

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

May 16, 2003

2:05 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR HOUSE JOINT RESOLUTION NO. 22(RLS)
Relating to the USA PATRIOT Act, the Bill of Rights, the Constitution of the State of Alaska, and the civil liberties, peace, and security of the citizens of our country.

MOVED SCS CSHJR 22(JUD) OUT OF COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86(JUD) am
"An Act relating to state permitted projects; and providing for an effective date."

HEARD AND HELD

CS FOR HOUSE BILL NO. 245(JUD)(efd fld)
"An Act relating to certain suits and claims by members of the military services; relating to certain suits and claims regarding acts or omissions of the organized militia; relating to workers' compensation and death benefits for members of the organized militia; relating to liability arising out of certain search and rescue, civil defense, fire management, and fire fighting activities."

SCHEDULED BUT NOT HEARD

SENATE JOINT RESOLUTION NO. 19
Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund.

SCHEDULED BUT NOT HEARD

SENATE BILL NO. 170

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

ITEM REMOVED FROM AGENDA

PREVIOUS ACTION

HJR 22 - See State Affairs minutes dated 5/13/03.
HB 86 - See Judiciary minutes dated 5/7/03 and 5/13/03.

WITNESS REGISTER

Mr. Jomo Stewart
Staff to Representative Guttenberg
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on HJR 22.

Ms. Rynnieva Moss
Staff to Representative Coghill
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on HJR 22.

Mr. John Brading
2004 Steese Hwy
Fairbanks AK 99712
POSITION STATEMENT: Supported HJR 22.

Mr. Frank Turney
Bill of Rights Defense Committee
PO Box 70392
Fairbanks AK 99716
POSITION STATEMENT: Supported HJR 22.

Mr. Mike Lawless
Bill of Rights Defense Committee
General Delivery
Two Rivers AK 99716
POSITION STATEMENT: Supported HJR 22.

Mr. Lee DeSpain
707 Cowles St. #3
Fairbanks AK 99701
POSITION STATEMENT: Supported HJR 22.

Mr. Scott Trafford Calder
PO Box 75011
Fairbanks AK 99707
POSITION STATEMENT: Supported HJR 22.

Ms. Jennifer Rudinger, Executive Director
Alaska Civil Liberties Union
P. O. Box 201844
Anchorage, AK 99520-1844
POSITION STATEMENT: Supported HJR 22.

Mr. Gary Carlson, Senior Vice President
Forest Oil Corporation
Anchorage, AK
POSITION STATEMENT: Supported HB 86.

Mr. Kyle Parker, Attorney
Pat & Boggs
Anchorage, AK
POSITION STATEMENT: Supported HB 86.

Mr. Tray Wilson, Senior Vice President
General Counsel and Secretary
Forest Oil Corporation
Anchorage, AK
POSITION STATEMENT: Supported HB 86.

Mr. Joe Balash
Staff to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on HB 86.

ACTION NARRATIVE

TAPE 03-50, SIDE A

CSHJR 22(RLS)-PATRIOT ACT AND DEFENDING CIVIL LIBERTIES

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 2:05 p.m. Present were Senators

Ogan, Ellis and French. The first order of business to come before the committee was HJR 22.

SENATOR ELLIS motioned to adopt SCS CSHJR 22(JUD), version Q. There was no objection and it was so ordered.

MR. JOMO STEWART, Staff to Representative Guttenberg, said the changes in the SCS are appropriate.

MS. RYNNIEVA MOSS, Staff to Representative Coghill, said she would answer questions.

MR. JOHN BRADY, Fairbanks resident, supported HJR 22. He said, "The USA's Patriot Act creates a virtual police state with little or no judicial oversight."

MR. FRANK TURNEY, Bill of Rights Defense Committee, supported HJR 22. He thought the definition of a terrorist was really broad in the Patriot Act.

MR. MIKE LAWLESS, Bill of Rights Defense Committee, supported HJR 22 and thanked them for all the hard work they had done on this resolution.

MR. LEE DESPAIN, Fairbanks resident, supported HJR 22.

SENATOR THERRIAULT arrived at 2:13 p.m.

MR. SCOTT TRAFFORD CALDER, Fairbanks resident, supported HJR 22. He wanted to know if the words "reasonable suspicion" had changed in version Q.

CHAIR SEEKINS replied reasonable suspicion and probable cause essentially mean the same thing.

MR. CALDER said he objected to the use of reasonable suspicion, but that this bill is only a resolution and it's better to get something passed than nothing at all.

SENATOR FRENCH commented that reasonable suspicion is a lesser standard than probable cause, but it is the standard that is used before you stop a citizen who is walking down the street.

SENATOR OGAN said that Black's Law Dictionary defines reasonable suspicion as:

Such suspicion, which will justify an officer, for fourth amendment purposes, in stopping a defendant in a public place, is quantum of knowledge sufficient to induce ordinary prudent and cautious man under circumstances that could lead to criminal activity...

He said that probable cause is a higher standard by 50 percent or more and felt that reasonable suspicion was enough to investigate an activity, but it's not enough to get search warrants for wiretaps and those kinds of things.

SENATOR FRENCH said what he reads on page 2, lines 13 - 25, is that they are resolving that in the absence of reasonable suspicion or criminal activity under Alaska state law, no state agency may begin an investigation. He asked whether they think that state officers should be able to assist in perceived violations under the same reasonable suspicion standard as federal law or are they trying to avoid that.

CHAIR SEEKINS added that he thought that was a good point and asked if we have state laws that cover the federal side of things like kidnapping.

SENATOR FRENCH replied that you can always find some statute that will cover a federal crime and vice versa.

MS. JENNIFER RUDINGER, Executive Director, Alaska Civil Liberties Union (ACLU), thanked Representatives Guttenberg and Coghill for the bi-partisan and tireless effort they put into crafting this resolution. The ACLU supported the language that came out of the House by a vote of 32 - 1. Reasonable suspicion is the appropriate legal standard for initiating the investigations and searches that are contemplated by HJR 22; probable cause is the appropriate standard for obtaining a warrant.

SENATOR OGAN asked if aliens are treated differently under the Patriot Act than for other crimes since it looks as though it allows them to be detained for six months without due process.

MS. RUDINGER replied that the Patriot Act takes many of the types of searches and covert surveillance that used to apply to agents of a foreign power and expands that to any kind of investigation.

It's not whether it's a U.S. citizen or a non-citizen and whether it's a routine criminal investigation or

an investigation related to terrorism. That's one of the more troublesome aspects of the Patriot Act. It's the breadth of power and the expansion of that power...

With respect to non citizens and their detention, I think a lot of that action came from executive orders, but I want to find out more information specifically on the length of those detentions as to whether that's coming from the Patriot Act or other executive orders.

SENATOR OGAN said Section 213 of the Patriot Act has the authority for delaying notice of execution of warrant and he wasn't sure if reasonable cause was an appropriate standard.

MS. RUDINGER said that issue has been troubling a lot of constitutional scholars, because although the Fourth Amendment does say probable cause is necessary to obtain a warrant, U.S. Supreme Court cases have lowered that standard in some instances. Justice Scalia said that troubled him.

SENATOR FRENCH commented that Alaska law has not eroded, but he couldn't speak to federal law.

CHAIR SEEKINS said the draft is too weak and ignores the possibility of other federal laws that cause some of the same problems.

MS. MOSS said this is the product of almost a week of negotiations between Representatives Guttenberg and Coghill and the intent is to encourage Congress to look at any measures that infringe on our liberties.

SENATOR FRENCH said the language is aimed at the problem, which is overreaching under the Patriot Act.

SENATOR ELLIS motioned to pass SCS CSHJR 22(JUD) from committee with individual recommendations and the accompanying fiscal note. There were no objections and it was so ordered.

2:32 - 2:36 p.m. - at ease

CSSSHB 86(JUD) am-INJUNCTIONS AGAINST PERMITTED PROJECTS

CHAIR SEEKINS announced HB 86, version X.2, to be up for consideration.

SENATOR THERRIAULT moved amendment 1.

CHAIR SEEKINS objected for the purposes of discussion.

SENATOR THERRIAULT said he was concerned about decreasing oil and gas production in Cook Inlet, but the Forest Oil Corporation activity has shown promise. After having fought lengthy legal challenges, they have permits in hand and are ramping up their production. Since they have jumped through all the hoops, the Legislature is saying once and for all that the project can go forward.

SENATOR ELLIS asked if this would be intervening in an active lawsuit.

SENATOR THERRIAULT replied that there has been a stream of challenges.

MR. GARY CARLSON, Senior Vice President, Forest Oil, said they operate the Osprey Platform and are developing the Redoubt Shoal Oilfield in Cook Inlet south of Anchorage. It's the largest oil field to be developed in Cook Inlet since the early 70s and its production is vital to Forest Oil and is in the state's interest. They have invested over \$200 million in this project to date (transporting about 35,000 barrels of oil per day) and they and the state are just beginning to see some return on the investment. They hope to increase production by another 10,000 barrels as additional wells are completed. All was accomplished in a safe manner using state of the art design, engineering and innovation to minimize environmental impacts of the project.

The Osprey Project is the first platform in Cook Inlet to grind and inject all the drill cuttings eliminating the need to transport the materials to shore. They are the first platform to reinject produced fluids on location and the first platform to electrify the drilling rig using shore power thereby eliminating the need for diesel engines and reducing the associated air emissions. They are the first Cook Inlet operation to use soil borings for pipeline installation, which eliminates disturbances to the bluffs and shoreline.

MR. CARLSON said they have done what the state has asked plus some. However, their development of the Redoubt Shoals has been the subject of continuing litigation since the leases were issued by the State of Alaska. He said, "The Alaska Supreme Court could issue an injunction at any time and, if it were to

do so, the fiscal impacts for both Forest Oil and the State of Alaska would be dramatic and immediate."

SENATOR ELLIS asked what they are in court for now and would this amendment resolve the matter.

MR. CARLSON replied the special interest group, Trustees for Alaska, have sued the state for awarding permits to develop the Redoubt Shoal field. They asked the superior court for a stay to stop production, but they were turned down so they petitioned the Alaska Supreme Court. The basic case is being heard by superior court right now.

SENATOR FRENCH said he too would be frustrated if he had been sued for 10 years, but he didn't know of any lawsuit that didn't have two sides and asked him what their argument was.

MR. CARLSON replied they stated in superior court that they are basically against any development and listed a lot of issues that the state didn't administer to their satisfaction.

SENATOR FRENCH asked if it had to do with the initial permitting.

MR. KYLE PARKER, Pat & Boggs, Counsel for Forest Oil, said they have been working with Forest Oil since 1997. The leases that are the subject of the current lawsuit are now in their 10th year of litigation, originating in 1993 in a case known as Ninilchik Traditional Counsel v. State. That is where the state issued its best interest finding and coastal zone consistency determination and put the leases out for sale. He continued,

In that litigation, the AC&P issues were litigated thoroughly. The next litigation that came along was 1995 and it was litigation over the general permit that governs all the discharges associated with oil and gas activities in Cook Inlet. That case was litigated again by Port Graham and Nanwalek Traditional Groups, represented again by Trustees for Alaska. The principal focus of the attack there was, again, the coastal zone consistency determination for the general permit that was issued for covering all discharges in Cook Inlet.

The next set of litigation was the litigation challenging the exploration phase of the Redoubt Shoals Project, which Forest Oil has been pursuing

since it came into acquisition of leases in 1996. Many of you will remember that last year the [Alaska] Supreme Court entered an injunction stopping the project in its tracks, because it found that under the AC&P, the state had failed to consider the impacts of the discharges associated with the projects. That is the very same issue that had been litigated in the general permit litigation, which was completed prior to the [Alaska] Supreme Court entering the injunction last year. The Legislature, you will recall, acted last year and passed a bill that ratified the state's ability to rely on general permits when they are authorizing projects. No sooner had the litigation ended in May of last year, but the Trustees and Cook Inlet Keepers stepped forward with the next litigation. The next litigation we're currently involved in challenging the development phase of the project and, again, the focus of the attacks is on the AC&P consistency determination....

CHAIR SEEKINS said this is a classic case of what this bill intends to keep from happening.

MR. TRAY WILSON, Senior Vice President, General Counsel and Secretary for Forest Oil Corporation, said he had a letter that he would summarize for the committee. It includes the amount of expenses they have incurred in defending the cases.

TAPE 03-50, SIDE B

The most significant impact of this litigation has been uncertainty of outcome. If they were enjoined from continuing production at this point, the cost would be significant. They disclose the litigation in their filings with the Securities and Exchange Commission and the public is aware of the uncertainty associated with it and they believe it has had a negative effect on the valuation of their stock. They are also concerned about whether or not they should invest in additional projects in Alaska.

SENATOR ELLIS asked if there are other companies in this same position and shouldn't everyone be helped or no one. Specifically, he asked whether other amendments would follow to help other companies close out litigation.

CHAIR SEEKINS replied that this is the only one he has seen, but he would be willing to look at everything on a case-by-case basis.

SENATOR THERRIAULT said his staff, Mr. Balash, has been dealing with drafters on Senator Ellis' issue and that the language is not project specific.

SENATOR OGAN said this bill references the Cook Inlet Basin, which is a geographic area.

MR. JOE BALASH, staff to Senator Therriault, said that Section 1 states the purpose and findings, which is:

To legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin that have, as of the effective date of the act, a final authorization permit or other form of approval from DEC, Fish and Game, DNR or the former Division of Governmental Coordination at OMB.

The new provision under AS 46.40.096 adding Section 3 supercedes and:

Replaces any other form of approval previously required by law and a project approved under this new section shall remain subject to regulation by any agency having jurisdiction over the project consistent with the terms and requirements of the authorization permit or other approval issued by the agency.

So, they are speaking to all oil and gas projects within the Cook Inlet Basin. This morning he spoke with a UNOCAL representative who is very supportive of the amendment. Marathon is also examining the amendment to see if it would help them, too.

MR. BALASH said lines 12-15 say a project that is approved by this act shall remain subject to regulation, which means that just because they are ratifying the decisions made by the agencies, does not mean that the companies can ignore the terms and conditions of their permits.

SENATOR FRENCH asked for a list of the Cook Inlet oil and gas projects that have a final authorization as of the effective date of this act.

MR. BALASH said he would try to get one from the Division of Oil and Gas.

CHAIR SEEKINS told Senator French that he was endorsing a concept in the bill that has no name attached regardless of the player.

SENATOR FRENCH replied the language says:

'The purpose of these next two sections is to legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin that have, as of the effective date of this act, a final authorization permit or other form of approval.'

So I guess what I need to know is how many of those are there...

MR. BALASH replied he could think of a handful of current projects that are either in exploration, seismic testing or development - the Cosmopolitan project on the Kenai and additional exploration with UNOCAL. He said he would be happy to get the list for him.

SENATOR FRENCH thanked him and asked what is meant by, "other form of approval."

MR. BALASH replied the permitting process is very complex. There are consistency findings, best interest findings, and elevations, to name a few - and this was an easy term to use to catch everything.

SENATOR FRENCH said he thought it could cover a telephone call that said, 'sure, go ahead,' and he did not want to give his legislative blessing to a telephone call. He thought "other form of approval" was too vague.

SENATOR ELLIS asked Mr. Balash if the two other companies he mentioned have lawsuits going in addition to this one.

MR. BALASH replied UNOCAL and Marathon are active players in the Cook Inlet Basin and would be subject to this bill.

CHAIR SEEKINS reiterated that this bill is not company specific, but is geographically oriented.

MR. BALASH said line 25 inserts a new section into the consistency review process, AS 46.40.096, and goes along with HB 191, which is the revision of the coastal management program.

CHAIR SEEKINS noted that the language on lines 3-17 says this is in Alaska's best public interest, avoids costly litigation, provides jobs, creates local tax revenue, and fuels local economies. The processes that have already taken place have adequately protected the public interest.

SENATOR THERRIAULT added that Section 3 says, "notwithstanding any other provision except with respect to an appeal filed by the applicant or the affected coastal resource district." So, the coast districts still have the right to appeal. Otherwise they are saying if a company has fulfilled all the other lengthy requirements, they are allowed to proceed.

SENATOR OGAN said he didn't think Section 3 applied to just the Cook Inlet area. It would apply to the coastal zone no matter where you are.

MR. BALASH replied that he was correct.

3:16 - 3:18 p.m. - at ease

CHAIR SEEKINS removed his objection to Senator Therriault's amendment.

SENATOR ELLIS objected to wait for Senator French's information.

CHAIR SEEKINS said he would hold HB 86 until tomorrow morning to get that information. There being no further business to come before the committee, he adjourned the meeting at 10:00 a.m.