

**ALASKA STATE LEGISLATURE**  
**HOUSE RESOURCES STANDING COMMITTEE**

March 7, 2003

1:05 p.m.

**MEMBERS PRESENT**

Representative Hugh Fate, Co-Chair  
Representative Beverly Masek, Vice Chair  
Representative Carl Gatto  
Representative Cheryll Heinze  
Representative Bob Lynn  
Representative David Guttenberg  
Representative Beth Kerttula

**MEMBERS ABSENT**

Representative Mike Chenault, Co-Chair  
Representative Kelly Wolf

**COMMITTEE CALENDAR**

HOUSE BILL NO. 24

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

- MOVED CSHB 24(RES) OUT OF COMMITTEE

HOUSE BILL NO. 86

"An Act relating to permits issued by the state."

- HEARD AND HELD

**PREVIOUS ACTION**

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)	PREFILE 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
03/05/03		(H)	Heard & Held -- Meeting

03/05/03 (H) Postponed to After Session --  
 MINUTE(RES)  
 03/07/03 (H) MINUTE(RES)  
 RES AT 1:00 PM CAPITOL 124

BILL: HB 86

SHORT TITLE: INJUNCTIONS AGAINST PERMITTED PROJECTS  
 SPONSOR(S): REPRESENTATIVE(S) FATE

Jrn-Date	Jrn-Page		Action
02/10/03	0169	(H)	READ THE FIRST TIME - REFERRALS
02/10/03	0169	(H)	RES, JUD
02/21/03		(H)	RES AT 1:00 PM CAPITOL 124
02/21/03		(H)	Failed To Move Out Of Committee
02/21/03		(H)	MINUTE(RES)
02/24/03		(H)	RES AT 1:00 PM CAPITOL 124
02/24/03		(H)	<Bill Hearing Postponed>
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124

**WITNESS REGISTER**

REPRESENTATIVE BRUCE WEYHRAUCH  
 Alaska State Legislature  
 Juneau, Alaska

POSITION STATEMENT: Spoke as the sponsor of HB 24.

JIM POUND, Staff  
 to Representative Hugh Fate  
 Alaska State Legislature  
 Juneau, Alaska

POSITION STATEMENT: Testified on HB 86; provided information about the changes made in the proposed committee substitute.

KATHRYN KURTZ, Attorney  
 Legislative Legal and Research Services  
 Alaska State Legislature  
 Juneau, Alaska

POSITION STATEMENT: Answered legal questions and addressed concerns relating to HB 86.

**ACTION NARRATIVE**

**TAPE 03-11, SIDE A**  
 Number 0001

**CO-CHAIR HUGH FATE** called the House Resources Standing Committee meeting to order at 1:05 p.m. Representative's Fate, Masek, Gatto, Heinze, Lynn, and Guttenberg were present at the call to order. Representative Kerttula arrived as the meeting was in progress.

HB 24-AGREEMENTS ON MANAGEMENT OF FISH AND GAME

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

Number 0076

CO-CHAIR FATE noted that HB 24 had been heard on 3/5/03 and had been held for the purpose of hearing more public testimony. [Version S. labeled 23-LS0135\S, Utermohle, 3/4/03, had been adopted as a work draft.]

Number 0156

REPRESENTATIVE MASEK turned attention to page 1, line 6, and she asked for clarification as to the type of board named in the bill.

Number 0203

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, speaking as one of the two sponsors of HB 24, said it was intended to be any board with management jurisdiction over fish and game resources [such as] the Alaska Department of Fish and Game (ADF&G).

REPRESENTATIVE MASEK asked Representative Weyhrauch if he thought the language read well enough to reflect [that intention] in the bill.

REPRESENTATIVE WEYHRAUCH said if the entity charged with developing that with the National Park Service (NPS) is going to come up with that kind of agreement, it's great to be broad enough to incorporate any of those entities - department or board - with management jurisdiction for the state over fish and game resources, so it would be broad enough. He offered his belief that it was intended to be generally broad to incorporate that and "sweep it in."

Number 0326

REPRESENTATIVE GUTTENBERG asked for an overview of the [intention] of the bill and what the problems had been in the past.

Number 0362

REPRESENTATIVE WEYHRAUCH discussed the area in question, which is about 600,000 marine acres in Glacier Bay National Park and Preserve that are involved in a jurisdictional dispute between NPS [and the State of Alaska]. He mentioned the quiet title for submerged lands, and management jurisdiction of the fisheries in those waters. Representative Weyhrauch said the United States Senate, through S. 501, had adopted a bill that required the state and the federal government to enter into co-management agreements on fisheries in the waters outside the park. He said this bill [HB 24] is intended to ensure that any co-management agreement between the State of Alaska and NPS is reviewed, because it is important [to assert] that the state did not cede its jurisdictional management rights over fisheries in those waters to NPS, so [the federal government] doesn't become the manager of Alaska's commercial fisheries.

REPRESENTATIVE GATTO said Steven Griles, Deputy Secretary, U.S. Department of the Interior, indicated that there are more than 22,000 rivers, streams, and lakes in Alaska that may be navigable under applicable federal standards and that it was time that the federal government quit acting as if those waterways belong to it.

REPRESENTATIVE GATTO expressed concerns about the federal [government's involvement in jurisdictional issues], but he noted he was in favor of the bill.

CO-CHAIR FATE noted that it was a big concern to many committee members and was aired at the last meeting concerning HB 24. He said it's still a concern whether this bill has an effect on that particular aspect of navigable waters, although it is a needed piece of legislation.

Number 0702

[Note: The bill packet also contained a nearly identical proposed sponsor substitute, Version 23-LS0135\Q, Utermohle, 2/21/03, which was never adopted. A motion to report Version Q, CSHB 24(RES) was inadvertently made.]

REPRESENTATIVE HEINZE moved to report CSHB 24 [Version 23-LS0135\S, Utermohle, 3/4/03] out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 24(RES) was reported from the House Resources Standing Committee.

HB 86-INJUNCTIONS AGAINST PERMITTED PROJECTS

CO-CHAIR FATE announced that the next order of business would be HOUSE BILL NO. 86, "An Act relating to permits issued by the state."

Number 0776

REPRESENTATIVE LYNN moved to rescind the action of failing to move HB 86 out of committee [on 2/21/03], and asked for unanimous consent. There being no objection, HB 86 was before the committee.

Number 0812

REPRESENTATIVE LYNN moved to adopt the proposed committee substitute (CS), labeled 23-LS0349\S, Kurtz, 3/6/03, as the working document. There being no objection, Version S was before the committee.

The committee took an at-ease from 1:18 p.m. to 1:20 p.m.

Number 0850

JIM POUND, Staff to Representative Hugh Fate, Alaska State Legislature, testified. Mr. Pound noted that some changes had been made to the proposed CS because of some concerns that were expressed at a previous committee meeting. He said the one concern is that as the bill was written, it may be interpreted that there's a possibility the commissioner would not be able to stop the project for an error through the procedure or if there was a legitimate concern, under [subsection] (a), that was a legitimate appeal process. Mr. Pound said [subsection] (b) provides that the commissioner is able to stop a project if there's an error in the procedure or if a concern is brought to him/her based on pertinent new scientific information or new recognized local knowledge. He indicated that the definition of "permit" and which departments [the bill] would affect were also clarified.

Number 1012

REPRESENTATIVE GATTO mentioned that he is troubled by the term "pertinent new". He indicated that someone may be able to use this language to stop a project.

Number 1132

CO-CHAIR FATE, sponsor of HB 86, noted that he was not present during the last committee meeting on HB 86 and he offered his understanding that the word "pertinent" was offered by Representative Gatto as a clarifying amendment. He suggested that [the language] "new scientific" is not just new information, but is "new scientific information". Co-Chair Fate noted that he had accepted "pertinent" as a clarifying amendment that Representative Gatto had proposed.

Number 1150

REPRESENTATIVE GATTO indicated that the language "not previously disclosed" may be more appropriate.

Number 1176

REPRESENTATIVE HEINZE indicated that the word "pertinent" seemed clear to her.

REPRESENTATIVE GATTO talked about a hypothetical situation and the extent to which a person may go if it was [his or her] goal to stop a project. He indicated that an attorney may find the language to be ambiguous.

The committee took an at-ease from 1:30 p.m. to 1:34 p.m.

REPRESENTATIVE GATTO turned attention to Sec. 46.35.400 and asked if there was a way to interpret the word "new".

Number 1435

KATHRYN KURTZ, Attorney, Legislative Legal and Research Services, testified. She offered her understanding that there are many ways to interpret the word "new".

REPRESENTATIVE GATTO asked Ms. Kurtz for clarification.

MS. KURTZ said this draft does not specify. She remarked, "New is new, and when you have a word like 'new' that is a common word, ... you could ask everyone sitting around the table, and

if you [have] different ideas about what new means, that indicates the breadth of interpretation which one could apply to that particular word." She said this draft does not have a particular timeline for "how new is new."

CO-CHAIR FATE asked, in this context, if "new" would mean not previously used.

MS. KURTZ, in response, said one might argue that.

REPRESENTATIVE HEINZE asked Ms. Kurtz if she could foresee any problem with [the language] "new scientific information".

MS. KURTZ said there is always the potential for litigation in almost anything, but particularly where the language of a statute isn't clear or tends to lend itself to more than one meaning. She said if there are people who interpret the word "new" differently and it's important enough to them, it is conceivable that there [is a potential] for litigation that would revolve around the meaning of the word "new".

Number 1543

REPRESENTATIVE HEINZE indicated the language "newly recognized" would also have to be looked at [because it also refers to "new"]. She asked, "Unless there's a real danger of ... us opening up to litigation, are we splitting hairs here?"

MS. KURTZ said she was not sure how to answer that, since she had missed the [beginning] of the meeting and was not sure that she had gotten a good perspective of the whole discussion that had already taken place.

CO-CHAIR FATE stated that the discussion was on the use of [the language] "pertinent new scientific information" and the meaning of "new". He said it was discussed that almost anything is not immune to a cause of action or to interpretation. Co-Chair Fate offered his view as sponsor that it would certainly have to be adjudicated as to what "new" means. He said he didn't know if [the committee] could determine the meaning of "new". Perhaps, he suggested, it would be up to some judicial body or to the commissioner, whom this is remanded back to anyway if there's an appeal, to determine what new means.

Number 1680

REPRESENTATIVE KERTTULA suggested that the sponsor's intention is that people who have gone through some kind of a process not be delayed inappropriately. She said the committee hadn't talked about what injunctions are normally used for or what enjoining really means. Representative Kerttula indicated she would like Ms. Kurtz to explain what an injunction is and how that happens. She suggested having a small subcommittee on the bill [with the objective] of coming to an understanding of what the goal is, because the language is "horribly" broad, and there would be terrible problems with enforcement.

Number 1765

MS. KURTZ explained that an injunction is a remedy that the court can offer, and that the court might give monetary damages in some suits. She said an injunction is where one party goes to the court and asks the court to make another party stop doing something. She said in the case of a project, it might be used to stop work on a project until [the party requesting the injunction] gets its lawsuit and other issues figured out. The [injunction] can remain as long as the court determines it's necessary, she said.

REPRESENTATIVE KERTTULA asked what standards are normally used in Alaska. She noted that an injunction is pretty dramatic, and normally the court doesn't like to grant injunctions.

MS. KURTZ offered her belief that the court would be looking for some sort of irreparable harm that might occur if the injunction is not granted.

REPRESENTATIVE KERTTULA asked if it would have to be a pretty dramatic [situation] for the court to take action, normally.

MS. KURTZ, in response, said there are different kinds of injunctions, but it's certainly something the court would consider.

REPRESENTATIVE KERTTULA asked if the court would grant an injunction if it felt all of the questions of the person asking to stop a project had been answered previously, if the agency had already looked at everything, and if the court was satisfied that had happened.

MS. KURTZ said the court does not have to grant an injunction just because it is asked for one. She explained that the court

would certainly look at the merits of the argument and [try to determine] whether it saw that harm happening or not.

Number 1850

MS. KURTZ, in response to a question from Representative Kerttula, said there could be many reasons why one would ask for an injunction. It could occur in many different types of lawsuits being brought for many different reasons.

REPRESENTATIVE KERTTULA asked if this bill would completely, radically change how injunctions are governed in Alaska for permitting.

MS. KURTZ said this bill would seem to set a significantly different standard.

REPRESENTATIVE KERTTULA asked Ms. Kurtz if she was aware of any other states that limit injunctions for permits in this manner.

MS. KURTZ, in response, said she was not personally aware of that.

REPRESENTATIVE KERTTULA said she thought that helped explain her basic concerns about the bill.

Number 1920

CO-CHAIR FATE said there had been cases where there was either an objection in the best public interest, which was never clearly defined, or an objection to an "eyesore," which some people didn't [view] as an eyesore, that helped in obtaining the injunction. He offered his belief that the 9th Circuit Court of Appeals is 80 percent wrong, and that it makes decisions that stop projects. Co-Chair Fate said he wanted to draw attention to [his belief] that the court is not immune to bias.

REPRESENTATIVE KERTTULA said she thought those were the kinds of facts that are really important. She suggested that maybe a subcommittee could [identify] what the intent [of bill] really is. Representative Kerttula said she thought this piece of legislation was enormously broad in its impact, and not really directed to what the concern is.

Number 1997

CO-CHAIR FATE noted that [attorneys] in [Legislative Legal and Research Services] had reviewed [the bill]. He remarked, "If it is the intent to slow a bill so that in the face of mounting committee assignments, because of the heavy load that is coming down on us, ... to slow this bill and stop it because of that, I won't tolerate it for that reason." He continued by saying if there is a valid reason that [committee members] think there should be a subcommittee, he would entertain it.

CO-CHAIR FATE noted that the bill still has to be heard in front of the House Judiciary Standing Committee, and he said it was his hope that some of these issues [would be addressed] at that time. Co-Chair Fate noted the intent of the bill was to allow projects to proceed without stopping for reasons that were not valid. He suggested that those valid reasons are embodied in this bill, so that [a decision] can be remanded back to the commissioner; so there is an appeal process, and there is no design to hold any kind of a public appeals process up. Co-Chair Fate said [the bill] is designed to allow a project to [proceed] without some type of nebulous reason for stopping it.

REPRESENTATIVE KERTTULA posed a hypothetical situation, and she asked if there would there be a risk that [individuals who object to a permitting project] would have to file a lawsuit, and yet wouldn't get an injunction under this standard.

MS. KURTZ, in response, said that raises an interesting question, because this does require new scientific information, so, yes, there is a risk that somebody would interpret this statute to block that type of suit. She offered her belief that if the state constitution is being violated, it would also raise questions about the validity of a statute.

REPRESENTATIVE KERTTULA remarked, "So, you've got the statute at risk, in and of itself."

MS. KURTZ responded, "In that hypothetical [situation], yes."

Number 2166

REPRESENTATIVE GUTTENBERG asked if there was a certain point of harm, potential harm, imminent danger, or damage that had to be reached in order to get an injunction, and what had to be proved to the courts in order to get an injunction.

MS. KURTZ said she wished that she'd been prepared with a good case setting forth the exact standards that the Alaska Supreme

Court has established for granting injunctions. She said it is something that is frequently requested, and in preparing for a trial court argument, one would certainly have it in hand. Ms. Kurtz said it becomes the decision of the court as to whether that standard has been satisfied in a particular case. She said generally there is presentation of some sort of evidence required to get an injunction, which might take the form of an affidavit, for instance.

REPRESENTATIVE HEINZE asked if the courts would grant an injunction for lack of evidence or lack of information.

MS. KURTZ explained that if the court doesn't have sufficient information to evaluate a legal claim, she would guess that [the court] would not grant an injunction based on that lack of information.

REPRESENTATIVE HEINZE remarked, "So, they could."

MS. KURTZ, in response, said in general she would say a court needs sufficient information to evaluate [both sides of the issue].

Number 2273

REPRESENTATIVE GUTTENBERG asked how the word "pertinent" applies to [the language] "pertinent new scientific information". He remarked, "It seems to me that the whole concept under new scientific information's not [really] pertinent. 'New' seems ... to allow the question; ... you can just keep asking it if something comes up that's [a] pertinent situation on a permit."

REPRESENTATIVE GUTTENBERG asked if this allows new information to be reevaluated constantly every time something happens.

MS. KURTZ asked Representative Guttenberg if he envisioned court cases that go on forever.

Number 2386

REPRESENTATIVE GUTTENBERG posed a situation in which a person frivolously wants to stop a project, and every day something new happens that might not have been pertinent the day before, but would be pertinent in the following days. He asked if that would "keep the ball rolling" for that person who is [looking for a reason to stop a project].

MS. KURTZ told the committee that the court system is an institution with limited resources that tends to not like to be confronted with the same issue repeatedly.

REPRESENTATIVE GUTTENBERG asked, if [the situation were to change], whether it would be considered "new and pertinent" [information].

REPRESENTATIVE HEINZE suggested returning to the [original bill that did not contain the language] "new and pertinent." She asked if [this language] would [cause] problems.

CO-CHAIR FATE explained that this isn't new language; it came out of other pieces of legislation including the "public interest land legislation," and that it had been used before. He said he is prepared to delay [the bill] so that [Legislative Legal and Research Services] could address the constitutionality of [the language]. Co-Chair Fate suggested that there's no use to put a bill, regardless of how good it is thought to be, through the process if it's going to have constitutional challenges.

CO-CHAIR FATE said he had no problem in finding out whether the bill [would potentially] have constitutional challenges. He said there is a need for legislation such as this, and he offered an example where a permit had been issued, and after approximately \$4 million and seven years [of litigation], the permit was basically reissued, and it was because of an injunction to stop the project. Co-Chair Fate remarked, "So it does happen, and as we try to progress and develop our State of Alaska, and do it properly, ... we don't need somebody that doesn't agree with us, from outside or within the state, ... stopping projects that have been properly permitted."

Number 2512

REPRESENTATIVE GATTO offered his belief that the bill needed to be moved forward with the new [language as it appears]. He noted that [the bill] was going to the [House Judiciary Standing Committee], which he suggested [could address the issue regarding the language] better than this committee.

CO-CHAIR FATE said it is his hope that before [the bill moves from committee], there would be some determination on either a constitutional fix or the constitutionality of it; as Representative Kerttula suggested, it might be problem.

REPRESENTATIVE MASEK said she had pretty broad concerns on the constitutional [aspect] of the bill, and she felt that the committee should be granted the opportunity to hear more on this subject matter, because it is a resource issue. She said she would feel more comfortable getting more background on [the bill] before moving it [from committee].

Number 2643

CO-CHAIR FATE clarified that a motion had not been made. He noted the [committee's] very tight schedule and his intention to request [Legislative Legal and Research Services to address issues related to the bill]. Co-Chair Fate indicated the intent of the bill is to get the state moving in the proper direction for proper development.

Number 2721

REPRESENTATIVE HEINZE objected. She said she thought [the concerns could be addressed in House Judiciary Standing Committee].

CO-CHAIR FATE agreed that it can be handled in there, but didn't fully agree that it could be handled any more expediently there than in the current committee.

[HB 86 was held over.]

#### **ADJOURNMENT**

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:00 p.m.