ALASKA STATE LEGISLATURE
JOINT MEETING
SENATE JUDICIARY STANDING COMMITTEE
HOUSE JUDICIARY STANDING COMMITTEE
February 10, 2003
1:35 p.m.

MEMBERS PRESENT

SENATE JUDICIARY

Senator Ralph Seekins, Chair
Senator Scott Ogan
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

HOUSE JUDICIARY

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative John Coghill
Representative Jim Holm
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

SENATE JUDICIARY

All members present

HOUSE JUDICIARY

All members present

COMMITTEE CALENDAR

Confirmation Hearing: Attorney General Gregg D. Renkes
CONFIRMATION ADVANCED

PREVIOUS ACTION

No previous action to record.

WITNESS REGISTER

Gregg D. Renkes, Attorney General designee
P.O. Box 110300
Juneau, AK 99801-0300

ACTION NARRATIVE

TAPE 03-3, SIDE A [SENATE JUD TAPE]

CHAIR RALPH SEEKINS called the joint meeting of the Senate Judiciary Standing Committee and the House Judiciary Standing Committee to order at 1:35 p.m. Senate members present were Senator Therriault, Senator Ogan, Senator French via teleconference and Chair Seekins. Senator Ellis arrived at 1:36 p.m. The business before the committee was the confirmation hearing for Attorney General Gregg D. Renkes and a brief overview of the Department of Law (DOL). Without objection, Chair Seekins turned the gavel over to Representative Lesil McGuire, Chair House Judiciary Standing Committee to chair the meeting.

CHAIR McGUIRE announced the House Judiciary Committee members present were Representative Gruenberg, Representative Gara, Representative Anderson, Representative Samuels, Representative Holm and Chair McGuire. Representative Coghill arrived at 2:32 p.m. She invited Attorney General designee Gregg D. Renkes to give a brief overview of the Department of Law and to provide personal information.

ATTORNEY GENERAL DESIGNEE GREGG D. RENKES introduced Barbara Richie, Chief of Staff in the Attorney General's Office. He said he met with many committee members earlier and wanted to meet with the remaining members as soon as possible.

He emphasized one goal of the Governor and that was to have an excellent working relationship with the Legislature. The Department of Law is statutorily required to support the legislature. He wants to be responsive to the Legislature's needs and gain the legislature's trust that DOL's views are accurate. He feels it is important that the legislature and DOL work together in the best interest of the state. He and the Governor want the state to carry out its obligations in a way that is more efficient and responsive to the people and in a frugal manner and to create a stronger economy that provides more opportunities for young people.

ATTORNEY GENERAL-DESIGNEE RENKES informed committee members he grew up in Michigan and went to college in upstate New York where he enjoyed the sciences and focused his studies on biology and geology. He developed a strong interest in the out-of-doors and studied wildlife ecology. His interest in wildlife conservation and related land-use policies led him to Yale University where he received a Masters of Science. While there, he was exposed to "a heavy dose of western land policy and Native American affairs" that led him to decide on law as a career. He then studied at the University of Colorado School of Law. He studied resource law, oil and gas law, water law and Indian law from nationally recognized experts in those fields. He assisted in writing a public land law casebook and an Indian law casebook and produced a mining law publication.

His interest in land resources and Indian law led him to Alaska. He worked in Anchorage during law school and wrote a lengthy final year paper on subsistence and Title 8 of ANILCA (Alaska National Interest Lands Conservation Act). He moved to Alaska in 1986 to take the Alaska bar examination and work as a law clerk for the Alaska Superior Court in Palmer. At the court in Palmer, he was sworn in as a magistrate to conduct trials, hearings and arraignments.

He maintained his interest in Alaska Native affairs by writing weekly articles on legal issues affecting people in village Alaska for the Tundra Times. He was drawn to Washington D.C. where Senator Murkowski hired him to help with his work on the Indian Affairs Committee in the Senate Energy and Natural Resources Committee. He thought he would be there two years, but stayed longer and worked on the 1991 amendments to the Alaska Native Claims Settlement Act (ANCSA) and became Senator Murkowski's legal counsel. His return to Alaska was delayed when he became chief of staff and staff director of the Senate Energy and Natural Resources Committee. He ran Governor Murkowski’s Senate reelection campaigns in 1992 and 1998. He told members:

> During my many years in the Senate working for Alaska, I had the opportunity to work on issues and with people from virtually every area of our state. You know, I’ve witnessed the work of family alcohol treatment in St. Mary's, listened to the concerns and fears of people in Pt. Hope when they learned of nuclear experiments in their back yard. I participated

in economic summits in Kotzebue and Barrow and with my wife, visited the health clinics in Norvik and Anapuchuk (ph). Traveled to Bethel with the Assistant Secretary for Indian Affairs to finally got the old BIA facility in the hands of the Yukon Kuskokwim Health Corporation and I've been to Bethel on other occasions to listen to children tell their stories of inhalant abuse. I've fought battles over wilderness in the Tongass and cruise ships and fishing in Glacier Bay. I've visited nearly every small community in Southeast Alaska. I've worked with the community leaders in Ketchikan and Sitka as they coped with mill closures and I spent time in Adak with the base closure and land transfer. I've held community meetings at the coffee shops in McCarthy, Northway, Wasilla and Pelican, not to mention those policy discussions that lasted late and moved into the bars at the Stikine Inn and the Talkeetna Road House. On more than one occasion, I introduced members of Congress to the people of Kaktovik.

I could go on and on, because it lasted 16 years, but I won't. The point is that I've dedicated my entire professional career to working for and with Alaskans from all over Alaska and I believe this gives me a very good perspective to bring to the office of the Attorney General.

ATTORNEY GENERAL-DESIGNEE RENKES said the Department of Law carries out widely varied and important functions to protect and further the interests of the state and its citizens. It has a highly professional and skilled staff. He explained:

By law, the attorney general serves as the legal advisor to the governor and to other state officers and agencies. We represent the 14 principal departments of the state government and in addition such agencies as the Permanent Fund, AIDEA [Alaska Industrial Development and Export Authority], the RCA [Regulatory Commission of Alaska] and the AHFC [Alaska Housing Finance Corporation]. We are also called upon to represent the judicial and legislative branches of government. In addition to the duties set out in statute, the attorney general has those powers that existed in a common law. I think this is interesting and important. Our state supreme court recently

described this authority as follows: 'Under common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest' - a broad grant of authority which includes the power to enforce Alaska statutes.

ATTORNEY GENERAL-DESIGNEE RENKES asked members to think of the variety of operations the state undertakes. Virtually all of those undertakings require legal services from the Department of Law. He noted that DOL handles everything from felony prosecutions to collection of restitution payments for victims of crime, "from the review and analysis of each piece of legislation introduced in this body to taking action against the federal government to protect and enhance the state's rights." He informed members:

Some case numbers and statistics from 2002 will give you a sense of the volume of work the Department of Law does. In 2002, the criminal division handled approximately 6,000 new felony cases and 21,000 new misdemeanor cases. The number of new felony case referrals has increased steadily over the last decade. In 1993, for example, there were 3,800 new felony cases referred. That's an increase of 55 percent. The only good news in these figures is that the number of felony sex crimes has not gone up, but the bad news is that felony drug cases have increased, felony assault has tripled and we're now identifying felony drunk drivers. Our streets are simply more dangerous than they used to be.

The number of new misdemeanor case referrals had stayed steady for several years, but this year it jumped a full 10 percent solely because of renewed interest in minor consuming cases. With the exception of minor consuming, the numbers have remained relatively stable, but it is the seriousness of the misdemeanor cases that has changed. In the past, domestic violence was hushed up and overlooked. We've come a long way in a short period of time, however. In the past, the typical misdemeanor assault case presented to the D.A.'s office was a drunk in a bar getting into a fight. Now two out of three misdemeanor assaults is a domestic violence assault. Despite increased penalties and certainly as a result of increased police enforcement, misdemeanor drunk

driving continues unabated. This is where we concentrate our effort in misdemeanor cases - domestic violence and drunk driving.

> Note that up to now, I have used the term "new felony and misdemeanor cases." This is to distinguish old cases that might be handled again and again. The courts have become sensitive to the plight of crowding in the Department of Corrections facilities and often substitute supervised probation for a longer jail sentence. The legislature has responded by allowing the courts to impose longer periods of supervision, but this means that more and more offenders are on probation, thus more and more proceedings to revoke probation and impose the suspended sentence. The number of these old felonies has increased steadily and we now handle 2,000 additional cases of felony probation revocation. There are also a few thousand misdemeanor probation revocation proceedings, but those are typically perfunctory hearings. The grand total is over 30,000 cases handled by the criminal division each year - a heavy, heavy load of work...

ATTORNEY GENERAL-DESIGNEE RENKES said he met with all the district attorneys to begin to better understand their needs, workloads and concerns. Criminal justice and public safety are high priorities for both he and Governor Murkowski. He stated:

> I will be looking for ways to strengthen our criminal prosecution efforts in both urban and rural Alaska through such means as changes to state laws, increased cooperation with the United States Attorney's Office and seeking available federal funds for law enforcement.

He was in Philadelphia the previous week at the Project Safe Neighborhoods Conference held by the Justice Department. He learned that federal money is available in the form of over 20 grant programs but the grants being awarded in Alaska are not coordinated with Alaska's criminal justice program. Coordinating these grants is a priority to ensure funds are used for the highest purpose. One person at DOL will be assigned to coordinate those funds.

ATTORNEY GENERAL-DESIGNEE RENKES met with the section supervisors of the Civil Division in Anchorage and Juneau and

intends to meet with the supervisors in Fairbanks. The Civil Division has 11 sections that focus on different areas of the law: natural resources, human services, transportation, collections and support, legislation and regulations, commercial, environmental, fair business practices, governmental affairs, oil, gas and mining, and special litigation. He explained:

> In 2002, the Civil Division collected just over $71 million in disputed oil and gas taxes and nearly $23 million in disputed royalties. We collected nearly $3.6 million in civil and criminal judgments owed the state. We opened 505 new child protection cases representing 858 Alaskan children and we completed 1,420 child support enforcement cases.

ATTORNEY GENERAL-DESIGNEE RENKES said he is working with Civil Deputy Scott Nordstrand to get to know all the sections and the staff, what they are doing, what the caseloads are like, what's working well and what could or should be changed to improve how the state provides legal services. This is to insure that the legal demands of the state are met and the Governor's priorities are receiving the attention and resources needed.

He explained the Conference of Western Attorneys General would undertake a performance review of the department the first week of March. Their report and the Governor's transition report will provide fresh recommendations and ideas on how to better focus the department's resources on the Governor's priorities and improve accountability. He continued:

> So what are our priorities of the Department of Law? I will focus the department on making Alaska a safer and better place to live and work, insuring that the state fully asserts and protects its sovereignty and making sure that the state receives full value for its oil and gas resources. I believe that the Department of Law plays a key role in achieving each of these goals. I’ve already discussed my strong interest in criminal justice and my plans for a renewed emphasis on our criminal prosecution efforts. In addition, I believe that the Department of Law will be instrumental in the implementation of Governor Murkowski's programs for economic development and responsible resource development. These are priorities

for the Governor and they are priorities for me as well.

ATTORNEY GENERAL-DESIGNEE RENKES explained DOL advises the resource agencies daily on legal issues relating to permitting decisions. They work closely with agencies to make sure Alaska laws are followed to minimize legal challenges. If there are challenges, DOL will defend the Attorney General's actions as expeditiously as possible. Oil, gas and mining issues are a high priority: developing Alaska's oil, gas and mineral resources and insuring the state receives taxes owed, its correct share of royalties and monitoring appropriate protesting tariffs charged for transportation of oil and gas production through pipelines. DOL provides legal advice and representation in all these critical areas.

In FY 2003, over $23 million was collected through actions pursued by DOL. He offered to provide a briefing on pending and future matters upon request in an executive session.

ATTORNEY GENERAL-DESIGNEE RENKES added:

State sovereignty and statehood defense is also a top priority. I believe that resolving the state/federal disputes and clearly establishing, protecting and defending the State of Alaska's rights with respect to our lands, water and resources including title to our navigable water, access rights, salmon resources and timber resources will have a profound and lasting impact on the management of Alaska's natural resources. Here I think it is important to reflect on some of the activities under way.

The Southeast Alaska Tidelands case - we call this original number 128. Last week we argued this in Washington D.C., our oral argument. The State filed this action against the United States in November of 1999 to quiet title in the lands underlying marine waters in Southeast Alaska. The state claims title to the lands underlying all marine waters in the Alexander Archipelago including those within the boundaries of the Tongass National Forest and Glacier Bay National Park. Because the case addresses a boundary dispute, it's filed originally in the Supreme Court. The parties had filed motions for summary

judgments on all four counts of the complaint and the oral argument was held, as I said, last week.

In response to the Tongass count, the federal government has conceded the title to the lands underlying the Tongass National Forest. The parties' special master will provide a recommended decision with the court in the next term beginning September of next year. Once the special master's report is filed, we'll read it, obviously, and then provide briefs on exceptions that we take to that. Then there will be an oral argument in the Supreme Court and we hopefully can get a decision on this case in the following term in 2005 of the Supreme Court. It seems like a long time, 1999 to 2005, but you'll recall Dinkum Sands [United States v. Alaska, No. 84 Original] took 19 years. So we'll do better than that I hope.

Roadless lawsuit, this is another one that I've been working on. The state filed suit challenging the U.S. Forest Service's decision to apply the roadless rule to the Tongass and the Chugach National Forests. The rule prohibits road construction, reconstruction and timber harvest except for stewardship purposes in all inventoried roadless areas. The suit argues that the roadless rule violates numerous federal statutes requiring a public planning process and consideration of local conditions concerns and impacts and, importantly, is a violation of the 'No More' clauses of ANILCA. The rule remains enjoined nationwide while the matter is before the 9th Circuit. Should the rule take effect, the State will consider its options including the possibility of asking the court for a preliminary injunction in Alaska. And I met with the Justice Department last week to discuss the status of the case.

Recordable disclaimers from navigable waters, this is an important area. The Department of the Interior recently amended its regulations for recordable disclaimers of interest. What a recordable disclaimer is is a regulation that allows the state to assert title. The federal government can consider the assertion and on the facts disclaim its interest and provide a disclaimer that then can be recordable and bring some finality to these title issues that we've

had difficulty moving through the courts. The regulations are authorized by the FLMPA, the Federal Land Management Policy Act, and provide this simple process. The BLM will in the first instance evaluate these applications and file the disclaimers should they believe that the applicant meets the criteria. If not, then we can pursue litigation. These regulations became final last Wednesday and on that day, purposely, I met with the Deputy Secretary of Interior, Steve Griles, in Washington D.C. to discuss how Alaska will proceed under these regulations.

I'll waste no time in using whatever means available to establish state title in its rights-of-ways, submerged lands and navigable waters. We can clearly use this new regulation to remove the clouds on lands underlying navigable waters in Alaska. At statehood, Alaska took title to lands underlying navigable waters. Under the constitutional Equal Footing Doctrine, the state holds the lands in trust for the public to use for navigation, commerce and fishing. Clouds remain on the state's title to much of these submerged lands. However, because the federal government has not been willing to concede navigability in any permanent matter, these regulations will change that. Obviously, litigation is time consuming. Importantly, we're already prepared to file our first application under these new regulations for the Black River in Northeastern Alaska. We've chosen this one because it provides the best factual case for the first application. The state intends to follow with other applications beginning with waters the BLM has already found to be navigable.

A word on a related issue - RS 2477's - another priority. We'll be reviewing inventory of RS 2477 rights-of-way and examining all appropriate means to increase access for Alaskans. In two recently settled RS 2477 cases, Harrison Creek and the Jualin Mine Road, we're awaiting final survey of the established rights-of-way. I will work closely with the Department of Interior as they review their existing regulations adopted by Secretary Babbit to frustrate Alaska and Utah for asserting their claims and I will press them for new regulations or guidelines that allow us a speedy process to finally establish title to our

access routes. It may be that we are able to use the recordable disclaimer process for RS 2477 rights-of-way, however the Babbit regulations stand in the way of that, the definitions of construction, the definitions of highway, which basically if it's not a paved road you're not going to get title to it as an RS 2477 under current regulations. At our urging, Deputy Secretary Griles and Secretary Norton are taking a hard look at this and evaluating the possibility of new national guidance on RS 2477 rights-of-way that should give us a workable process to achieve title.

2:02 p.m.

Endangered Species Act, there are some interesting things going on that we're involved in with the Endangered Species Act. The Alaska Center for the Environment v. State [(6/13/97), 940 P2d 916], in that case we're defending in the Alaska Supreme Court, Fish and Game's decision not to add the Cook Inlet Beluga whales to the Alaska list of endangered species. The population appears healthy and is expected to increase and the Cook Inlet population is not a recognized subspecies.

The state is reviewing its options to protect its interests in Greenpeace versus the National Marine Fisheries Service [No.C98-492Z]. This is a lawsuit filed in Washington State challenging the legality of federal groundfish fisheries in Alaska under NEPA [National Environmental Policy Act of 1969] and the Endangered Species Act in an effort to protect Stellar sea lions. The state formally participated as an amicus [curiae] in the 9th Circuit and I will very soon increase our involvement by filing a motion to intervene in this case. We are concerned about the impacts the suit may have on the state's economy and the state fisheries and it is my view that the state must be at the table in this litigation and part of any resolution that flows from it.

Our attorneys also regularly participate in review and preparation of comments on proposals that designate critical habitat under the Endangered Species Act and a variety of other issues related to hatchery fish,

sea otters and groundfish. In addition, we monitor federal actions relating to management of federal fisheries, federal preemption, groundfish and crab issues.

Related to that is the Pacific Salmon Treaty. Two cases filed in Washington State, Confederated Tribes and Bands of the Yakima Indian Nations versus Baldridge [U.S. 9th Circuit Court of Appeals No. 95-35901] and the U.S. versus Washington [C70-9213] challenged the allocation of and treaty rights to salmon resources in Alaska waters as well as in the Pacific Northwest. We are a party to these cases. While the cases are currently stayed based on recent agreements in the Pacific Salmon Treaty, we continue to review biological opinions and recovery plans for the West Coast salmon populations and assess the actions [of] the United States, the tribes and other states and Canada.

Subsistence, we regularly review and comment on proposals before the federal Subsistence Board, testifying at board meetings and requesting a reconsideration of decisions we believe are in error. We are also defending litigation manning the state in which the state subsistence law is challenged on the ground that the scoring process for tier two applications unconstitutionally takes place of residence into account.

Statehood Act Entitlement, both the litigation and through negotiation and review of proposed federal actions - we work to insure that the state receives the land to which it is entitled under the Statehood Compact. In addition to our efforts to protect state title to navigable waters, this work includes review of BLM decisions to convey land to others as well as ensuring that our land selections are properly considered, surveyed and conveyed.

Related to that we also took up in Washington recently, the wilderness reviews and wilderness study reviews that are underway as part of the BLM and Fish and Wildlife Service planning process. The Department of Interior - we formally asked the department, the Secretary of Interior, to look again to the No More

clauses of ANILCA and what we believe is a prohibition on further federal wilderness study and review.

ATTORNEY GENERAL-DESIGNEE RENKES pointed out that because of Alaska's unique circumstances, the congressional delegation and the Washington D.C. Office of the Governor often need the support of the Department of Law to review, analyze and flag for action things being proposed in Congress. It is frequently necessary to remind Congress of the particular protections and exemptions in ANILCA, like the No More clauses as they affect federal action. He pointed out:

> In this regard, one thing I want to bring to your attention I think is significant, the EPA [Environmental Protection Agency] and the Army Corps of Engineers are soliciting comments, I believe due by the first part of March, as they review and establish new definitions for waters of the United States. A 2001 Supreme Court decision known as the SWANCC case [Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178] determined that isolated waters including wetlands are not subject to federal jurisdiction. The regulations that will be adopted to reflect new definitions of wetlands consistent with the SWANCC decision could fundamentally change the way much of our wetlands are regulated in Alaska.
>
> Another priority for our state, for us, is our state tribal relations. I believe clarification of the authority of the Alaska Native entities under the law will be critical as we move forward to bridge the urban/rural divide and empower people at the local level. This is a complex area of the law, which I intend to devote time and attention [to] as attorney general.
>
> Clearly many challenges lie ahead for the State of Alaska. The Department of Law is likely to be right in the middle of many of them, advising and assisting the state in determining the best course of action. I see the Department of Law, really, as an engine of change and I intend for the department to be instrumental in carrying out the Governor's vision for Alaska. With that, I hope this wasn't too long, thank you and I'd be happy to answer questions.

CHAIR McGUIRE thanked Attorney General-designee Renkes for his time and the thorough overview.

SENATOR OGAN thanked Attorney General-designee Renkes and appreciated his experience with the federal government because the state has been "wrapped around the axle" with the federal government for a number of years over various issues. He asked, "The recordable disclaimer issue is one that interests me a great deal. You said it would 'remove clouds to our navigable waters issues.' Is one of the 'clouds' that you are talking about the Reserved Water Rights Doctrine?"

ATTORNEY GENERAL-DESIGNEE RENKES said the 'cloud' is the assertion of federal title. The federal government has been reluctant to permanently waive title to our submerged lands. Without a specific issue in conflict, it is difficult to get into court to establish finality in a quiet title action on specific navigable waters cases. This regulatory process will provide a way to get to finality so as to receive a disclaimer of interest that is recordable.

SENATOR OGAN said in the 1953 Submerged Land Act the title to submerged land came with the right to manage all the resources including the fisheries. The 9th Circuit Court has decided that because water originated on federal land, the federal government has the right to control subsistence fishing all the way to saltwater and probably beyond. In the Dinkum Sands case, Justice Sandra Day O'Connor said, "If those disputed lands were submerged lands, which the state owns and with it including the right to control fishing, they would have ruled a little bit differently on Dinkum Sands." He supported the DOL priority to assert state sovereignty. One of the most fundamental sovereign rights is to manage all state fisheries including the submerged lands fisheries. He asked what DOL was going to do in that regard and would that also fit under the No More clause. The federal government was not to take any more land with ANILCA yet they have taken away the management on submerged lands with the Reserved Water Rights Doctrine.

ATTORNEY GENERAL-DESIGNEE RENKES said the 9th Circuit Court pressed this expansive view of federal reserved water rights and 12 to 14 states are prepared to file an amicus brief on the appeal. Alaska is still litigating attorney's fees in the Katie John Case [State of Alaska v. Babbitt, No. 94-35480] and the state may owe about $1 million in attorney's fees as a result of

dropping the appeal. To get the Federal Reserved Water Rights Doctrine before the U.S. Supreme Court, a related fact pattern will have to arise in Alaska or another circuit court allowing another lawsuit on a slightly different angle.

He felt Alaska's most expedient remedy is to go to the U.S. Congress to clearly define the extent of the Federal Reserve Waters Rights Doctrine created by the 9th Circuit Court in the Katie John case. The Reserve Water Rights is a controversial issue and very difficult legislation to move though Congress but with Republican majorities in the U.S. House and Senate and a Republican in the White House it is a legitimate area for review. Some western Senators, like Senator Craig from Idaho, have been champions in working to restrict the application of federal reserve water rights in the West. The 15 members of the Conference of Western Attorneys General are to meet with Secretary Norton in Washington D.C. in March and federal reserve water rights will be one of the issues raised at that meeting. Education and advancing the state's interest in Washington D.C. will be the way to address the 9th Circuit Court's decision, probably not through the courts.

SENATOR THERRIAULT asked Attorney General-designee Renkes his opinion on where the state stands with regard to state and tribal relations and the "legal underpinnings" of the Millennium Plan signed by the previous administration.

2:15 p.m.

ATTORNEY GENERAL-DESIGNEE RENKES said as he read it the Millennium Agreement only applies to the extent that there is law to support it. About 80 tribes have signed to be parties. It creates a great amount of confusion with state agencies because agencies are told to cooperate with these organizations on a government-to-government basis and the tribes get consulting agency status in permitting decisions. With 223 organizations theoretically qualifying, it can cause a lot of problems in the way things are done in Alaska. He planned to review the creation history of the Millennium Agreement, the dialogue that went into forming it, and look at the objectives that were meant. He stated:

> I think the objectives were good, I mean the objectives were - we need to have a better working relationship with the groups in rural Alaska. We need to enhance our way we work together as opposed to

> against each other and empower people at the local level to take responsibility and control of their lives and circumstances. I think those are very good objectives, but I'm not sure just calling everyone a tribe and saying that they're on a government-to-government relationship with the state accomplishes those objectives. I think that often when we focus on legal victories, or you know what we call something, we lose in the translation the rights of the people who live there. And so I'm very concerned about how the law and, I'll say, the legal fiction in this area has developed in Alaska and what impact it's having on people, on children, the people who live in rural Alaska and the rights that they believe they have under the state constitution. So I think this whole area needs to be looked at.
>
> I really think that what we have in Alaska is a full spectrum of organizations and tribal organizations with many different capabilities and to treat them all the same or to say they are all on a government-to-government basis with the state is troubling I think.

ATTORNEY GENERAL-DESIGNEE RENKES explained that Congress has plenary authority to recognize tribes and that authority is delegated to the Secretary of Interior in the federal acknowledgement process. Under the Clinton Administration, Assistant Secretary of Indian Affairs, Ada Deer, published a list that included every Alaska village and called them all Indian tribes with government-to-government status. She took every Alaska Village Corporation off the list and this was wrong because those corporations do qualify to provide benefits to their shareholders because their status is Native American.

In 1994, Congress passed the Federal Indian Tribe List Act that purported to ratify the action taken by Assistant Secretary of Indian Affairs, Ada Deer. Attorney General-designee Renkes said, in his opinion that statute fails to meet the burden of clearly employing Congress's plenary authority over Indian Affairs in recognizing those tribes. This was an assertion of authority that did not exist in the executive branch and needs careful examination. He added, "I think the spirit of the Millennium Agreement is good and I think we have to find ways to empower people."

TAPE 03-3, SIDE B [SENATE JUD TAPE]

2:21 p.m.

ATTORNEY GENERAL-DESIGNEE RENKES said there needs to be a positive working relationship between rural and urban Alaska. It is a tall order to have the Millennium Agreement be a positive exercise that improves the quality of people's lives, makes sure rights are protected and protects children who are often pawns in jurisdictional fights. He said the issue is a high priority.

SENATOR THERRIAULT agreed. He understood Alaska's congressional members do not agree there was ratification of the list and that caused confusion. He asked if Congress was going to take action to clarify that and said, "Because quite often now when pieces of legislation come up we've got some [indisc.] language that gets added to the bills that says nothing in the act is to add to or detract from potential tribal sovereignty." Legislative counsel advises the continued addition of that language because this is an issue Congress has yet to take final action on. Senator Therriault said there were recommendations that language should not be added to bills because Congress never really intended to create this cloudy area and therefore the Legislature should not pretend it exists.

ATTORNEY GENERAL-DESIGNEE RENKES said he met with Steve Griles, Deputy Secretary of Interior, and Matt McCowen, Solicitor General First Assistant, and requested they look at the current state of the law, the impact of the federal Indian Tribe List Act on the list and the purposes for which the list is published. The congressional delegation is interested in the consolidation of grants coming to the tribes in rural Alaska. He will ask the congressional delegation to raise the issue at the first opportunity.

SENATOR ELLIS said oil and gas issues are very topical for the Alaska Legislature. He asked Attorney General-designee Renkes to tell the committee how many years he served as a lobbyist, who his clients were, which particular oil and gas interests he represented in the past and how he did so for the public record.

ATTORNEY GENERAL-DESIGNEE RENKES testified he had a consulting business and was of counsel to a law firm for about three and a half years in Washington D.C. He did advisory work and a small amount of lobbying for ARCO. Most of his work for ARCO was related to permitting and litigation surrounding the development of the Alpine Oil Field. He worked for ARCO on a strategic plan

for achieving the reauthorization of the right-of-way for the TAPS line. He worked on merger issues during the BP/ARCO merger. His work for BP related to constructing a federal legislative strategy for natural gas pipeline incentives and solving regulatory issues left over by ANGTA (Alaska Natural Gas Transportation Act of 1976).

SENATOR ELLIS said the Nuclear Energy Institute doesn't really apply to Alaska and added, "Nothing nuclear in our future I hope."

ATTORNEY GENERAL-DESIGNEE RENKES said he did work on a nuclear issue once that involved Alaska. In 1988 or 1989 the Department of State, the Department of Energy and the Department of Defense negotiated the U.S./Japan agreement for peaceful cooperation in the use of nuclear fuel. The transportation section would allow plutonium to be flown from Europe to Japan. This caused great concern because the planes would land in Anchorage to refuel. The agreement had to come before the U.S. Senate for a resolution of approval or disapproval under the Atomic Energy Act. He constructed an amendment that was added to the Nuclear Waste Policy Act that banned the air transport of plutonium from Europe to Japan and mandated sea shipment.

CHAIR McGUIRE announced for the record that Representative Coghill joined the committee.

2:32 p.m.

REPRESENTATIVE GARA explained initially he wanted to be assured Attorney General-designee Renkes had the legal experience needed to fulfill the duties of Attorney General. He asked:

> Let me say for the record that if you were here before us as the Governor's selection to be his chief of staff I would have not even a second's worth of concern. You are bright, you share the Governor's philosophy and I think the Governor has a right to choose folks who share his philosophy. You are well spoken. You were polite when you came over to see me and that meant a lot. So - but my real questions in that regard are as Attorney General, do you have the background really to fulfill the duties?

REPRESENTATIVE GARA said he still had those questions but was sidetracked because of Senator Therriault's questions about the

Millennium Agreement. He asked, with the Tribal Recognition and Indian Bureau Enhancement Act of 2001, whether roughly 229 tribes were federally recognized in the State of Alaska. The former governor and many tribes within the State of Alaska signed the Millennium Agreement. He asked if there was any chance this Administration was going to depart from that signed agreement.

ATTORNEY GENERAL-DESIGNEE RENKES answered no, however they had to look carefully at the assumptions presented. There may not be 229 federally recognized tribes. The list and the attempt to ratify the list may not have accomplished what was hoped. The Millennium Agreement sets the way the state will seek to deal with the federally recognized tribes. The state will listen to their needs, goals and objectives and afford them the courtesies that would be afforded another government. He thought the state should examine who has the capability to benefit from that government-to-government relationship and who the federally recognized tribes are that can benefit from it.

REPRESENTATIVE GARA asked if Attorney General-designee Renkes was suggesting the Administration is going to take action to de-list some currently federally recognized tribes.

ATTORNEY GENERAL-DESIGNEE RENKES asked if he meant the federal administration.

REPRESENTATIVE GARA said the Murkowski Administration. He asked if he, as Attorney General, was going to take action to try and de-list any of the recognized Alaska tribes.

ATTORNEY GENERAL-DESIGNEE RENKES answered there was no action he could take to de-list tribes. The state can look at whether or not groups have been federally recognized. Those that clearly have the attributes of federal recognition should be dealt with on a government-to-government basis. There are groups that don't have the requisite attributes but are on the ANCSA village list from 1971, which might have been used as a basis for creating this list. He said he was voicing his skepticism that all 229 groups listed have the same capacity, capabilities, history, inherent powers and governmental status. He continued:

> I think that that assumption bears some closer examination on a case-by-case basis to determine just what are the capacities, [indisc.] history, legal status of each of our tribes and we should deal with

them accordingly. Because I think if we do that... we will not be denying citizens of this state the protections of state laws, for example on a sovereignty immunity situation, where they shouldn't be denied the protections of those laws or transferring children to tribes that lack the capability of protecting the interest of the child. Those kind, those are areas that, you know disturb me. I don't think that we have room in those cases for assumptions about the capabilities or governmental status.

This state has an obligation; I think particularly in the case of children, we have an obligation to protect the best interest of the child. And unless the state's convinced that the tribal organization, which we're transferring jurisdiction over a child, can provide the same level or better of protection and services for those children, I feel strongly that the state should not readily give up jurisdiction over those children. I'm just saying let's be thoughtful and let's look at these things on a case-by-case basis. Let's be less concerned about whether we are anti-tribal or pro-tribal or whether we are creating a new body of law here. Let's look at the specific circumstances on the ground in Alaska, evaluate the legal status of the groups individually, their capabilities, capacities and work in a positive way to empower people, train people, do the things that are necessary to make sure that the interests that are sought to be protected here, the interests of the citizens of the State of Alaska, are protected.

REPRESENTATIVE GARA said it is his understanding there is a list of 229 tribes, essentially Alaska's villages that are recognized tribes under the Federal Recognized Tribal List Act signed by the President of the United States. He asked if he was hearing that Attorney General-designee Renkes does not agree those villages have been properly established as tribes.

ATTORNEY GENERAL-DESIGNEE RENKES opined that was an arguable point of law. There were no tribes listed in the Federal Indian Tribe List Act and the Assistant Secretary of Interior may not have had statutory authority to publish the subsequent list. Attorney General-designee Renkes could not answer the question at the time. He said he had been asked to take a very careful

look at the issue and would do so in an open, honest and positive way and maintain a dialogue with Representative Gara and others.

REPRESENTATIVE GARA said he heard Attorney General-designee Renkes, speaking on behalf of the Governor's office, intended to honor the spirit of the Millennium Agreement. He asked, "Is there not an intention to honor the word of the Millennium Agreement? Is there any question about whether the Millennium Agreement needs to be rewritten in some sense or are we going to honor the document and the words of it?"

ATTORNEY GENERAL-DESIGNEE RENKES said a new administration must take a hard look at previous administrative orders and actions and make sure they achieve policy objectives. He wanted to work closely with Representative Gara and look at what the agreement means, what the experience has been and how it is impacting activities of state agencies. He felt the tribes have to sign the agreement to benefit from it. The agreement may need some strengthening, tinkering and adjusting. It was an important step; a culmination of two years of work, hearings and dialogue, to improve the relationship with rural Alaska, but it is not locked in stone.

2:43 p.m.

CHAIR McGUIRE said it was clear he was bringing up issues that may have legal questions surrounding them and discussing the kind of things he would be working on as Attorney General.

REPRESENTATIVE SAMUELS said for the past four to six years the Legislature has been focusing on a 'mission and measures' approach so as to measure the results and effectiveness of a program. He asked Attorney General-designee Renkes how he would measure whether he had done a good job in the Criminal Division and how he would measure his effectiveness with the dollars budgeted by the Legislature.

ATTORNEY GENERAL-DESIGNEE RENKES said it is difficult to measure effectiveness but one way would be to measure the number of successful prosecutions and the resulting sentences. The support given victims through the tragedy of crime is another area to judge how well DOL had done. If the criminal prosecution area has insufficient resources, prosecutors become overloaded with cases and some expediency results. Cases are pled that otherwise would go to trial and public safety suffers as a result on

occasion. The district attorneys and prosecutors explained that a lack of resources is the problem. The increase in criminal misdemeanors, domestic violence and drunk driving cases referred to prosecutors take increased time and resources.

REPRESENTATIVE SAMUELS referred to the increase in felony cases from 3800 cases to 6000 cases in ten years. He asked whether the Legislature had criminalized more behavior or had behavior changed. He asked what the district attorneys had indicated was the cause of the increase.

ATTORNEY GENERAL-DESIGNEE RENKES said the increase in cases was due to population increases along with improved detection and enforcement of certain criminal statutes, particularly in felony domestic violence, sexual assault and sexual abuse cases. Moving from community policing to a system focused on particular types of crimes seems to result in more cases. The Anchorage Police Department doubled the number of sexual assault and sexual abuse cases in one year by shifting the way they deal with them. It is a combination of factors: increased population, increased awareness on the part of the public and the police and a changing pattern in the way the police do their business.

CHAIR McGUIRE informed Attorney General-designee Renkes she chaired the Administrative Regulation Review Committee for two years her first term and the Uniform Mechanical Code and International Mechanical Code case was a “black and white” case. The Department of Public Safety (DPS) has a broad grant of authority from the Legislature involving regulations that pertain to public safety and they adopted the International Mechanical Code. Her first objection was that DPS failed to listen to the people in the field. The Department of Community and Economic Development (DCED) got involved and at a committee meeting in September in Anchorage, she pointed out three different sections of the statute where it clearly states the Uniform Mechanical Code is to be adopted. She asked DCED to work with the Legislature to sort it out because that is the law. She said, “They in turn thumbed their nose at my committee and turned around and adopted that regulation, adopting the International Building Code and Mechanical Contractor Codes in violation of the law.” There was a statute that said “X” and an agency that adopts “Y” and the two are completely different. No solution was reached and a legislative battle ensued. She asked Attorney General-designee Renkes how he would handle situations to ascertain whether or not an agency has overextended its authority.

ATTORNEY GENERAL-DESIGNEE RENKES said he hired David Marcus who worked as the liaison for legislation and regulations. He has experience in negotiated rule making and the regulatory review process. Mr. Marcus will be in direct contact with the Legislature and the regulatory review process and be responsive to concerns. The Legislature needs to be part of the evaluation of whether regulations fit within the laws.

He explained the code issues are very contentious. The building officials, architects and engineers have one point of view and the mechanical contractors and laborers have another. The only way to work through the different views about what the appropriate codes should be is through some kind of public process that brings in views, evaluates them, and comes to a decision. Senate President Therriault has introduced legislation that provides a process for this kind of thing. It is going to be contentious regardless of the results. The experts need to meet with the certification and training boards and some resolution found. The superior court did not see the regulation exactly the way Chair McGuire saw it in terms of the affect of the statutes with respect to the regulation; that is now on appeal. He said he was stuck with what the law is.

CHAIR McGUIRE asked what the law is.

ATTORNEY GENERAL-DESIGNEE RENKES said a regulation that is the law adopted under the state rule making process. Since September of 2001, it has been the International Code.

CHAIR McGUIRE asked, "Why isn't the law what is in the statutes?"

ATTORNEY GENERAL-DESIGNEE RENKES answered that is what the courts are for; the superior court disagreed and found the provisions in the statute that referred to the Uniform Code did not require that only the Uniform Mechanical Code be adopted. It is on appeal and could very well be overturned. The process needs new rule making or Senate President Therriault's legislation to pass so the different interest groups can have confidence in the result being the right decision.

CHAIR McGUIRE said she did not and did not think anyone came into that battle for proprietary reasons. She saw a clear violation of the separation of powers. As a member of the Legislature, she was disturbed by how it was handled. She

trusted Attorney General-designee Renkes and David Marcus to work on the issue in the future.

ATTORNEY GENERAL-DESIGNEE RENKES said he would do the best he could and had no predisposition on the issue.

3:00 p.m.

CHAIR McGUIRE announced the meeting would be adjourned at 3:10 p.m. and asked if Representative Gara, Senator Ogan and Representative Gruenberg wanted to discuss the use of the remaining time.

The committee took an at-ease from 3:03 p.m. to 3:04 p.m.

SENATOR OGAN moved the appointment be forwarded to a joint session for consideration with the understanding this does not reflect the intent by any of the members to vote for or against Attorney General-designee Renkes during any further session.

There being no objection, Chair McGuire announced that Attorney General-designee Renkes' name would be advanced to the full body for a vote.

REPRESENTATIVE GRUENBERG supported the motion with the understanding that Attorney General-designee Renkes would be back in the near future to answer questions. He noted he was favorably impressed, but had a couple of questions.

There being no further business before the joint House and Senate Judiciary Committees, the meeting was adjourned at 3:05 p.m.