issued in 1980 by the Department of the Interior's Bureau of Land Management. That grant does not expire until December 2010 and may be renewed at the request of the Project

sponsors. On state side, the Project has a pending State of Alaska right-of-way lease application. Recently, we have initiated discussions with state officials toward completing the pending application.

I would like now to turn to our specific comments on SB 121. It responds to a potential problem that has been identified in Alaska state law affecting applications for state right-of-way leases. Specifically, AS 38.35.050(c) currently provides that "Any amendment to an application is subject to all provisions of the Right-of-Was Leasing Act applying to the original application."

The potential problem arises from the fact that the words "substantial change" as applied to an amended right-of-way lease application are not currently defined in statute. As a result, should any party desire to delay or obstruct the issuance of a state right-of-way lease, they are free to argue that any change to an application after it is submitted constitutes a substantial change. Without clear policy direction from the legislature, administrative appeals and litigation over which changes are substantial are likely, with the result being that the courts ultimately get to decide the issue on a case-by-case basis.

SB 121 proposes a definition for substantial change that is intended to provide clear guidance for all parties of interest, including applicants, the reviewing and authorizing agencies and the public. As fully explained below, Foothills supports Senator Leman's efforts to amend AS 38.35.050(c) to avoid ambiguity and to minimize the risk of specious litigation by providing clear standards for determining whether or not changes to a right-of-way lease application are substantial.

We believe that defining substantial change in the context of an amendment of an application will provide several important benefits for all projects that must procure a right-of-way lease across state lands, as well as for the State of Alaska. These benefits include:

- More timely processing of lease applications, especially where much work has already been done in support of an application; (Typically, an application for a major pipeline can take as much as a couple of year or longer.)
- Increased certainty; and
- Reduced potential of delay in authorizing and constructing projects of benefit to all Alaskans.

Under Senator Leman's proposed language, an amendment to an original application would constitute a substantial change in the application under either of two circumstances:

- If the amendment proposes a least a 10 percent net increase in the amount of state acreage to be leased for the right-of -way when compared to the amount of acreage in the original application;
- If the amendment proposes a change in the design of the pipeline that would use less effective environmental or safety mitigation measures or less advanced technology than proposed in the original application.

We believe this approach to defining substantial change is compatible with the state's goals as set out in its Right-of-Way Leasing Act, that is, that "the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its resident, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment." Equally important, we believe that incorporation of these proposed definitions will not diminish meaningful agency and public review of an applicant's amended right-of-way lease application.

The proposed amendment would further define how an increase in state acreage would be calculated for the purposes of determining substantiality. Specifically, in calculating the percentage increase in acreage due to an amendment, the following would each be excluded from that calculation. First, acreage attributable to an amendment to a right-of-way grant across federal land originally issued by the federal government, whether administered by the state or federal government, would be excluded. Secondly, land subject to an existing federal right-of-way grant held by the applicant that is transferred to the state for its administration would also be excluded.

We believe these exclusions to be appropriate, as they take out of the calculation land that is already subject to a federal right-of-way lease and lands that may come to be administered by the State of Alaska. Such land should be taken out of the calculation because it would

> not have been subject to an initial state lease application. It includes such land in the calculation of whether or not there has been a 10 percent increase in the amount of state land covered by an application would penalize unfairly those applicants that successfully procured a right-of-way grant across federal land that subsequently comes to be administered by the State of Alaska.

Number 700

SENATOR ELTON said he could see many reasons for getting an amendment, for example, rerouting a pipeline through a community. If the net acreage gain on the new route is less than 10 percent, he asked if that would preclude the need to do an amendment.

MS. KREITZER answered that it would not be considered to be a substantial change if it was less than 10 percent.

SENATOR ELTON added, "Even though it would be a substantial change to the neighborhood."

MS. KRIETZER said they had discussed this scenario with the department and Mr. Britt could speak better to the question.

MR. BILL BRITT, State Pipeline Coordinator, he said that Senator Elton is correct that a rerouting of a pipeline would not be captured by the bill in front of them.

CHAIRMAN TORGERSON asked if a community didn't want it, what kind of mitigation measures would they do.

MR. BRITT responded that:

> AS 38.35 gives the commissioner a great amount of power to place stipulations on right-of-way leases to deal with a variety of public health, safety and environmental issues. So we could certainly be responsive to any concern that came out at any one process. Their normal process would be to analyze an application. Our version of a best interest finding is called a commissioner's analysis and proposed decision. We public notice the availability of that commissioner's analysis and proposed decision along with draft lease and receive comments on it through a comment period or a public hearing or both. So we can receive comments from the public very late in the process and alter the right-of-way lease in response to those.

SENATOR ELTON said he imagined this would have tilted the balance

back toward the company that had the right-of-way in any kind of community discussion on a pipeline reroute.

MR. BRITT responded, "It's important to remember that the discussion is regarding an applicant, not an actual lessee. After a lease is executed, we are dealing with different questions. This only regards changes to an application."

Number 1000

MR. EASON added that it is important to focus on the provision of what the substantial change does that they are trying to define. He explained:

> As the statute reads today, the undefined substantial change triggers all the provisions of the chapter, which quite literally means that you go back to square one and file a new application, not just notify people of a change in the application, and do every procedural step that's outlined in Title 38.35. This could, again, conceivably include steps that have gone on for 18 or more months with a very public process. I certainly stand to be corrected, but it was my understanding that the intent is not to limit or change public notice so that people should be aware of changes regardless of whether there are substantial changes or changes that rise to the judgment of the commissioner as requiring public notice. It's just a question of whether or not a change is substantial enough to trigger all the provisions of the chapter being required to be done again.
>
> My understanding of the example you gave of rerouting that might occur that brings a project closer or within a community, can happen in either of two ways. It can happen because an applicant has requested it or it can happen because the agencies require it. It's conceivable that an applicant proposes something that avoids all communities, but it could be determined for reasons of Fish and Game or DEC or others that the preferable route is actually closer to the community. My belief would be that under those circumstances, those kinds of changes would be publicly noticed and you would have an opportunity to discuss them and review them in the context of the application as well as the finding.

SENATOR ELTON asked if this had ever been an issue to his knowledge - where someone has defined substantial change in a way that has caused economic hardship or regulator hardship.

MR. EASON replied:

My research of the files and I have been able to locate two instances in the Pipeline Office's administration that actually addresses this question, one is a written decision affecting not the application, but an existing conditional lease that was issued to Yukon Pacific. In that case, the application process had been completed and the commissioner had actually issued the lease. Yukon Pacific came back, as I recall, some years later, maybe a couple of years or longer, and addressed the commissioner with a revised project, which increased the pipeline pressure. I believe it increased the pipeline size. It changed the number of compression stations and it changed the location of the compression stations, but it was their belief that those were not substantial changes, because the changes actually resulted in less land being used than originally proposed, even though the system looked quite different. There's a written finding that the commissioner confirmed the calculation was the issue. If it used less acreage, even though there had been changes that in your view or others' view may very well signal substantial changes, but there weren't.

I believe there is another instance with, I believe it was, Badami where two alternative pipelines were proposed, a buried pipeline and an elevated pipeline. I apologize, I can't remember which one went in which direction or whether they finally went from buried to raised or raised to buried, but my understanding is that the pipeline office determined that was a substantial change requiring all the provisions of the chapter.

All that is sort of preliminary to the answer from our perspective that's probably more important. In some respects, these projects may have not have risen in profile to invite litigation and quite honestly, in our review of the statutes we were surprise that this term had been in the statute since its adoption without definition. We think that the uncertainty surrounding that is enough given the high profile nature of a project to deliver gas from Alaska that we see it as a great risk and we think Alaskans should see it as a great risk - the policy direction for what constitutes a substantial change is not set so we don't have, perhaps, years of delay by people being asked to refile and refile and begin the process again for whatever change may come.

CHAIRMAN TORGERSON asked Mr. Britt if he supported the bill.

MR. BRITT responded that they are neutral, but they think it's a good idea for the legislature to define the term. He said:

> There are three instances they can think of that would be captured by the bill. Two of those come up, one is routing and the other is a change from below ground to above ground mode or vice versa and the third one that hasn't been mentioned yet, would be a change from a 12-inch to 48-inch pipeline. Presumably that would not be captured by these amendments.

SENATOR TAYLOR asked if he had any other suggestions for the committee with regards to routing and pipe size. "It seems odd that we should have to do this for every aspect of the pipeline…"

MS. KREITZER responded that they attempted to look at the routing issue and tried to deal with that problem and it just made the problem worse. The routing seems to be the highest concern. Regarding the pipeline issue, she thought the department had already answered that with its action in the Yukon Pacific case. "It has already said that is not a substantial change. So we're sort of codifying what they have already done."

SENATOR TAYLOR said he wanted it on the record that this is based on a previous decision.

CHAIRMAN TORGERSON asked if the original pipeline was 12 inches.

MR. EASON replied that it was somewhere between 42 - 48 inches. He didn't anticipate quadrupling it. "The technology is not there."

MS. KREITZER added that a potential amendment the committee might consider to make the clearer is on page 2, line 5 to insert, "The acreage attributable to an amendment of a right-of-way originally issued by the federal government."

CHAIRMAN TORGERSON said it already seemed clear to him, but they would consider it, if that's what they need to do. He announced they would hold the bill for further work.
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#SJR15

SJR 15-CHILEAN FARMED SALMON

CHAIRMAN TORGERSON announced SJR 15 to be up for consideration.

MR. IAN FISK, Staff to Senator Austerman, sponsor of SJR 15, said he would answer the committee's questions.

CHAIRMAN TORGERSON stated there were a couple of letters of support for SJR 15.

Number 1500

MR. PAUL SHADURA II, Kenai Peninsula Fishing Association, supported SJR 15. He said they are the largest setnet representation group in Cook Inlet. He said that they target markets all over the world, but it's no good if they are forced out of our own markets with unfair practices. SJR 15 takes a big step in protecting the marketing of wild Alaskan salmon.

MR. JERRY MCCUNE, United Fishermen of Alaska, said the purpose of this resolution is that there is a meeting in Florida on the pre-Chilean trade agreement on March 26. He said:

> Chile is dragging down everybody's price for salmon. The last time there was a study, there was 3 percent overproduction to the United States. They are flooding the market and the United States with fillets. We feel that's unfair competition to us. When they first started they said they weren't going to put salmon on the market at the same time we did, but they've gotten so big now…The Japanese actually own a lot of the farms in Chile, now, that are overproducing. We would like to see some fair competition in that arena.

SENATOR ELTON commented that he used to troll and it's somewhat misleading on page 2, lines 4 and 14 where it seems to imply to the world that you can't get fresh salmon between the months of October and May. In fact, you can't get a lot of it, but it's the best fresh salmon you can get with the possible exception of Copper River reds. He didn't want to propose an amendment, but he wanted them to acknowledge that we can get fresh salmon most of the year.

MR. FISK responded that that was definitely correct and out of respect to the troll fleet, Senator Elton's comments are welcome.

SENATOR TAYLOR moved to pass SJR 15 from committee with individual recommendations. There were no objections and it was so ordered.
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#HJR10

HJR 10-GROUNDFISH FISHERIES AND STELLER SEA LION

CHAIRMAN TORGERSON announced HJR 10 to be up for consideration.

REPRESENTATIVE DREW SCALZI, sponsor of HJR 10, testified:

Upon passage of Magnuson Stevens Fisheries Conservation Management Act, fisheries in the U.S. waters became governed by regional councils and they were set up to make sound decisions based on biological data and economic viability to the coastal communities. The North Pacific Fisheries Management Council has done a very good job in managing the largest fisheries in the United State waters, which are predominantly carried in the Bering Sea and Gulf of Alaska.

In 1973, the U.S. Congress also passed the Endangered Species Act, which was a noble attempt to place safety measures around species deemed threatened to the point of extinction. The Western Stellar Sea Lion in Alaska has become identified as such an endangered species. Nevertheless, the fisheries management by the North Pacific Fisheries Management Council was challenged in court by Green Peace and a stay was issued in a Ninth Circuit Court requiring that a biological opinion to determine what measures are deemed necessary to protect the Stellar.

The National Marine Fisheries Service was charged with the task of formulating the biological opinion (BIOP), which set in motion a number of restrictions on our U.S. and Alaskan fisheries. In defense of NMFS (National Marine Fisheries Service), the task was to prove a negative. That is a conclusion proving there was no conflict between commercial fishing and the Stellar Sea Lion and if there was a conflict, what mitigation measures they were going to use to offset that.

Four hundred and sixty-three pages of the BIOP sited numerous assumptions on the feeding habits of the Stellar regime shifts that have taken place in the last 20 years - predation by Orcas upon the Stellar and the identifiable conflicts between commercial fishing and the Stellar Sea Lion. In conclusion, the scientists could not determine 100 percent cause and effect of any one component, but rather drew assumptions that many factors may have resulted in decline of the Stellar. To err on the side of conservation, the BIOP concluded that shutting down a large portion of our fisheries may bring the North Pacific Fisheries Management Council in compliance with the Endangered Species Act. Frustration with the process as the preponderance of evidence citing

the decline of the Stellar could find no conclusion, because the evidence of NMFS was based on assumptions, not facts, but assumptions.

This resolution asks that we base our management on good science and conclude a reasonable outcome. There must be a decision made to reasonably change the sustained yield principal of fisheries management in U.S. waters and the assumptions that are cited in the BIOP need to be proven and from there we'll draw a reasonable fisheries management plan. To this end we are thankful to Senator Stevens. We are fortunate to have $3.5 million of federal appropriation that has been distributed among the scientific community including the National Academy of Sciences to conduct a peer review of the BIOP and produce the necessary research upon which to base a legitimate decision.

Dr. Bob Small, Marine Mammals Coordinator for Fish and Game is a member of the Governor's Stellar Sea Lion restoration team and will speak about the state and federal research that's planned. It's ironic that Green Peace, in their effort to shut down the fisheries, initially targeted the large factory trawlers. These 200-300 ft. vessels are going to be little affected by this act at all. It's going to be the small coastal vessels that are going to take the brunt of this. The vessels out of Seward, Homer, Kodiak, King Cove, Sand Point, Dutch Harbor. They are all ill equipped to fish in the winter waters. We know that this natural phenomenon has altered affects on all living creatures on the earth, including mankind himself. Many civilizations have come and gone due to regime shifts. All we're asking in this resolution is that we manage our fisheries with good science.

SENATOR TAYLOR moved and asked for unanimous consent to pass HJR 10 from committee with individual recommendations. There were no objections and it was so ordered.
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CHAIRMAN TORGERSON adjourned the meeting at 4:24 pm.