

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

May 17, 2003

10:15 a.m.

TAPE(S) 03-51,52

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

SENATE JOINT RESOLUTION NO. 19

Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund.

HEARD AND HELD

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86(JUD) am

"An Act relating to state permitted projects; and providing for an effective date."

MOVED SCS CSSSHB 86(JUD) OUT OF COMMITTEE

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."

HEARD AND HELD

PREVIOUS ACTION

SJR 19 - See State Affairs minutes dated 5/13/03

HB 86 - See Judiciary minutes dated 5/7/03, 5/13/03, and 5/16/03

HB 245 - No previous action to record.

WITNESS REGISTER

Senator Georgiana Lincoln
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SJR 19

Representative Eric Croft
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of HJR 3 (House version of SJR 19)

Ms. Victoria Pate
Nikiski, AK
POSITION STATEMENT: Supports SJR 19

Mr. James Price
Nikiski, AK
POSITION STATEMENT: Supports SJR 19

Mr. Bill Arnold
Sterling, AK
POSITION STATEMENT: Stated appreciation that SJR 19 was introduced and believes the taxation question is a states' right issue.

Mr. Bob Bartholomew
Chief Operating Officer
Alaska Permanent Fund Corporation (APFC)
PO Box 25500
Juneau, AK 99802-5500
POSITION STATEMENT: Described problems of incompatibility between the POMV method and SJR 19

Mr. Roger Shannon
Kenai, AK
POSITION STATEMENT: No position taken on SJR 19

Representative Hugh Fate
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of HB 86

Mr. Jim Pound
Staff to Representative Fate
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Answered questions about CSSSHB 86(JUD)AM

Mr. Kyle Parker
Forest Oil Corporation
1600 Broadway, Suite 2200
Denver, Colorado 80202

POSITION STATEMENT: Answered questions about Amendment 2 to CSSSHB 86(JUD) am

Mr. Joe Balash
Staff to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Explained the effect of Amendment 2 to CSSSHB 86(JUD) am

Mr. Scott Nordstrand
Deputy Attorney General, Civil Division
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Answered questions about CSSSHB 86(JUD)am

Ms. Gail Voightlander
Chief Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Described CSHB 245(JUD)(efd fld)

ACTION NARRATIVE

TAPE 03-51, SIDE A
10:15 a.m.

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 10:15 a.m. Present at the call to order were Senators Ellis, Ogan, French, and Chair Seekins. Senator Therriault arrived shortly afterward. The committee took up SJR 19.

SJR 19-CONST. AM: PERMANENT FUND INCOME

SENATOR GEORGIANA LINCOLN, sponsor of SJR 19, and Representative Eric Croft, sponsor of HJR 3 (House companion legislation), introduced themselves.

SENATOR LINCOLN told members that members' bill packets contain a copy of SJR 19, its fiscal note, a sectional analysis, and a letter from former Governor Jay Hammond. She described each section of SJR 19 as follows.

- Section 1 requires that the income of the permanent fund be deposited into the earnings reserve account and distributed according to specific statutes as they read on July 1, 2002, which contains a statutory formula for the distribution.
- Section 2 requires that the statutes referred to in Section 1 remain in effect as they were on July 1, 2002, essentially freezing those statutes. That will allow future Legislatures to appropriate funds from the earnings reserve account only as authorized under the frozen statutes unless the voters ratify a different appropriation.
- Section 3 suspends and repeals the [constitutional] amendment if the IRS makes any adverse ruling on the earnings reserve account regarding taxation of the fund.

SENATOR LINCOLN said the crux of the legislation is to protect the permanent fund dividend. She noted that members of a House committee met that morning and discussed implementing various taxes to close the fiscal gap and using the permanent fund earnings, which is frightening for constituents.

REPRESENTATIVE CROFT informed members that he introduced HJR 3 because he believes the public should weigh in on this very important public policy decision. The public is very concerned about the Legislature's ability to take away the dividend. The Legislature has been a responsible steward of the dividend throughout the permanent fund's history, but the public should be involved in the decision of whether the Legislature is able to use any portion of the earnings. He said this constitutional amendment assures the public it will be involved in that decision.

REPRESENTATIVE CROFT said, regarding the taxation issue, the courts apply a number of tests to determine whether a public fund should be taxable. The two tests of primary concern are whether the fund is an integral part of the state and whether its proceeds accrue to a private benefit. He does not believe establishing the dividend in the Alaska Constitution, by statute, or by regulation will change whether the fund is an

integral part of the state or whether it is a public or private benefit. He maintained that the Michigan Educational Trust ruling should provide the Legislature with solace regarding the tax issue and said he does not believe this constitutional change will create any new risk.

REPRESENTATIVE CROFT concluded:

We put on those provisions that Senator Lincoln talked about at the end that give protection if my reading of those cases is wrong. So, we've tried to protect it two or three different ways to make sure that this is not taxed, and if we can solve that problem, then the fundamental policy question becomes is it appropriate that we ask the people before we change the dividend or use their earnings. We believe it is and that is why we introduced this constitutional amendment.

SENATOR LINCOLN referred members to a 1998 letter from Morrison & Foerster, a legal firm in Washington, D.C., that addresses the tax issue. In the executive summary the author says that three primary arguments support the position that the income of the fund and the APFC are not subject to federal taxation. The first argument is that the constitutional doctrine of implied immunity of state instrumentality of federal taxation applies. The second argument is that, according to the history of the IRS rulings, income earned by a state or an integral part of a state is not specifically subjected to taxation. The third argument, an alternative, is that the income is excluded from Section 115 of the IRS Code, which excludes gross income from any income that is derived from the conduct of an essential government function and accrues to the state or political subdivision.

SENATOR FRENCH thanked Senator Lincoln and Representative Croft for introducing the resolutions and said, in his mind, this is the central public policy question before the state for the next several years. The issue is whether to let the people have a say before the Legislature takes part of their dividends and spends that money on government. He stated:

That is a train that's on the tracks and I think the history of the permanent fund and the history of our grappling with the fiscal issues in the state says that the people expect to vote. The people expect a say and the only way they're going to get a say is if this or a very similar amendment gets in front of them

on the ballot soon so that this is subject to a public vote.

He said he is not very concerned about the tax issue. He has read the Morrison & Foerster letter twice and his reading is the permanent fund is nothing but an integral part of the state. It is made of Alaskan oil that has been transferred from underground to a bank above ground. He thanked both sponsors for the work they have done and stated full support for the resolutions.

CHAIR SEEKINS said the Senate Judiciary Committee plans to hold hearings during the interim to get public input on the POMV issue. He intends to work in conjunction with APFC Board of Trustees and to discuss SJR 19 and HJR 3 simultaneously. He said his concern is that the legal opinion cited today was written in 1998 and he wants to make sure the Legislature is updated. He feels it would be valid to ask for a legal opinion from the IRS. He emphasized his intent is to make sure the public trust is protected.

SENATOR THERRIAULT indicated he did not have a copy of the letter from former Governor Hammond.

MR. BRIAN HOVE, committee aide, said he would be sure to distribute copies of that letter to members.

SENATOR THERRIAULT then stated:

I really would like to take a look at that. Of course, we saw a letter from a former Governor the other day that suggested that to save the longevity bonus, we just go back and ignore the Zobel case. I don't know exactly how many times we have to lose that case before it's clear that we can't do what the Governor suggested. The other thing, Senator, I'm not sure this letter from Mr. Martin - is this something that you had included in the packet and had distributed?

SENATOR LINCOLN was not aware of the letter Senator Therriault was referring to.

REPRESENTATIVE CROFT pointed out that Mr. Martin was available to testify at the meeting scheduled the prior day, but because that meeting was postponed until today, Mr. Martin sent in his written testimony.

CHAIR SEEKINS repeated his intent is to include SJR 19 as part of the committee's discussions on the permanent fund during the interim.

SENATOR ELLIS said his personal preference is that the committee take action on SJR 19 today and move it to the full body for consideration.

CHAIR SEEKINS said he is concerned about the legal ramifications and does not believe the committee can address those before the end of session.

10:32 a.m.

SENATOR THERRIAULT indicated the Board of Trustees, at its next meeting, plans to discuss the issue of who would have standing to request an IRS ruling and the mechanics of that procedure.

CHAIR SEEKINS maintained that answers to those questions are essential.

SENATOR FRENCH said his view differs. He stated the IRS is a subsidiary of the U.S. Congress, which is where this battle will be fought if it is to be fought decisively. If the IRS issues an adverse ruling, the state will take the ruling to court. The court will not look to previous IRS rulings; it will look to Congress to determine whether Congress has written a law that affects this fund. He noted that Congress has been enormously reluctant to tax the state. He believes that in the absence of clear direction from Congress, the court is highly unlikely to say that the United States government can tax an integral part of the state.

CHAIR SEEKINS responded that Senator French has much more faith in the court system than he does.

10:35 a.m.

SENATOR THERRIAULT indicated that he is not concerned that the permanent fund, in its current structure, will be deemed to be taxable. He believes Congress would have to take action to change that status. However, he is concerned that establishing the payout mechanism in the Alaska Constitution instead of keeping it completely within legislative control could trigger the question of whether the fund is being used for a public purpose; that is the question he would like the IRS to address. He then said he does not understand the need to push this

legislation through now since the public could not vote on it until next year. He believes it is important to take the time to find out who has standing to make a request for a ruling from the IRS.

SENATOR FRENCH maintained the particular genius of SJR 19 is Section 3, which would revert the permanent fund to its pre-tax status should Congress take action.

CHAIR SEEKINS maintained it is better to have a clear picture ahead of time and reduce any risk.

REPRESENTATIVE CROFT asked if the committee would be taking public testimony on SJR 19.

CHAIR SEEKINS said the committee would have ample opportunity to take public testimony on SJR 19 at this time and during the interim.

SENATOR LINCOLN said legal counsel from Legislative Legal and Research Services does not believe the Morrison and Foerster opinion needs to be updated. Director Tam Cook reiterated that assets and income of the permanent fund are those of the state and therefore are not subject to federal taxation. She questioned opening Pandora's box when the resolution contains a repeal clause.

CHAIR SEEKINS argued the committee should address the question of who has standing to request an IRS opinion and how the POMV proposal would work. He said he is not ready to determine whether constitutional amendments for both SJR 19 and the POMV proposal should be on the ballot simultaneously without giving full consideration to both proposals first.

REPRESENTATIVE CROFT stated it is his understanding that the IRS is reluctant to issue prospective rulings. He then informed members:

The integral part of the state test, which the Michigan Educational Trust, the Sixth Circuit in that case determined, where private money went into government hands and then was paid back out for tuition, they ruled that was an integral part of the state - that educational trust. This is government money that started as government money and stays. And the distinction between putting it in regulation, statute or the Constitution, for example, Mr.

Chairman, the CBR is no less governmental by the fact that we have a three-quarter vote on it. The fact that you have made it through a different governmental process - accessing it through a different governmental process, sometimes with higher hurdles, doesn't change its essential governmental character. But to make doubly, triply sure, we put that Section 3 on.

I hope we don't let this taxation issue, which will never conclusively be solved I believe, delay the public right to have a constructive say in the dividend and the future of the fund. I'm glad that we're going to take it out to public hearing but as long as the ultimate, complete power rests solely in the legislature, I don't think you're going to get broad public authority to use some of those funds. I don't think you're going to get that public buy-in. So, I understand what you're going to do. Obviously I'm disappointed about it. I'll let you hear other testimony or not as you will, but I appreciate you hearing it here today.

CHAIR SEEKINS replied that every legislator should advocate for his or her position. He believes, as a former permanent fund trustee, that the Legislature should not hurry into a position. He then took public testimony.

MS. VICTORIA PATE, a resident of Nikiski testifying on her own behalf, stated strong support for SJR 19. She believes it will guarantee for the permanent fund what 83 percent of the voters supported in 1999. She said almost every candidate she heard in November of 2002 promised not to touch the permanent fund without a vote of the people. She believes SJR 19 will fulfill that promise. She asked members to pass SJR 19 out of committee so that all members of the Senate could vote on it. She believes Section 3 provides a back door if the IRS does not rule favorably.

10:46 a.m.

MR. JAMES PRICE, a resident of Nikiski testifying on his own behalf, echoed Ms. Pate's testimony. He believes SJR 19 is supported by an overwhelming majority of the citizens of Alaska. He believes the threat of IRS taxation is real, however SJR 19 recognizes and addresses that threat. He strongly encouraged

legislators to give Alaskans the opportunity to vote on a constitutional amendment.

MR. BILL ARNOLD, a resident of Sterling testifying on his own behalf, thanked Representative Croft and Senator Lincoln for introducing the resolutions. He said the Morrison & Foerster 1998 report boils down to two issues. First, the report says it might be argued that the implied immunity of state instrumentalities from federal taxation applies. Second, federal taxation cannot reach income earned by an integral part of a state. He said he has researched germane U.S. Supreme Court cases and believes the argument boils down to states' rights. The IRS promulgates regulations and interprets the code, but the court would decide any conflict. However, it all begins in Congress. [A portion of Mr. Arnold's testimony was inaudible.] He said his desire is to protect future generations of Alaskans.

MR. BOB BARTHOLOMEW, Chief Operating Officer of the Alaska Permanent Fund Corporation, told members the current board of trustees has not deliberated SJR 19 and taken an official position. He said many people have commented that the Morrison & Foerster report supports the tax-exempt status of the permanent fund as it is today. The executive summary and the final paragraphs of the opinion focus on the proposed change. He said the Board of Trustees has been concerned about understanding the effects of that change and plans to focus on them, particularly on the creation of a private benefit. He informed members the Board of Trustees will consider its role in this issue, if any, at its June meeting. The board needs to determine its role versus the role of the executive branch versus the role of the legislative branch.

MR. BARTHOLOMEW told members if the policy decision is to move forward, he hopes two issues are considered. The first issue is the Board of Trustees has proposed constitutional changes to the permanent fund because the board deals with how much money comes out of the permanent fund each year and desires to make the rules that govern the permanent fund consistent with its current investment strategy. The board believes that issue is critical, regardless of the outcome of SJR 19. The second issue is that if the Board of Trustees' percent of market value (POMV) proposal is adopted, the mechanics of it would be inconsistent with SJR 19. Under SJR 19, the calculation of the dividend amount would be based on existing statute, but the board believes that calculation was designed for a fund that was created 26 years ago and it no longer works in the same way. He said if the dividend were enshrined in the Alaska Constitution, the board

would recommend that the Legislature look at using a dividend calculation method that is compatible with the POMV. Mr. Bartholomew noted that legal counsel to the APFC was available to answer questions about the tax status.

10:55 a.m.

SENATOR THERRIAULT noted Mr. Storer said last week the trustees are primarily interested in the POMV because they view their highest goal as preserving the purchasing power of the fund over time. He asked if the legislature takes what he considers to be an overly simplistic step to ensure a dividend [SJR 19], it would be inconsistent with the POMV proposal, which is designed to preserve purchasing power. He stated the philosophy [of the resolution] is not inconsistent but the methodology is.

MR. BARTHOLOMEW said if the citizens adopt the POMV payout, and SJR 19 is also adopted, the mechanics would be incompatible. Although the mechanics of SJR 19 are in use today, they are problematic, and one motive behind the POMV proposal is to make the payout strategy work with the investment strategy.

SENATOR THERRIAULT asked if the question of ensuring that a percentage of the payout would be used for dividends and the question of adopting the POMV methodology are compatible and could be linked or whether the two issues would have to be posed as separate questions.

MR. BARTHOLOMEW said they could be separate questions. The trustees' POMV proposal allows [up to] 5 percent of the value of the permanent fund to be made available annually for distribution. He pointed out that a House bill attempts to determine how that money would be distributed and provides a mechanical set up that would work with the POMV. He said the House bill would delineate the distribution in statute; SJR 19 sets a distribution method in the Constitution.

SENATOR THERRIAULT said he noted a previous testifier said if the POMV methodology is adopted, and a percentage payout is enacted to guarantee a dividend, that would smooth out the swings in the dividend amount. He said that would benefit people who build the dividend into their budget.

11:00 a.m.

MR. BARTHOLOMEW responded:

... To reiterate, the highest dividend that's been paid was \$1,950. We're projecting two years from now, all things staying equal in the financial markets, we'll have a dividend of \$600. If you roll that up to a statewide perspective, the total amount paid out for a dividend at its largest was \$1.1 billion. In two years, we project the payout to be \$400 million. Just when you look at it in that scale, that is a huge difference - \$1.1 billion to \$400 million - what comes into the economy. What's available changes significantly and it varies drastically. If you had a percentage of market value and decided whatever amount of that you wanted to go to the dividend, you would not see those yearly swings. You'd have a much tighter range. You would not have had a \$1,950 dividend; it would have been smaller. You would not have a \$600 dividend; it would be larger. Again, everything depending on what you pick, but if you tried to keep the percentage that goes to the dividend the same, you would have had a much narrower range.

But the more important issue that the percent of market value proposal has is under the current constitutional structure, you can go to zero, you can have no distribution. So you can have a dividend formula as we have today that says come this June 30, our 5-year formula says pay to the citizens of Alaska an \$1100 dividend. If the stock market takes a dip or there's an international event that drives the stock market down before June 30, there could be zero available. I think the second most significant change that the percent of market value offers is it would remove the floor that there would ever be zero available. And that has as large an effect on future payouts from the fund for dividends or any other purpose.

So there's a formula issue. You could improve the formula to make it smoother, more predictable, but you could also have a policy decision of whether you want to risk going to zero or whether there should be a distribution every year. That's the second issue that can really affect payouts in the future and we believe, by making the change, you could achieve both. A stable consistent payout is one policy issue. The second one is how do you want to approach the determination of the dividend.

SENATOR FRENCH said he is concerned about the effect of a deflationary period on the POMV method. He asked that the trustees analyze that scenario at great length because a 10-year period of deflation could result in a loss of half of the fund's value. He asked Mr. Bartholomew to take back to the trustees an interesting example of a parallel to the permanent fund and dividend in its current form. He referred to page 21 of the Morrison & Foerster letter, and explained that another state created a lifeline fund to subsidize utility bills of the poor. The IRS concluded that use of the fund was an integral part of the state. The funds came from a state ordered surcharge on utility bills and were invested until paid out to needy individuals.

TAPE 03-51, SIDE B

He asked that the trustees, as they examine the proposals, make the point that the IRS has looked at state created funds that pay dividends directly to individuals and found that use to be an integral part of the state and the fund was thus shielded from taxation.

MR. ROGER SHANNON, testifying from Kenai on his own behalf, said, in regard to SJR 19, "The hens have been disturbed, the fox is on the loose, the [indisc.] are aware."

CHAIR SEEKINS closed public testimony.

SENATOR ELLIS asked that the entire committee decide whether to take action on SJR 19 at this time. He then moved SJR 19 to the Senate Finance Committee with its accompanying fiscal note.

SENATOR THERRIAULT objected to the motion. He asked Senator Lincoln if it was her intent when she introduced SJR 19 to preclude public and legislative consideration of the POMV methodology.

SENATOR LINCOLN replied the POMV issue is separate from SJR 19.

SENATOR THERRIAULT noted that the committee was just told that the mechanics of SJR 19 are not compatible with the POMV. He asked if it is her intention to cut off consideration of the POMV proposal.

SENATOR LINCOLN said she is aware that folding SJR 19 and the POMV together would create some complications, but she did not

explore those complications because she feels very strongly about SJR 19.

SENATOR THERRIAULT maintained that guaranteeing a dividend via SJR 19 would prevent passage of the POMV proposal. He pointed out that Mr. Storer said if the Legislature wants to guarantee a dividend, SJR 19 is a clumsy way of doing that. He asked Senator Lincoln why she is not interested in looking at a methodology that would mesh with the POMV proposal.

SENATOR LINCOLN said she has not concluded that SJR 19 is a clumsy way of guaranteeing a dividend. She said she is not prepared at this point to say whether the two are compatible. She said right now, SJR 19 and the POMV are very separate issues and she believes SJR 19 is very workable. She then thanked the Chair for hearing SJR 19 at this time. She acknowledged that she would be disappointed if the committee does not take action on SJR 19 at this time. However, if that is the case, she hopes that she and Representative Croft can be involved in the discussion during the interim.

CHAIR SEEKINS said he hopes so too.

CHAIR SEEKINS announced the following result of a roll call vote: Senators French and Ellis were in favor; Senators Therriault and Seekins were opposed. Chair Seekins noted the motion to move SJR 19 to the Senate Finance Committee failed.

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The committee took a brief at-ease and, upon reconvening, took up CSSH 86(JUD)am.

^#HB 86

CSSH 86(JUD)am -INJUNCTIONS AGAINST PERMITTED PROJECTS

CHAIR SEEKINS reminded members they were contemplating Amendment 1 during the last discussion on CSSH 86(JUD)am.

SENATOR THERRIAULT moved to withdraw Amendment 1 and replace it with corrected language.

CHAIR SEEKINS announced that without objection, Amendment 1 was withdrawn.

SENATOR THERRIAULT moved to adopt Amendment 2. He explained to members that he received a memo from legislative counsel who

expressed a few areas of concern. Amendment 2 contains modifications that will address those concerns. The first concern was about the separation of power between the legislative and executive branches. To address that, language on page 3, lines 9 and 10 has been removed. The second change is to line 13 [page 3] where language was inserted to clarify that an individual's right to challenge the activity will not be cut off. He pointed out the counsel's concern was whether the courts would always grant an individual citizen's constitutional rights, despite what the Legislature did in statute.

SENATOR OGAN expressed confusion and asked if the bracketed language on line 11 would remain in the legislation with additional language added to it. He noted when language is bracketed in a bill that usually signifies it is to be deleted.

CHAIR SEEKINS asked members if they had any objection to rewriting Amendment 2 by removing the bracket at the beginning of line 11 and the bracket after the word "review" on line 13, and adding the phrase, "unless it is a claim based on the United States Constitution or the Constitution of the State of Alaska" for the purpose of clarity.

SENATOR OGAN agreed those changes will eliminate further confusion. [No members objected.]

REPRESENTATIVE FATE asked if Section 3 had been deleted.

CHAIR SEEKINS said it was not.

SENATOR THERRIAULT noted that he provided information to address Senator French's concerns.

SENATOR FRENCH referred to a document entitled, Oil and Gas Projects in Cook Inlet, and noted it lists six projects. He asked where the Osprey project by Forest Oil company falls in that list.

SENATOR THERRIAULT indicated it would fall in the Redoubt unit.

SENATOR FRENCH asked if that is the only unit that has been involved in 10 years of litigation.

CHAIR SEEKINS said he would not say the Redoubt unit is the only one with a problematic process, but, "...it is the one ... we have used as an example of the problem that exists."

MR. KYLE PARKER, general counsel, Forest Oil Company, told members the project that Forest Oil spoke of yesterday that has undergone 10 years of litigation dates back to the lease sale in 1978. He clarified that during that 10 year time period, additional litigation over Cook Inlet lease sales has occurred, but that litigation was not reflected in the chronology presented to the committee. Other litigation regarding listing the beluga whale as an endangered species also transpired. He said some people would suggest that all of that litigation has been geared toward stopping oil and gas development in Cook Inlet.

SENATOR FRENCH said he was trying to set up a clear distinction between this project and other projects in the Cook Inlet area. He said an example of a project that is going forward without too much difficulty is Conoco Phillips' Cosmopolitan exploration drilling in the southern part of the [Kenai] Peninsula.

MR. PARKER said an important distinction between the Cosmopolitan and Redoubt projects is that the Cosmopolitan project is being drilled from shore. The Redoubt project brought the first new exploration and development platform into the Cook Inlet since the early 1980s. If the state is going to see additional oil and gas development in Cook Inlet, additional exploration and development platforms will have to be brought into the Inlet. The offshore platforms appear to be the focus of the litigation by the environmental groups.

SENATOR FRENCH maintained that is the beauty of waiting for better technology and said the horizontal drilling that will be used on the Cosmopolitan well is astounding. He noted Conoco Phillips would be drilling several miles into the Inlet from on shore.

CHAIR SEEKINS pointed out the permits that have been issued for the Cosmopolitan project and the Redoubt project would be grandfathered in under this legislation. He believes it is incorrect to say this legislation is specific to any project because it is not specific to Cook Inlet.

SENATOR FRENCH said he would feel far more comfortable dealing with a clean copy of Amendment 2. He noted the legislation will make a big change to the way Cook Inlet permits will be addressed: it will freeze the permits in place and give them legislative blessing. He said he would like to hear from everyone who will be affected by this legislation, such as

fishermen. He said he shares the concern of other legislators about passing legislation in the closing weeks of the session.

SENATOR THERRIAULT apologized for presenting an amendment that had markings on it, but said it is clear. With regard to the previous action [on SJR 19], the Senate was asked to take action on a constitutional amendment that was introduced a few weeks ago. He noted there is a big difference between a constitutional amendment and a statute.

CHAIR SEEKINS said he has great faith in Senator French's ability to understand Amendment 2.

SENATOR ELLIS indicated the adoption of this amendment and passage of this legislation would end one court case. He said he is unclear about which other court cases will cease as a result of this legislation.

CHAIR SEEKINS said he has no idea and that he has not considered that in this matter. He considers CSSSHB 86(JUD) am to be good legislation.

MR. JOE BALASH, staff to Senator Therriault, said the language in Section 1 of Amendment 2 deals with all authorizations and permits up until the effective date of the law. He explained:

And as we move through whatever period of time there will be between today and passage of the bill and then, finally, being signed into law, it will then be another 90 days before the new law is effective, which would be new bill section 3 on page 2. So, in that intervening time, there will be multiple permits and authorizations issued, which will be subject to the possibility of litigation throughout the summer and so if we did not have sort of this forward looking ability to say that there will not be an opportunity beyond these sets of circumstances, we could wind up with a very awkward situation with kind of a weird window in the middle that doesn't accomplish what we're setting out to do here. And so the potential is there for additional projects to be litigated and so we want to protect those additional projects, which are the ones cited on this first page here on the various exploration units and development units.

SENATOR THERRIAULT said he wants to make sure everyone understands that getting a permit will still require applicants

to undergo a lengthy process and a project must adhere to the requirements of the permit. He added:

We have given specific standing to the applicant in case they're turned down - they can appeal. The affected coastal resource district, which is the entity that creates and shapes the local enforceable policies - that's where areas of extra sensitivity in a community - we allow the community to direct extra attention, extra protection for those areas, that's the coastal district. And individual Alaskans - we've clarified to make sure that everybody understands their right to due process - constitutional right - is not in anyway abridged by this. I just want to make sure that everybody understands we're not changing the permit process. We're just saying when you get to the end of the permit process, you're allowed to go forward with your project.

SENATOR OGAN said when he first read this bill, he discussed with legislative counsel his concern that due process be provided. He said his concern was addressed. Amendment 2 will limit who has standing. The affected coastal resource district will be the place for due process for people who have problems. If people feel their due process rights are compromised on a constitutional basis by this legislation, they have standing to challenge that. He said although this legislation deals with one project involved in litigation, it also deals with all projects on a broad regional basis.

MR. SCOTT NORDSTRAND, Deputy Attorney General for the Civil Division of the Department of Law, told members he provided the committee with a letter describing the department's concerns. He said the committee should be aware the ongoing litigation has a cost to the state as well as to Forest Oil Company. The state has incurred about \$300,000 in legal fees, either internally or paid to the Trustees of Alaska.

SENATOR FRENCH referred to Section 3 of Amendment 2, on page 2, and asked if that is specific to the Cook Inlet area or whether it will be applicable to any coastal program.

MR. NORDSTRAND said the Department of Law has not undertaken a formal review of Amendment 2 but he sees nothing in it to suggest it is specific to Cook Inlet.

SENATOR FRENCH asked if the amendment makes a statewide change to the Coastal Zone Management Plan.

SENATOR THERRIAULT explained the coastal zone management system still operates the way it was set up: permit review, consistency determination, and the ability to elevate decisions by permit writers. However, [the amendment] will provide that when an applicant comes out with a permit in hand, the applicant can move forward and will not be subject to litigation unless the litigation is a constitutional matter, or the applicant or coastal resource district has specific standing.

SENATOR FRENCH asked if it would apply statewide.

SENATOR THERRIAULT affirmed that it would.

11:42 a.m.

SENATOR OGAN said he believes the intent of Amendment 2 is to provide a linear process for people investing in Alaska. He said he learned during his first year as a legislator that companies do not mind having to jump through hoops during the application process, but they need to know that when they've jumped through "hoop Z," they do not have to go back to "hoop A." He said that costs time and money and this state has driven away business because it does not have a linear process.

CHAIR SEEKINS said he believes the public process is protected with this legislation. He said once the public process is completed and a permit has been issued, the cost of litigation is not in the best interest of the State of Alaska in terms of income, revenue, jobs, or local tax revenue. This legislation will provide a point of finality in the permit process.

SENATOR FRENCH said he is aware the Legislature recently adopted a fairly comprehensive change to the Coastal Zone Management Plan; HB 191 is en route to the Governor for his signature. His understanding is that law has its own subsection (i). He said it is possible the legislature is sending two bills to the Governor with identical language and he questioned the result.

MR. BALASH replied:

Unlikely as it may seem, the Governor has the ability to veto HB 191, in which case we would need - the very next section in statute - or subsection would be (i). So, I think if you looked at 46.40.096 in HB 191, the

very first piece of that section of statute that's been added is subsection (i). They both start with a new (i). But in our revisor's powers, over in [Legislative Legal and Research Services], they take a look at all of the legislation passed and enacted through the course of a session and the revisor is given specific statutory authority to place the sections and subsections where they belong in relation to one another. And so, I'm not sure what the final subsection was in 191. I think it went out to (q) or (r) so this would then be the next letter in the alphabet.

SENATOR THERRIAULT agreed that the legislative system anticipates the need to mesh multiple laws together. He noted that the Senate had a fairly good debate on HB 191. Its big impact will be that the local enforceable policies will have to meet some standards so that contractors are not confronted with vague statements that do not describe what activity is entailed.

CHAIR SEEKINS noted that objection to the adoption of Amendment 2 was maintained. After a roll call vote was taken, he announced that the motion carried with Senators Ogan, Therriault and Seekins in favor, and Senators French and Ellis opposed.

SENATOR THERRIAULT moved SCS CSSSHB 86(JUD) from committee with individual recommendations and its attached fiscal notes.

SENATOR FRENCH objected. He said he is still concerned with language on the first page of Amendment 2, lines 7 and 8, which basically says the legislature is putting its blessing on all oil and gas projects that had, as of the effective date of this act, a final authorization permit or other form of approval. He expressed discomfort with the "other form of approval" phrase, as it is vague and indeterminate.

He moved to strike "other form of approval" from lines 7 and 8 on page 1 of Amendment 2.

CHAIR SEEKINS noted that a motion was already on the floor.

SENATOR ELLIS asked if the sponsor of the motion would be willing to withdraw his amendment to allow Senator French's motion to be addressed.

SENATOR THERRIAULT agreed to do so and withdrew his motion.

SENATOR FRENCH made a motion to amend Amendment 2 of SCS CSSSHB 86(JUD) by striking the words, "or other form of approval" from lines 7 and 8. He noted the punctuation would have to be cleaned up and the word "or" would have to be inserted between "authorization" and "permit."

SENATOR THERRIAULT objected and asked that Mr. Parker or the former director of the Division of Oil and Gas provide an example. He pointed out that the Legislature controls the statutes that grant the approvals and permits.

MR. JIM EASON, former director for the Division of Oil and Gas, Department of Natural Resources, and currently representing Forest Oil Company, told members that other authorizations do exist, one being best interest findings, another being letters of non-objection for activities considered to be minimal, such as collecting rock samples with a rock hammer.

SENATOR THERRIAULT maintained his objection to amending SCS CSSSHB 86(JUD).

CHAIR SEEKINS called for a roll call vote. The motion to amend Amendment 2 failed with Senators Ellis and French voting yes and Senators Ogan, Therriault and Seekins voting no.

SENATOR THERRIAULT moved to pass SCS CSSSHB 86(JUD) from committee with individual recommendations.

SENATOR ELLIS objected.

CHAIR SEEKINS called for a roll call vote and announced the motion carried with Senators Ogan, Therriault, and Seekins in favor, and Senators French and Ellis opposed. SCS CSSSHB 86(JUD) moved from committee.

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The committee took a brief at-ease.

^#HB 245

CSHB 245(JUD)(efd fld)- SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

MS. GAIL VOIGTLANDER, Chief Assistant Attorney General of the Civil Division, Department of Law, provided the following overview. CSHB 245(JUD)(efd fld) makes two very important public policy changes. First, the bill provides immunity for emergency services workers so that they can do their jobs without the distraction of possible civil liability and civil

litigation while on the job and make important emergency-related decisions. Second, the bill will save the state a substantial amount of money in defense costs and in the payment of claims. This bill brings Alaska into the norm with other jurisdictions and with other statutes in terms of immunity. She added that the emergency workers who will have immunity are workers who have workers' compensation coverage through the State of Alaska. This bill does not change that coverage at all so it does not change the fact that when one receives workers' compensation benefits, any ability to additionally recover for tort remedies from the employer is waived. The workers' compensation system is a no-fault system that provides more prompt payment to the injured worker without formal litigation and without any need to prove negligence.

MS. VOIGHTLANDER pointed out that the first subject area of the bill addresses search and rescue operations. The Alaska State Troopers are responsible for making decisions about initiating and conducting search and rescue operations, although they rely heavily on local governments and volunteer workers once a decision is made to conduct a search and rescue. The Alaska Supreme Court has ruled in a number of cases that police are not exposed to civil liability in this area. This will bring search and rescue within that gamut.

MS. VOIGHTLANDER explained the second subject area the bill addresses is that of intra-military torts. This bill clarifies what was muddled in a Supreme Court case in 2001, in which two of the distinctions that had been followed and understood by members of the military became blurred.

TAPE 03-52, SIDE A
12:00 p.m.

MS. VOIGHTLANDER said the law of the land in all but two jurisdictions has been that the Feres doctrine prohibits members of the military from suing one another for decisions that are incident to military service. That doctrine is based upon two public policies. The first policy acknowledges the importance to the military command structure that an officer in charge not be subject to civil liability when giving an order. The second policy recognizes that it is not good public policy to have civilian courts interject themselves into military orders and decisions about military operations. CSHB 245(JUD)(efd fld) would bring Alaska back into alignment with the other jurisdictions that follow the Feres doctrine, which the military believed was the operating law of the land in Alaska until the

2001 decision by the Alaska Supreme Court. The bill also clarifies who is to pay for injuries to military members. When military members are on state orders, they would be covered by state workers' compensation; when on federal orders, they would be covered by federal workers' compensation and benefits.

MS. VOIGHTLANDER said the third subject area covered by the legislation is that of civil defense. This is simply an amendment to Title 26, which deals with civil defense issues. It provides important immunities to those who are acting in civil defense of Alaska from being sued by each other or members of the public. It contains an exception that allows for a third party claim against the state or local government or civil defense workers if malice or reckless indifference to the interests, rights, or safety of others can be demonstrated using the clear and convincing evidence standard.

MS. VOIGHTLANDER informed members the final subject area of the bill addresses firefighting. This legislation will bring Alaska into alignment with a majority of other jurisdictions that immunize firefighters and state and local governments that conduct firefighting activities. Litigation has not occurred in this area in the past because people assumed the body of this law prohibited such lawsuits. However, the Alaska Supreme Court issued two decisions in 2001 that said litigation could be filed against the state over firefighting activities. She said firefighters are covered by workers' compensation under existing law. Additionally, local firefighters are already immunized under existing law. This legislation would expand that same immunity to other firefighters in the state.

MS. VOIGHTLANDER pointed out that defending civil litigation in these four areas has had a significant fiscal impact on the state. For example, the defense costs of a recent case on search and rescue amounted to \$250,000. That case is on appeal over a judgment in excess of \$7 million. In the area of intra-military torts, the 2001 case cost \$1 million in defense costs, and the total settlement was \$7.5 million, of which the state is obligated to pay \$2.5 million. The state no longer has insurance so any future claims will directly impact the state budget. Finally, the cost of the defense for cases that were tried in Palmer over the Miller's Reach fire has been \$2.5 million. She offered to answer questions.

SENATOR FRENCH said he is curious about the parallel between police investigations and the court decisions that determined immunity exists regarding how those investigations are

conducted, and the search and rescue situation. He asked if the immunity doctrine is developed purely through court decisions or whether a statute grants immunity for police investigations.

MS. VOIGHTLANDER replied:

Senator French, that immunity has arrived basically through court decisions. And to put a finer point on it, what the court has found in the number of cases that I cited is that it will not recognize a tort of negligent police investigations. So while we oftentimes merge the doctrines of no actionable tort duty and immunity, those are founded upon the precept that there is no actionable court duty, however the effect is there is immunization.

SENATOR OGAN informed the audience he would be temporarily chairing the meeting. He then asked about people who might violate someone's civil rights, such as a police officer that unreasonably detains a person, and whether that type of scenario is addressed in the legislation.

MS. VOIGHTLANDER told members the violation of constitutional rights is a claim that can be made under federal law 42 U.S.C. 1983. It says a claim may be filed in either state or federal court. This legislation does not affect the ability of an individual to bring a 1983 action against an individual who allegedly violated a constitutionally protected right because that is covered by federal law.

SENATOR OGAN asked if individuals would be able to sue for damages in state court if their constitutional rights were violated by one of the organizations that have immunity.

MS. VOIGHTLANDER answered:

Senator Ogan, that is correct. A violation of constitutional rights cannot be made against a state under that law but it can be made against individuals in their individual capacity and that lawsuit could be filed in state court and, because it is founded upon a federal law that Congress passed, this bill does not affect that right.

SENATOR OGAN asked if a person could sue and collect punitive damages in state court for a violation of his or her constitutional rights.

MS. VOIGHTLANDER clarified that a person could because although the law is federal, it was specifically passed so that a litigant could file either in federal or state court. Both courts have jurisdiction so this bill could not change that federal law.

SENATOR OGAN pointed to language on page 5, line 26, and noted the legislation provides immunity to "any organization authorized to prevent, control, or suppress fires;". He asked if the authorization would come from the state Fire Marshall's office.

MS. VOIGHTLANDER said she does not know the answer to that question.

SENATOR OGAN said his concern is that a private property owner could authorize a neighbor to help fight a fire. He suggested adding the words "state recognized" before authorization.

CHAIR SEEKINS suggested replacing "any organization" with the phrase, "the state or any subdivision thereof".

SENATOR OGAN pointed out that he was the chief of a non-profit fire department and an outlaw fire department that was not recognized by the state Fire Marshall. The outlaw fire department was an ad hoc group of neighbors that bought a surplus truck.

MS. VOIGHTLANDER noted that is a term of art that exists in AS 41. 15. 040, which is in the section that authorizes control and suppression of fires. She said it contains a "laundry" list of those who are authorized to control and suppress and uses the same term.

SENATOR FRENCH referred to new language on page 4, lines 12 and 13, and read, "except when malice or reckless indifference to the interests, rights, or safety of others is shown by clear and convincing evidence." He said he sees that language as a check on the sweeping immunity this bill will grant. He explained his concern is that this bill not grant blanket immunity and contain some limit to immunity for poor decisions.

MS. VOIGHTLANDER explained that exception exists in the existing statutory provision relating to civil defense. She said a problem always arises when exceptions are made to immunity statutes. An exception provides an opportunity for lawsuits to

be filed, which are costly to the state. Given State of Alaska case law, it is extremely difficult to have civil cases disposed of summarily on summary judgment. Although exceptions may go some way in limiting liability, they do not serve the purpose of limiting exposure to civil litigation and the associated costs.

SENATOR OGAN asked if clear and convincing evidence means the jury must be more than 50 percent sure.

MS. VOIGHTLANDER said the general civil standard is preponderance, which is viewed as 51 percent. The Alaska Court System has characterized clear and convincing evidence as being highly probable.

SENATOR OGAN asked if the bill will limit liability for negligence, but if malice or reckless indifference is involved, the evidence must prove that was highly probable.

MS. VOIGHTLANDER said that is correct for the section that deals with civil defense.

CHAIR SEEKINS informed members the committee would take up CSHB 245(JUD)(efd fld) the following day at 9:00 a.m. He then adjourned the meeting at 12:20 p.m.

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