

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

March 5, 2003

2:20 p.m.

MEMBERS PRESENT

Representative Mike Chenault, Co-Chair
Representative Hugh Fate, Co-Chair
Representative Beverly Masek, Vice Chair
Representative Carl Gatto
Representative Cheryll Heinze
Representative Bob Lynn
Representative Kelly Wolf
Representative Beth Kerttula

MEMBERS ABSENT

Representative David Guttenberg

COMMITTEE CALENDAR

HOUSE BILL NO. 115

"An Act extending the termination date of the Alaska Minerals Commission."

- MOVED HB 115 OUT OF COMMITTEE

HOUSE BILL NO. 24

"An Act relating to intergovernmental agreements regarding management of fish or game."

- HEARD AND HELD

PREVIOUS ACTION

BILL: HB 115

SHORT TITLE: EXTEND ALASKA MINERALS COMMISSION

SPONSOR(S): REPRESENTATIVE(S) KERTTULA

Jrn-Date	Jrn-Page		Action
02/19/03	0253	(H)	READ THE FIRST TIME - REFERRALS
02/19/03	0253	(H)	RES, FIN
02/24/03	0293	(H)	COSPONSOR(S): CROFT, GARA
02/26/03	0323	(H)	COSPONSOR(S): GRUENBERG, GUTTENBERG,

02/26/03 0323 (H) FOSTER
03/03/03 0370 (H) COSPONSOR(S): DAHLSTROM
03/05/03 (H) RES AT 1:00 PM CAPITOL 124

BILL: HB 24

SHORT TITLE: AGREEMENTS ON MANAGEMENT OF FISH AND GAME
SPONSOR(S): REPRESENTATIVE(S) WEYHRAUCH, WHITAKER,

Jrn-Date	Jrn-Page		Action
01/21/03	0037	(H)	PROFILE RELEASED (1/10/03)
01/21/03	0037	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0037	(H)	RES, JUD
03/05/03		(H)	RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

STAN FOO, Manager
Mining Section
Division of Mining, Land and Water
Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 115.

LANCE MILLER, Executive Director
Juneau Economic Development Council
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 115.

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of HB 24.

GEORGE UTERMOHLE, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: Answered legal questions relating to HB 24.

TED POPELY, Majority Legal Counsel
Majority Legal Office
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Answered legal questions relating to HB 24.

ACTION NARRATIVE

TAPE 03-10, SIDE A

Number 0001

CO-CHAIR HUGH FATE called the House Resources Standing Committee meeting to order at 2:20 p.m. Representatives Fate, Gatto Heinze, Lynn, Wolf, and Kerttula were present at the call to order. Representatives Chenault and Masek arrived while the meeting was in progress.

HB 115-EXTEND ALASKA MINERALS COMMISSION

CO-CHAIR FATE announced that the first order of business would be HOUSE BILL NO. 115, "An Act extending the termination date of the Alaska Minerals Commission."

Number 0086

REPRESENTATIVE KERTTULA, speaking as the sponsor of HB 115, explained that the bill would extend the Alaska Minerals Commission for a term of 10 years versus 5 years, because it's been doing a good job, and she said it seems unnecessary to bring it back in every 5 years. Representative Kerttula said the commission was established in 1986, to make recommendations to the governor and to the legislature on ways to mitigate constraints on the development of minerals. Since 1986, she said, several recommendations have been implemented such as the Exploration Incentives Act passed in 1995 to encourage explorations for minerals. She said in 1996, miners were provided with more flexible work hours, and in 1998, the funding was provided to update the recorder's offices. She noted that these are all things that the commission has taken the lead on, and she said given the state's history and the real viability of this industry, she thought it was a great commission that's been dedicated to trying to work out ways to have good, responsible mining in an environmentally sound manner. She said she would like to see the [commission's] work continue.

Number 0277

CO-CHAIR FATE asked about the possibility of amending present statutes relating to mining or changing the mission of the commission if changes needed to be made before the end of the 10-year term.

REPRESENTATIVE KERTTULA said if the legislature felt there needed to be changes, or there were an audit that showed the necessity for a change, the legislature could always come back in and sunset it earlier. She said the commission feels it is necessary to work for a longer period of time, and that it would cost less time and energy to put it on that kind of a term.

REPRESENTATIVE KERTTULA, in response to a question presented by Representative Heinze, explained that travel costs are paid for out of the general fund, and [funding for] staff is through the department and is not included in the commission's budget.

Number 0442

REPRESENTATIVE HEINZE asked Representative Kerttula if she was referring to the Department of Economic and Community Development.

REPRESENTATIVE KERTTULA answered in the affirmative.

Number 0468

REPRESENTATIVE GATTO said there seemed to be a tendency on the boards to extend the regulatory "group" for longer than the previous time. He stated that he's not entirely in favor of it, but he's okay with it, but he noted that an audit could be conducted at any time the [legislature feels it is necessary]. He said that makes it okay for him to accept the [bill].

Number 0524

STAN FOO, Manager, Mining Section; Division of Mining, Land and Water; Department of Natural Resources, testified. Mr. Foo said the division supports the extension of the Alaska Minerals Commission to the year 2014. He explained that the commission provides important and meaningful feedback to the administration, the legislature, and the division on mining issues, including land management and water management issues. Mr. Foo said it provides the division with a "reality check" for the state's ongoing efforts for developing, enhancing, and conserving the state's mineral wealth. He explained that the commission includes representation from both large and small miners representing hard rock, placer, and coal mining. He said broad representation also includes [corporations established under the Alaska Native Claims Settlement Act (ANCSA)] and, most importantly, provides a broad geographic representation advising on mining and offering guidance on mining throughout the state.

With the importance of mining to the economy of Alaska being expected to grow in the coming years, he said, the division looks forward to the ongoing feedback and guidance provided by the commission.

Number 0698

LANCE MILLER, Executive Director, Juneau Economic Development Council (JEDC), testified. Mr. Miller noted that he was previously employed as a projects manager for Placer Dome in Asia, mainly working in the Russian Far East based out of Alaska, and as chief geologist for Echo Bay [Mines], on the "AJ project" for nine years. Mr. Miller spoke about the tenure of the [commission], and he said from a private-sector perspective, 10 years is actually short, because mines take a long time to put into production these days. He said he thought it shows good will on the part of the state if the state is willing to extend the commission 10 years. When a company is willing to invest hundreds of millions of dollars in a state, he said, it often is putting its capital at risk for over 10 years. He said a study from the Frasier Institute indicated that Alaska has slipped in investment attractiveness. Mr. Miller said with everything that it takes to get a project moved ahead, 10 years is what companies are looking at, so if the state can do that also, it sends a good signal.

Number 0867

REPRESENTATIVE KERTTULA noted that [Frankie] Pillifant, [Development Specialist, Mining and Minerals, Division of Community and Business Development, Department of Community and Economic Development] is her cousin. She noted that Ms. Pillifant works with the Alaska Minerals Commission but isn't funded out of this legislation.

Number 0927

CO-CHAIR CHENAULT moved to report HB 115 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 115 was reported from the House Resources Standing Committee.

HB 24-AGREEMENTS ON MANAGEMENT OF FISH AND GAME

[Contains discussion of HB 132]

CO-CHAIR FATE announced the next order of business would be HOUSE BILL NO. 24, "An Act relating to intergovernmental agreements regarding management of fish or game."

Number 1020

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, speaking as one of the two sponsors of HB 24, characterized HB 24 as a bill that addresses agreements between the State of Alaska and the National Park Service (NPS) over management of commercial fishing in Glacier Bay National Park and Preserve ("Glacier Bay"). [Representative Weyhrauch stepped forward to the committee room's map of Alaska to orient the committee.] He said Glacier Bay is located northwest of Juneau, and he described where the boundaries of the park are located. He explained that [Glacier Bay consists of] almost 500,000 marine acres of water that NPS claims is within the national park and monument boundary. It's one of the most productive fishing grounds in Alaska and is home to a huge troll [salmon] fishery, halibut fishery, king crab fishery, Tanner crab fishery, and a Dungeness crab fishery, he said. He noted that ground fish, like crabs, and some shrimp are all caught in these waters. Representative Weyhrauch explained that the Glacier Bay [issue] has been before the legislature in various permutations.

REPRESENTATIVE WEYHRAUCH said the reason it's come before the legislature and is of interest on a statewide basis is because NPS claims that it has management jurisdiction over the submerged lands in the park. Currently, he said, the state of Alaska and the United States government are in a quiet title action before the United States Supreme Court. He referred to a [newspaper] headline a few weeks ago, and he said the state was involved before a special master before that court, in which case it is arguing the issue over title to submerged lands and some other areas of the state. It's a critical case, he said, involving who has ownership of those submerged lands in that area, the State of Alaska or the federal government. He explained that this bill does not address that, but it is "part of a backdrop" in which this bill has been introduced.

NUMBER 1245

CO-CHAIR CHENAULT moved to adopt the proposed committee substitute (CS), labeled 23-LS0135\S, Utermohle, 3/4/03, as the working document. There being no objection, Version S was before the committee.

REPRESENTATIVE WEYHRAUCH said what has happened is that through an Act that was ironically introduced by then-U.S. Senator Frank Murkowski, S. 501 has become law. The federal law [SEC.3. COMMERCIAL FISHING, (b) MANAGEMENT PLAN] states as follows:

The Secretary and the State shall cooperate in the development of a management plan for the regulation of commercial fisheries in the outer waters of the park in accordance with existing Federal and State laws and any applicable international conservation and management treaties.

REPRESENTATIVE WEYHRAUCH said federal law is saying that the federal government and the state shall enter into co-management agreements. When this bill was introduced, it was broadly worded to disallow any co-management agreement between any sovereign and the state regarding any management of fish and game. He said discussions with some members of the legislature and other interested parties, particularly, Native organizations and other kinds of organizations, [had determined] that the language in the original bill was too broad in that it would affect things like management agreements for operation of weirs on streams, for example. He said in certain instances it's in the state's interest to have groups work with the state on a co-management-type of basis, where it's more ministerial as opposed to discretionary as to who has jurisdiction over a resource.

Number 1420

REPRESENTATIVE WEYHRAUCH said he is sensitive to those kinds of agreements, and that this proposed CS requires the State of Alaska to have the legislature review and approve any co-management agreement with the federal government over the management or jurisdiction of fisheries in those disputed marine waters of Glacier Bay before it could become law. It doesn't have anything to do with any other entity, he said. It doesn't affect the U.S.-Canada salmon treaty, which the state is a party to; it doesn't affect halibut under the International Pacific Halibut Commission (IPHC). It only affects agreements between NPS and the State of Alaska on Glacier Bay. That's how the proposed CS really focused attention on Glacier Bay, he said. The policy basis for doing this, he said, is that the legislature wants to ensure that any management agreement the state enters into does not cede any argument or any ability of the state to claim that it is the predominant manager, and to ensure that the State of Alaska has the primary jurisdiction over its fisheries and state waters.

REPRESENTATIVE WEYHRAUCH said, essentially, if this is not stated clearly in Glacier Bay, [the State of Alaska] doesn't want to have the argument in other areas of the state that it has given up jurisdiction over management of its fisheries in those waters, and it may affect other waters in other parts of the state. Representative Weyhrauch told the committee that he thinks it's a critical state's rights kind of an issue, and it's particularly offensive right now, when NPS is paying fishermen not to fish anymore in Glacier Bay, where fishermen are being excluded from Glacier Bay and are prohibited from fishing there under federal law. He indicated it is important for the state to stake as much claim as possible to its ability to continue to fish in those waters. He said this is the [reason] for this legislation.

Number 1536

REPRESENTATIVE GATTO said he appreciated the conversation that dealt with ceding the possibility that the federal government might be able to acquire some sort of meaningful jurisdiction over these waters, and he noted that this concerns him. He said he was hoping to receive some comment [on this issue], and he recommended holding HB 24 in committee to allow for more time to hear [testimony], because the issue about giving the federal government any jurisdiction [over fisheries in disputed waters] is so important. He suggested that the federal government will accept any amount of jurisdiction it is given and use that in any kind of an issue.

Number 1618

CO-CHAIR FATE said he had also questioned [the issue] and brought his concern to Representative Weyhrauch, who did a pretty good job of explaining it.

REPRESENTATIVE WEYHRAUCH, in response to Representative Gatto's concerns, said HB 132 addresses the state's interest in any lawsuit that affects the state's management jurisdiction in a much broader context. He told Representative Gatto that he would talk with him about it outside of the committee meeting.

Number 1718

CO-CHAIR FATE referred to the printout that had been placed before him and he suggested that "jurisdiction" and "management" mean two different things.

REPRESENTATIVE WEYHRAUCH, in response, said the bill only addresses management, but it's the jurisdiction of the state to review the management of any matter having to do with commercial fisheries in those waters, and it's the jurisdiction of the State of Alaska to ensure that the management agreement does not cede any management ability to NPS on commercial fisheries. If it does, he explained, it has to be revisited by the drafters of any cooperative agreement to ensure that jurisdiction of the state is not diminished through the management of fisheries. Jurisdiction is not defined in this bill, he said; the jurisdiction has to do with simply adopting the bill to ensure that management stays with the state. He said if there's a reason that management is not going to be with the state, there's a sound policy basis that does not interfere with the state's jurisdiction.

CO-CHAIR FATE referred to S. 501 [SEC.3. COMMERCIAL FISHING, (2), which states]:

Nothing in this Act shall enlarge or diminish Federal or State title, jurisdiction, or authority with respect to the waters of the State of Alaska, the waters within Glacier Bay National Park and Preserve, or tidal or submerged lands.

CO-CHAIR FATE asked if this Act affords some protection as to the potential of future actions regarding navigable waters in the state.

Number 1842

GEORGE UTERMOHLE, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, testified. Mr. Utermohle said this provision of the bill is an attempt to maintain a status quo, so that anything achieved in doing this bill does not adversely affect the states' position at a later time in any litigation the state might have with the federal government.

Number 1871

REPRESENTATIVE HEINZE talked about her experience in Glacier Bay, and she said she'd heard that many whales calve inside Glacier Bay. She said in reading through the bill she found a lot of fish and game management, but very little on conservation. She asked if [conservation] had been addressed.

REPRESENTATIVE WEYHRAUCH said whales are a marine mammal and are not a commercial fishery. The commercial fisheries are affected if there are vessels that interfere with the transit of a marine mammal or interfere in their habitat or existence. The state's jurisdiction over that is through the National Marine Fisheries Service (NMFS) and NOAA [National Oceanic and Atmospheric Administration]. Whales are not the subject of [HB 24], he said; the fish that whales feed on, for example, the smaller herring, needlefish, and other kinds of fish are not a commercial fishery in those areas. Most [whales] feed on the opposite side of the Glacier Bay entrance outside Point Carolus at Point Gustavus, he said. Representative Weyhrauch said there is no intent here to address marine mammals or marine mammal protection, or any operation of federal law related to whales or humpback whales. He said they may calve in there, but he wasn't familiar with the calving habits of humpback whales, only with the analyses and studies on humpbacks by NPS and NMFS.

Number 1976

REPRESENTATIVE GATTO asked if it would be regarded as federal jurisdiction if a whale were to calve within the three-mile limit.

REPRESENTATIVE WEYHRAUCH said he didn't think there was a jurisdictional issue on calving; it's more plenary jurisdiction over the whale itself. He indicated that regardless of where they calve, whales are under the federal government's jurisdiction.

Number 2036

CO-CHAIR FATE talked about the possibility of a jurisdictional hiatus between the powers of government, in this case, the legislature and the administration. He turned attention to language on page 1, lines 9-10, "unless the legislature has approved the agreement by law ...," and he asked if management was a function of the administration rather than the legislature. He also asked whether management agreements between the State of Alaska and the federal government had been or would need to be approved [by the legislature].

REPRESENTATIVE WEYHRAUCH told Co-Chair Fate that his question was a separation-of-powers kind of argument. He said Mr. Utermohle could address the legal question and he could address the [intention of the sponsors].

MR. UTERMOHLE told the committee that the Constitution of the State of Alaska provides that the legislature is the law making body for the State of Alaska, and the role of the governor is to execute or implement the laws passed by the legislature. Where the role of the governor begins, and where the legislature's ends in the management of the executive branch, is in large part undefined, he said. The execution of laws is the responsibility of the governor, he said, given the law relating to management of game and the power to enter into agreements with other agencies regarding management of that game. How much can the legislature then go back into that process and inject itself into it and successfully do that under Alaska constitution, he asked. He said the issue has never been addressed.

MR. UTERMOHLE said there are a number of situations in which the legislature does require approval of executive branch actions, but only one of which, that he was aware of, had actually been before the court. That situation dealt with approval of labor-management agreements between the executive branch and the unions, which are subject to legislative approval, and did not take effect unless approved by the legislature by law. That's an example of where legislative involvement in the executive branch has been upheld by the courts, he said. In a situation such as this, he said, he wasn't aware of any litigation or cases that have involved this issue of requiring legislative approval of an administrative or executive branch action, although there are a number of cases where that is required in statute.

Number 2219

REPRESENTATIVE KERTTULA said the situation is different than with [State v. A.L.I.V.E. Voluntary], and the preapproval of regulations.

MR. UTERMOHLE said the issue involved in A.L.I.V.E. Voluntary, was that the legislature was trying to take action to amend law, a regulation, by virtue of a resolution. The state legislature did not take its action by law, he said. Mr. Utermohle, in response to a question from Representative Kerttula, said the agreements are with NPS, except there may be agreements out there that would fall under the provision of this Act. He explained that the bill does provide for those agreements to stay in place until the legislature has an opportunity to review them to see whether those agreements have somehow ceded, or somehow affected the state's jurisdiction to the extent that the

legislature is not willing to approve those agreements. If the legislature failed to approve any existing agreements, he said, those agreements would be void under this bill after July 1, 2004, although he wasn't sure if there are any of these agreements. Mr. Utermohle couldn't say how the provision - impairment of contracts - relates to an agreement or contract between the United States and the State of Alaska. Generally, he said, the remedy for impairment of contract is damages. He said he was unsure what damages the federal government might have against the state for backing out of an agreement.

Number 2376

TED POPELY, Majority Legal Counsel, Majority Legal Office, Alaska State Legislature, testified. He said he was in agreement with Mr. Utermohle's testimony regarding the impairment question and damages, and it's difficult to assess what kind of damages would be available through the federal government, even if there were an impairment question. Mr. Popely offered his belief that most co-management agreements [contain] termination clauses with a specified period of days contained within them, so they're not interminable by nature.

REPRESENTATIVE KERTTULA asked if anything coming after this would void any terminable [clauses].

REPRESENTATIVE WEYHRAUCH, in response, said there is no intent in this bill to interfere with contracts to the extent that it causes damages; if so, they need to be brought to the legislature's attention when it is reviewing these things to ensure that they are dealt with before the state incurs damages.

REPRESENTATIVE KERTTULA expressed concern that if there is an impairment-of-contract question, it could be a constitutional question under this law itself. She said there seem to be ways to get around the issue.

REPRESENTATIVE WEYHRAUCH offered his understanding that there is no contract or impairment-of-contract issue that exists at all in this matter. He said what's being discussed is a hypothetical contract that may exist and may result in some sort of damage claim. That's much further afield, he said; this is intended to ensure that the legislature reviews any management or co-management agreement between the [NPS] and the State of Alaska on the management of fish and game. Representative Weyhrauch said it's intended not to interfere with a private party action or the federal government's ability to obtain some

remuneration from the State of Alaska that results in a damages claim. This is a management issue, he said, not a contract issue.

REPRESENTATIVE KERTTULA offered her understanding that management agreements can be contracts themselves.

Number 2541

REPRESENTATIVE WEYHRAUCH, in response, said they could, but federal law that was enacted under S. 501 says that [the federal government] shall cooperate in the development of a management plan for the regulation of commercial fisheries in the outer waters of the park. He offered his understanding that to date, with the exception of any co-management of the Glacier Bay compensation program, there has been no co-management agreement between the federal government and the State of Alaska over commercial fisheries in the waters of the park. To the extent that some sort of contract had been brought to the NPS or the state's attention in the negotiation of this kind of co-management agreement and then brought to the legislature's attention, he said, there would have to be a fiscal note attached to compensate that party for harm or damages caused by the violation of the contract; thus the legislature would know in advance the fiscal impact of having to finance any contract action that resulted in a damages claim.

Number 2578

CO-CHAIR FATE noted that he would honor Representative Gatto's request to hold the bill over to allow for an opportunity to hear further testimony.

REPRESENTATIVE WEYHRAUCH noted that both he and Representative Kerttula are from an area that had been significantly affected by Glacier Bay.

CO-CHAIR FATE mentioned public concerns about navigable waters in Alaska, and he said it was an ongoing issue that is affected by [the bill], and that the concerns need to be addressed.

Number 2634

CO-CHAIR FATE indicated HB 24 would be held in committee for further review.

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 3:02 p.m.