

ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE

March 28, 2001
3:35 p.m.

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Pete Kelly
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln

MEMBERS ABSENT

All Members Present

COMMITTEE CALENDAR

SENATE BILL NO. 156

"An Act amending the Alaska Land Act to clarify the requirement of a single written Best Interest Finding required for the sale, lease, or other disposal of state land or resources or an interest in them, and relating to certain disposals involving multiphased development; and providing for an effective date."

MOVED CSSB 156(RES) OUT OF COMMITTEE

SENATE BILL NO. 158

"An Act directing the commissioner of revenue to prepare a report to the legislature relating to the state's participation in owning or financing a gas pipeline project; and providing for an effective date."

MOVED CSSB 158(RES) OUT OF COMMITTEE

SENATE BILL NO. 164

"An Act prohibiting leases under the Right-of-Way Leasing Act on state land in or adjacent to the Beaufort Sea; and providing for an effective date."

MOVED SB 164 OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

SB 156 - No previous action to record.

SB 158 - No previous action to record.

SB 164 - No previous action to record.

WITNESS REGISTER

Ms. Judy Brady, Executive Director
Alaska Oil and Gas Alliance
121 W Fireweed #207
Anchorage AK 99508
POSITION STATEMENT: Supported SB 156.

Ms. Marty Rutherford, Deputy Commissioner
Department of Natural Resources
550 West 7th Ave. Ste 1400
Anchorage AK 99501
POSITION STATEMENT: Supported SB 156.

Mr. Mark Meyers, Director
Division of Oil and Gas
Department of Natural Resources
550 West 7th Ave.
Anchorage AK 99501
POSITION STATEMENT: Commented on SB 156.

Ms. Mary Lundquist, Assistant Attorney General
Department of Law
100 Cushman St., Suite 400
Fairbanks, AK 99701
POSITION STATEMENT: Commented on SB 156.

Mr. Ken Boyd (former Director, Division of Oil and Gas)
No address provided
POSITION STATEMENT: Commented on SB 156.

Mr. Jim Eason
No address provided
Anchorage AK
POSITION STATEMENT: Commented on SB 156.

Mr. Patrick Coughlin
Consultant to the Senate Resources Committee
Senator Torgerson
State Capitol Bldg.
Juneau AK 99811
POSITION STATEMENT: Commented on SB 156.

Mr. Darwin Peterson

Staff to Senator Torgerson
State Capitol Bldg.
Juneau AK 99811

POSITION STATEMENT: Commented on SB 158.

Mr. Wilson Condon
Commissioner
Department of Revenue
PO Box 110400
Juneau, AK 99811-0400

POSITION STATEMENT: Commented on SB 158.

Mr. Michael Hurley
North American Natural Gas Pipeline Group
P.O. Box 100360
Anchorage AK 99510

POSITION STATEMENT: Opposed SB 164.

Mr. Bill Britt
Pipeline Coordinator
Department of Natural Resources
411 W 4th Ave., 2nd Floor
Anchorage AK 99501

POSITION STATEMENT: Supported SB 164

Mr. Jack Griffin, Assistant Attorney General
Department of Law
1031 W 4th Ave., Suite 200
Anchorage AK 99501

POSITION STATEMENT: Commented on SB 164.

ACTION NARRATIVE

TAPE 01-24, SIDE A

Number 001
#SB156

SB 156-BEST INTEREST FINDING UNDER AK LAND ACT

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee meeting to order at 3:35 p.m. and announced SB 156 to be up for consideration.

SENATOR PEARCE said that SB 156 amends the Alaska Land Act to clarify the requirement that the Department of Natural Resources prepare a single, written Best Interest Finding for multi-phased development projects. In 1994, the Legislature passed SB 308 to amend the Alaska Land Act in response to several unfavorable Alaska Supreme Court decisions that threatened the state's leasing program. She explained:

We have a "catch-22" situation with offshore leases on the North Slope where the court tried to require a Best Interest Finding to discuss or lay out what the impacts would be on onshore animals as a result of the offshore sale. This is when they instituted phasing, because there was really no way to guess what those might be, because they didn't know if and where the development might be. The legislation explicitly allowed project phasing and precisely defined the scope of the Best Interest Finding determination. Since its passage, recent court decisions have continued to threaten the program and the courts have said that the Department is obliged, at each phase of development, to issue a best interests finding...relating to that phase before the proposed development may proceed.

Under SB 308, the original legislation, the Legislature intended that a Best Interest Finding would be prepared for the first phase, the disposal and subsequent phases would be subject to the Department's approval and to separate reviews by extensive permitting processes that include public input and scrutiny of other agencies. The Legislature did not intend the approval to be defined as a Best Interest Finding determination as the courts have misinterpreted. The Legislature intended the Department to exercise their discretion to impose conditions in the Best Interest Finding determination, issued for the disposal, which would minimize future impacts. Preparation of a Best Interest Finding determination for every phase would be a very costly and time-consuming process.

SB 156 elaborates the legislative findings for phasing under the Alaska Land Act and amends AS 38.05.035 so it becomes clear that DNR is required to issue a single written Best Interest Finding for the disposal of state land. It also ensures the public the opportunity to comment at the exploration, production and transportation phases of a project. By clarifying the Legislature's original intent, SB 156 will overturn the courts' erroneous interpretation. It provides clear guidance to the courts regarding the e legislature's policy and will result in the avoidance of protracted litigation and associated delays or disruptions of the state's leasing program and development of already leased acreage.

SENATOR PEARCE explained that the concern is if a Best Interest

Finding is required at every phase, the cost and time delay for both the state and the industry would be enormous. They want to make sure that doesn't happen.

SENATOR KELLY asked if a public meeting was part of the Best Interest Finding.

SENATOR PEARCE said it is a very long and involved process. The permitting processes in later phases also have opportunities for public comment.

MS. JUDY BRADY, Executive Director, Alaska Oil and Gas Alliance, supported SB 156. It makes it clear what the Department of Natural Resources' obligation is to prepare one Best Interest Finding for disposal of oil and gas lease lands. The only problem they see with the bill is on page 5, lines 21 - 25, the public notice section. They don't understand what that section is trying to accomplish and that would be important.

MS. MARTY RUTHERFORD, Deputy Commissioner, Department of Natural Resources, said:

As Senator Pearce noted, in a Supreme Court decision in Kachemak Bay Conservation vs. Department of Natural Resources 2000, the court spoke to the necessity for DNR to take a continuing hard look at future development on lease sale lands and to issue a Best Interest Finding on each phase of a project before the proposed development may proceed. DNR believes this interpretation was not the intent of the legislature and this bill clarifies that conclusion by specifying that additional Best Interest Findings are not required in subsequent phases of a project. Therefore, the administration supports this bill. However, we would propose one amendment. On page 5, line 21, add, "If the disposal is an oil and gas disposal." We recommend this amendment, because the primary focus of this legislation is on the oil and gas activities. We believe that a public notice requirement should be focused upon oil and gas and not upon other disposal activities that do not currently require public notice.

Number 800

CHAIRMAN TORGERSON noted that an amendment would be offered that would take care of the public notice concern.

SENATOR ELTON asked where they get the most public involvement and

does it come mostly through the permit processes or through the Best Interest Findings.

MS. RUTHERFORD answered that it depends on whether it's an oil and gas activity or some other type of disposal.

SENATOR ELTON asked to start with oil and gas.

MR. MARK MEYERS, Director, Division of Oil and Gas, said he thought they had a good public input throughout the whole process, but there is great opportunity during the Best Interest Finding. He said there is public input prior to development, also.

SENATOR ELTON asked how close this bill comes to the constitutional provision that requires public notice and other safeguards in the public interest in the disposal of state assets.

MS. RUTHERFORD answered that she believed it was within the constitution and she believed that this amendment would continue what has been the status quo for the Department of Natural Resources' public processes.

SENATOR ELTON asked if she had gotten an analysis from the Department of Law.

MS. RUTHERFORD said the Attorney General told the Director that the constitution requires public notice prior to a disposal of an interest in state lands and this provision actually deals with public notice of later permitting activities.

SENATOR ELTON noted language on page 4, lines 9 - 11, "The Best Interest Finding shall be based upon known information or information that is made available to the director." He asked what happens if there is known information that the developer has, but doesn't give to the director.

MS. RUTHERFORD answered that the director is only required to consider known information or information that is made available to him through the public process. It does not require the director to seek out additional information.

SENATOR ELTON asked what happens in a situation in which information isn't transmitted to the director that could affect the Best Interest Finding, specifically if the developer doesn't give pertinent information to the director. "Does that void the Best Interest Finding process?"

MS. MARY LUNDQUIST, Assistant Attorney General, answered:

A failure of industry to provide information to the director could not void a disposal or void a Best

Interest Finding. The requirement is placed on DNR to consider known information or information that is made available to the director. The Alaska Supreme Court has recognized that there is no requirement placed on DNR to actively go out and solicit information. A Best Interest Finding would not be overturned based on not actively going out and seeking information. However, DNR's method of operation is currently to widely publicize the lease sales or other disposals and to consider all information that is made available to them.

Number 1200

MR. KEN BOYD said he was one of the former directors of the Division of Oil and Gas. He explained that a Best Interest Finding is really for the disposal of state land and at that phase of the process they are just issuing a lease. There is a huge process that follows the issuance of that lease; the lease itself is a paper transaction. This was clearly recognized by the legislature in SB 308. The director has to consider only those things that he knows at that time. MR. BOYD continued:

To me, this is an extraordinarily important piece of legislation. I believe the courts have misconstrued the meaning of the legislature by saying that we have to do a Best Interest Finding in every phase. Truly, the first phase, when you're just issuing a lease, you are just doing a paper transaction. At subsequent phases, I think it's important to realize that the state is, through all its many agencies and all its many powers, gathering a lot more information. All the agencies, not just DNR, have the opportunity to have any questions they need to have answered, especially at subsequent phases.

MR. JIM EASON, another former Director for the Division of Oil and Gas, said he was speaking on behalf of himself today. He wanted to shed some historical perspective on any questions the committee might ask. He was director during the time when many of the lawsuits were spawned that led to SB 308. He was also working with Senator Pearce and others in the legislature in 1994 to try and correct that problem. He said further:

I am embarrassed to say that we obviously didn't do it well enough for the Supreme Court, but hopefully, this time it will work. It was the intent of the legislature originally to have a Best Interest Finding for the disposal of state interests and that is how the statutes read before we became involved in 1994 and that's how they read today. But the Court, including the Supreme

Court, apparently has made the judgment in a couple of cases that in their reading of the amendments that occurred in 1994, (the ones that are before you now), that there is an implication that the subsequent process after the disposal would include a detailed Best Interest Finding at each phase. In other words, at exploration and at development, if you're lucky enough to find something. Based upon my experience, we were trying not to require additional Best Interest Findings and I believe it was the legislature's intent that that not be required.

Under the amendments that are proposed in SB 156, I believe that you will correct that problem and make it clear that one single Best Interest Finding is required. And I believe that Senator Pearce has pointed out, and I agree, that a number of things will be accomplished if you do that. You will avoid some extraordinarily time-consuming and very expensive and costly processes that the state would be required to undertake if it were to be required to do Best Interest Findings at each phase. You would have additional delay and uncertainty in the development of resources and, important to each of you, I believe, delay in the receipt of state revenues to support the programs that are important to all Alaskans. I encourage you to take up SB 156 and pass it. I think it will be to the state's benefit.

SENATOR ELTON said he appreciated Mr. Eason's and Mr. Boyd's participation, because they are nonaffiliated experts. He asked if the words: "This act is intended to make clear that public notice and the opportunity to comment shall be provided at each phase of the project." on page 4, line 12 was already covered under existing regulations that govern permits or is this going to require new regulations on the part of the Department.

MR. EASON replied that he believed all the operations that occur on oil and gas leases are in the coastal zone. He elaborated:

First of all in the preliminary phase and the Best Interest Finding phase, there certainly is detailed and prescribed public notice and process for response. As a matter of fact, the Best Interest Finding requires not only public notice and meeting, but the preparation of a preliminary finding and then public notice of that and its availability and the opportunity for people to comment and suggest changes, which then produces a final Best Interest Finding for each disposal. Since the disposals are occurring in the coastal zone, any activity, including geophysical prospecting, drilling of

wells or building of facilities and structures if you find something, all go through a review for coastal zone consistency which involves a detailed public process.

I think that, at least in my reading, the sponsors are trying to make clear on page 5, lines 21 - 25, through some amendment language they are proposing, that if there's any question, it's reaffirmed here that public notice will take place on those subsequent phases in either of two situations. Either, if you're proceeding to the next phase, the Department will require notice under regulations, which it will adopt, if it is not covered by noticing provisions of the Alaska Coastal Management Program. My perception, at least, is that this is intended to make clear that there will be notice and if it is not provided for now, it will be provided for under this amendment.

SENATOR ELTON asked if he just gave the long answer of, "No, you don't think that new regulations will be required?"

MR. EASON responded, "I believe today, noticing is occurring on all leases in every instance and it hasn't required new regulations."

SENATOR PEARCE noted a zero fiscal note from the Department of Natural Resources and that she had two amendments.

SENATOR PEARCE offered a technical correction to amendment #1 on page 5, line 18 to delete "a" and insert "to". She then moved amendment #1. There was objection for an explanation of the amendment.

SENATOR PEARCE explained:

This answers and the second and third piece, I hope will help alleviate Ms. Brady's and AOGA's concern. When we passed SB 308, it was our intent that the phases - We do a disposal or lease sale; then you've got an exploration phase; you've got a development phase; you have a transportation phase whether you're building a pipeline or some way to get the product to market. So those are the phases. I understand Judy's concern that the language on page 5 might be now interpreted by laws meaning every little thing that might be done might be a new phase. But that's certainly not the legislature's intent and I think this amendment helps clarify that. That was our intent in SB 308. The other pieces of this amendment frankly speak to drafting errors and small changes we needed to make.

SENATOR LINCOLN asked the committee to consider the meaning of the proposed language if "or" was deleted on page 5, line 23.

MR. PATRICK COUGHLIN, Consultant to the Senate Resources Committee, said he wanted to comment on Senator Elton's question regarding whether regulations would have to be adopted. He explained:

Today everything that we're leasing has been in the coastal zone and therefore, new phases are publicly noticed pursuant to those regulations. However, we are now issuing leases outside of the coastal zone and we have a lease sale coming up in May for the Foothills. Some of that acreage is outside the coastal zone. So, the purpose of this was to insure that for leases that might fall out of the coastal zone and, therefore, wouldn't be subject to public notice under the coastal zone provisions, there would be public notice for such activities and those would be the regulations the Department would have to adopt.

The reason for changing "or" to "unless" [Senator Lincoln's question] was because it's really meant to be either or, not both. When some people read the "or" they were confused and the suggestion was you either give it by the regulations adopted by the agency unless it was begin given under the coastal zone management program.

SENATOR PEARCE moved to amend the amendment on page 5, line 23, to delete "or, if" and insert "unless".

SENATOR ELTON noted that the answer also indicated that new regulations are going to be necessary if this falls outside the coastal zone. "So, the short answer has changed a little bit."

CHAIRMAN TORGERSON said that amendment #1 had been noted and asked if there was any further discussion. There were no objections and amendment #1 was adopted.

SENATOR PEARCE said she understands AOGA's concern that there not be a new definition of what every little piece is that might require a public notice. She agrees with Mr. Eason that any leasing and further phases are happening now without public notice. She explained further:

However, and I hope I get a little latitude here, I never would have imagined that the Railroad could have managed to build a terminal at the Anchorage Airport that had no EIS, no environmental assessment, no public notice requirements, because it fell through all of the cracks

in all of the programs...There was never public notice before the project was actually happening and so, there are situations out there where we find we don't have the blanket that we think we have. I understand the interest of the folks in Cook Inlet of making sure, and all of the state, that they have public notice as these phases are moving forward so they have an opportunity to testify and provide comments. I would like to have that prescribed in law as this does as opposed to have systems such as the stake holders process that the governor followed on a previous Cook Inlet lease sale that I think didn't accomplish much and, on the other hand, was completely outside of the law. So, I'm happy to see we are calling for specific opportunities for that to happen.

SENATOR PEARCE offered amendment #2 that was requested by the Department on page 5, line 21 which points out that this new section is for those disposals that are oil and gas disposals.

SENATOR LINCOLN apologized to Senator Pearce with a technical amendment deleting "if".

MS. RUTHERFORD said she was comfortable with that change.

CHAIRMAN TORGERSON announced there were no further objections and the amendment was adopted.

SENATOR HALFORD asked if there was any limitation on how long a Best Interest Finding lasts.

MS. LUNDQUIST answered that there is a provision in 035(e) that deals with oil and gas lease sales releasing under 180.

MR. MEYERS replied Best Interest Findings last for 10 years.

MS. LUNDQUIST added, "Unless substantive new information becomes available. Then they would have to do an amendment prior..."

SENATOR HALFORD said at some point you go back and review the Best Interest Finding on the original gas line or the application for a refining plant and, "it's sold to somebody else and it goes on forever." I just wanted to make sure there was a limitation on it.

SENATOR ELTON noted that Senator Pearce said this would save a lot of time and energy in the Department for doing this and the fiscal note doesn't reflect any savings and he was assuming it would be potential savings, because they are not now doing what the courts suggested they ought to be doing.

MS. RUTHERFORD replied that was a correct interpretation.

SENATOR PEARCE moved to pass CSSB 156 (RES) with the fiscal note with individual recommendations. There were no objections and it was so ordered.

#

#SB158

SB 158-REPORT:STATE PARTICIPATE IN NAT GAS PIPE.

CHAIRMAN TORGERSON announced SB 158 to be up for consideration.

MR. DARWIN PETERSON, Staff to Senator Torgerson, explained that commercialization of North Slope natural gas has been one of the legislature's top priorities this session. The potential benefits of commercialization include short and long-term employment, additional state and municipal revenues, opportunities for new industries and cheap clean energy for the state. This bill would direct the Commissioner of the Department of Revenue to retain a financial expert to examine whether the state should participate in either ownership or financing of a natural gas pipeline. The expert would examine any benefit or detriment to a project caused by the state's participation. In the past the state has retained financial experts to advise it on the possibility of the state participating in such a project. Those reports need to be updated. The bill would insure that the legislature participates in the preparation of the report by:

- 1. requiring that the chairs of the Senate and House Resources Committees periodically meet with the expert to review data and information about the report, and
- 2. requiring that the Commissioner provide progress reports to the chairs every 60 days.

The bill would require the Commissioner to prepare a confidential report with recommendations addressing the state's options by January 31, 2002 and submit it to the legislature and the governor.

SENATOR ELTON asked why they used January 31, 2002, when they are anticipating a report from the producers at the end of this year.

CHAIRMAN TORGERSON responded that he came up with that date but said, "Maybe we want it quicker."

COMMISSIONER WILSON CONDON, Department of Revenue, said "I will take the responsibilities outlined in this bill, if it becomes law and if funds are appropriated that will allow us to enter into a contract with a suitable party to do the work. I have no recommendations in terms of changes to the assignment as reflected in the bill."

CHAIRMAN TORGERSON asked him what he thought of the January 31, 2002 date.

COMMISSIONER CONDON replied that was his sister's birthday and it will remind him to send her a card.

SENATOR LINCOLN wanted to know, "If that were not your sister's birthday, would that date be good?"

COMMISSIONER CONDON replied, "Yes, it would."

SENATOR ELTON asked if it could be earlier.

COMMISSIONER CONDON replied that he, "didn't want to promise anything any earlier."

SENATOR LINCOLN said on page 2, line 29 it says that the "Commissioner of Revenue shall contract with a qualified or suitable firm or person qualified...to complete this job", but the fiscal note says the Commissioner would contract with an investment banking firm for the expertise. She asked if that was the individual they were referring to.

CHAIRMAN TORGERSON replied that it was his intent to give the Commissioner as much latitude as possible and he had talked all along about a banking firm that had a lot of information and expertise in this field. But it could be a person.

SENATOR TAYLOR moved amendment #1.

CHAIRMAN TORGERSON explained that the amendment inserts another section that says, "The state should participate in a gas pipeline project by establishing a private corporation, which would be composed of Alaska residents who wish to become shareholders, that would own a portion of the project or assist in the construction and operation of the project." He explained that it was brought to him by another member who wanted the opportunity to have shares available so that individual Alaskans might be able to buy them.

TAPE 24, SIDE B

CHAIRMAN TORGERSON said he didn't think that would have much impact on investment firms or anyone else looking at it.

CHAIRMAN TORGERSON noted there were no objections to amendment #1 and it was adopted.

SENATOR TAYLOR moved to pass CSSB 158(RES) from committee. There were no objections and it was so ordered.

#

#SB164

SB 164-NO GAS PIPELINE OVER BEAUFORT SEA

CHAIRMAN TORGERSON announced SB 164 to be up for consideration. He explained that SB 164 makes legislative findings saying, "We want the North Slope gas for the highest utilization to be made for in-state usage to the maximum - jobs and opportunities that are within the state for value-added opportunities and adding significant long-term property base for the state and the bill concludes with making a legislative Best Interest Finding that prohibit the Commissioner from issuing a lease for the right-of-way over the top until a line is built south."

MR. MICHAEL HURLEY, North American Natural Gas Pipeline Group, said the three companies in the group are BP, ExxonMobil, and Phillips and they are, "working diligently to develop an economically viable project to commercialize North Slope natural gas by pipeline through Canada to the Lower 48 markets."

FERC, before it issues a Certificate of Public Convenience and Necessity, requires them to analyze alternative pipeline route options as part of the application process. This project has the potential to be the largest energy project in North America and will require capital investments in the billions of dollars. He said their energies are used for a thorough evaluation of alternatives and an understanding of their relative strengths, weaknesses, risks and rewards. Their efforts are, "focused on creating and understanding opportunities, not prematurely discarding them. This legislation would do the later."

MR. HURLEY said that limiting options would discourage other investors in Alaska projects. Any Alaskan projects, "must be able to deliver products to the market at a competitive cost in order to succeed. There are many other competing sources of supply and buyers will go elsewhere if a project fails in that regard. While our work may show that a southern route does offer the best combination of benefits and economic viability to Alaskans, it must be realized that efforts to prohibit the consideration of other development options, such as a northern route, may impede an Alaska natural gas project from moving forward."

MR. HURLEY said they were listening to the views of the Alaskan legislature and Alaskan citizens and were evaluating the alternatives on the basis of seven criteria:

- Overall project economics
- Alaskan access to gas
- Jobs for Alaskans
- Revenue to the State
- Safety

- Environmental protection
- Project timing

We do not feel that we have enough information, yet, to make a route decision. That is the reason for our aggressive work program this year. The effect this legislation will have on FERC and other agency permit applications is as yet unknown.

SENATOR TAYLOR asked how this legislation would preclude them from analyzing all the routes.

MR. HURLEY answered that they don't think that; they don't know what FERC will require of them as a result of its passage.

CHAIRMAN TORGERSON said he, "Found it difficult to believe FERC is going to make you look at options when the President of the United States and Congress has picked one. FERC doesn't have a dog in this fight." He thought not wanting the southern route was an intercompany policy.

MR. HURLEY replied that they are approaching this as a green field application that would require an alternative analysis as part of the backup of the application.

CHAIRMAN TORGERSON asked if they were ignoring the authorized route.

MR. HURLEY replied that the lack of clarity about how the old laws applied and whether they still apply has caused them to push forward as if it were a green field application.

SENATOR LINCOLN said that she was a bit offended by his testimony today. "To me it suggests that we have not been diligent in our analysis of the different routes and what's in the best interests of the state." She didn't think there had ever been any question about the dedication of Alaskans' access to gas and jobs, revenues to the state, safety and environmental protection. As far as timing, "We would like to see that done as quickly as possible..."

SENATOR LINCOLN continued: "This Chair, I've given him great kudos for really taking the Resources Committee through all of the routes, to hearing the public testimony, hearing from the producers, to hearing from the different groups that have an interest in this."

MR. HURLEY apologized and said it wasn't intended to offend.

MR. BILL BRITT, Alaska State Pipeline Coordinator, strongly supported SB 164. The over-the-top route is not in the state's best

interests for the reasons sighted nor do they believe it would be cheaper or faster due to a variety of design and permitting considerations.

However, a brief legal review has revealed some possible legal and constitutional issues, especially related to separation of powers. He said they needed more time to examine the issue. They are concerned about the precedent of this very prescriptive statute. They agree with the policy, but feel that they would be led to the same result without the prohibition in section (b), page 3.

CHAIRMAN TORGERSON asked what the separation of powers issue he was concerned with.

Number 1800

MR. JACK GRIFFIN, Supervisor of the Oil and Gas Division in the Department of Law, said their legal review has been cursory, but on the face of the bill there is a separation of powers concern.

While the legislature clearly has the constitutional authority to establish land use policy in the first instance, as a rule it establishes that policy on laws of general applicability and leaves the implementation of that policy to the executive branch. That's the approach the legislature has chosen and is reflected in the current Right-of-Way Leasing Act.

SB 164, on the other hand, starts off with the general and very legitimate policy consideration articulated by the legislature, but then in subparagraph (b), directs the commissioner to exercise the discretion in the event the commissioner sees application for a particular project in a particular area. The problem here is not really what the bill would do, but how it would do it. For example, the legislature clearly makes the state lands under the Beaufort Sea a state park. The legislature could clearly circumscribe the territorial reach of the Right-of-Way Leasing Act so that it doesn't reach submerged lands and the legislature could follow its legitimate policy articulating not only applicable policy considerations that must be evaluated and applied by the executive to implement this particular act. Those would be much easier to defend.

It's possible to put an interpretive clause on section (b) that would in effect interpret it as essentially a elucidation on the territorial scope of the Right-of-Way Leasing Act. I think the problem with that particular

interpretation, though, is that it ignores the specificity with which the bill identifies the offending project. For example, the commissioner can still issue a right-of-way lease for a gas pipeline that would follow the ANWR coast to Kaktovik. The pipeline goes on to Canada and then south at the commissioner's discretion has been eliminated. Conditions are [indisc.] saying separation of powers concerns that the specificity with which that particular project is identified raises, at least potentially, concerns under the United State Commerce Clause and under the U.S. and State people's protection clauses.

He didn't have enough time to analyze whether those concerns are significant, but on the face of the bill they could be significant.

CHAIRMAN TORGERSON said those same concerns were also in the NorthStar agreement in which Kachemak Bay Reserve was made off limits to oil and gas drilling, and that passed muster of the Supreme Court. He advised Mr. Griffin to check it out if he had some free time, but he thought it would be a waste.

SENATOR TAYLOR moved to pass SB 164 from committee with individual recommendations. There were no objections and it was so ordered.
#

CHAIRMAN TORGERSON adjourned the meeting at 4:45 pm.