

**ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE**

February 18, 2004

3:33 p.m.

TAPE(S) 04-10 & 11

MEMBERS PRESENT

Senator Scott Ogan, Chair
Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Kim Elton
Senator Ben Stevens

MEMBERS ABSENT

Senator Georgianna Lincoln

COMMITTEE CALENDAR

SENATE JOINT RESOLUTION NO. 27
Relating to the resolution of submerged land title disputes.

MOVED SJR 27 OUT OF COMMITTEE

SENATE BILL NO. 305
"An Act relating to state ownership of submerged land underlying water that was navigable at the time Alaska achieved statehood."

MOVED SB 305 OUT OF COMMITTEE

SENATE BILL NO. 295
"An Act extending the termination date of the Navigable Waters Commission for Alaska; and providing for an effective date."

MOVED SB 295 OUT OF COMMITTEE

^DONLIN CREEK PROJECT UPDATE

Gregg Bush, General Manager, Donlin Creek Joint Venture
Jeff Foley

PREVIOUS COMMITTEE ACTION

BILL: SJR 27

SHORT TITLE: SUBMERGED LAND TITLE DISPUTES

SPONSOR(s): SENATOR(s) SEEKINS

02/06/04 (S) READ THE FIRST TIME - REFERRALS
02/06/04 (S) RES
02/18/04 (S) RES AT 3:30 PM BUTROVICH 205

BILL: SB 305

SHORT TITLE: ASSERTING STATE TITLE TO SUBMERGED LAND
SPONSOR(s): SENATOR(s) THERRIAULT

02/06/04 (S) READ THE FIRST TIME - REFERRALS
02/06/04 (S) RES, FIN
02/18/04 (S) RES AT 3:30 PM BUTROVICH 205

BILL: SB 295

SHORT TITLE: EXTEND NAVIGABLE WATERS COMMISSION
SPONSOR(s): SENATOR(s) THERRIAULT

02/06/04 (S) READ THE FIRST TIME - REFERRALS
02/06/04 (S) RES, FIN
02/18/04 (S) RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Mr. Brian Hove, Staff
Senator Ralph Seekins
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Commented on SJR 27 for the sponsor.

Mr. Ron Somerville, Resources Consultant
House and Senate Majority
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Commented on SJR 27 and SB 295.

Ms. Joann Grace
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Commented on SJR 27.

Senator Gene Therriault
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of SB 305.

Mr. Dick Mylius, Deputy Director
Division of Mining, Land and Water
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724
POSITION STATEMENT: Commented on SB 305.

Mr. Joe Balash, Staff
Senator Gene Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 305 for the sponsor.

Mr. Zach Warwick, Staff
Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 295 for the sponsor.

ACTION NARRATIVE

TAPE 04-10, SIDE A
^#SJR27

SJR 27-SUBMERGED LAND TITLE DISPUTES

CHAIR SCOTT OGAN called the Senate Resources Standing Committee meeting to order at 3:33 p.m. Present were Senators Wagoner, Dyson, Seekins, Elton and Chair Ogan. Senator Stevens arrived at 3:35. The first order of business to come before the committee was SJR 27.

MR. BRIAN HOVE, Staff to Senator Seekins, sponsor, explained that the state has been waiting for the federal government to make claims on navigable waterways within the state and the federal agency has been "doing a little foot dragging." SJR 27 asks it to move the process along.

CHAIR OGAN asked him why the process needs to move faster.

MR. HOVE replied that the state needs to have use of the waterways that were promised it at statehood.

CHAIR OGAN said that Alaskans already use the waterways - "Just get a boat and go on 'em. Nobody is stopping us, right?"

MR. HOVE clarified that he meant not only use, but manage.

SENATOR SEEKINS stated that this resolution is very important to the future of the State of Alaska. The State of Alaska has over 20,000 rivers and over one million lakes - or 60 million acres of submerged lands (anything from the high water mark, underneath, to the high water mark on the other side).

Those submerged lands by virtue of the Equal Footing Doctrine, when we became a state, were transferred to the State of Alaska - those that were not reserved prior to statehood. The federal government held them in trust for the future of the State of Alaska. Once we were admitted, those lands became sovereign lands of the State of Alaska. Yet, we've never been able to get title - and even though the Equal Footing Doctrine said, and our statehood agreement with the United States of America says, that the Submerged Lands Act of 1953 also applies to the State of Alaska. That Submerged Lands Act says that title to those submerged lands would be transferred to the state or that the title belongs to the state. We've not been given clear title. There is still a clouded title by the federal government. It lays choate. In other words, if at any time on a river that has not been determined or the title has been clearly transferred, the federal government can come along and say we now believe we have a claim in the ownership of these submerged lands and then we have to go to court under the Quiet Title Act to sue the federal government to get title to something that was given to us at statehood. That's wrong. And the federal government has drug their feet. They've said that Alaska is a huge state and it's just really tough to get this done, but it's been 45 years, Mr. Chairman....

SENATOR SEEKINS said that statements from a Ninth Circuit Court decision, written by Judge Kleinfeld, on a quiet title action brought by the Doyon Limited against the federal government are relevant in this instance. He explained that the federal government tried to include the submerged lands under the Kandik, Black and the Nations Rivers as part of their allocation to Doyon Corporation under the Alaska Native Claims Settlement Act (ANCSA). Doyon maintained that couldn't be done, because the submerged lands belonged to the state. Title was cleared on two of the rivers, but since the federal government had not yet made a claim on the third river, Judge Kleinfeld could not give quiet title to the state. Senator Seekins quoted Judge Kleinfeld:

It is undisputed that when the Union was created, each of the 13 original states retained title to the lands covered by navigable waters and that under the Equal Footing Doctrine, each new state succeeds upon statehood to the federal interest in those lands. The Submerged Lands Act gave Alaska title to the beds of navigable waters on January 3, 1959. Under the Quiet Title Act, the federal government takes the position that its sovereign immunity shields it from the state government's claim to clear title to those submerged lands. Mr. Chairman, until the federal government itself makes a claim, because Alaska is very large - much of it is wilderness and there are numerable waters the federal government has not had time [45 years] to determine what claims it wishes to make. Therefore, the state government must wait until the federal government makes a claim, if it ever does, before settling whether it has title. That's not acceptable, in my opinion, for me as a legislator and a trustee of our lands that should be commonly owned by the people of the State of Alaska - to have that cloud on our title. This resolution asks the federal government to join with the state to help us clear that title.

CHAIR OGAN said he met with the Secretary of Interior and the Senate President last summer and was very encouraged by the progress that had been made on title transfers of submerged lands. The process is arduous and lengthy, even if SJR 27 is followed to the letter.

SENATOR ELTON asked, in reference to the Doyon case, if the federal government transferred title of submerged lands to other entities.

SENATOR SEEKINS replied that he wasn't aware of any.

SENATOR ELTON said he would like any history the sponsor might have that could explain why Congress considered, but failed to pass, the legislation that provided for federal officials to participate in the Navigable Waters Commission.

MR. RON SOMERVILLE, Resource Consultant to the Senate and House Majority, partially answered the question saying the Legislature was in the process of passing the 2002 State/Federal Navigable Waters Commission when he and Senator Halford went to

Washington, D.C., to amend the Quiet Title Act to speed up the process and to push for the Navigable Waters Commission. He briefed the committee:

That's when she raised this issue of using the recordable disclaimers of interest as a possible solution to it. One of the reasons, I think, that this is included in here, even though the recordable disclaimer of interest has been effective in one case - that's the Black River - it hasn't been subjected to the court challenges that the environmental community has been threatening over use of recordable disclaimers of interest on RS 2477 transfers in Utah. I mean, that's where it's probably going to hit first. And they've threatened to do the same thing on recordable disclaimers of interest for navigable waters in Alaska. It's a painful slow process that kind of gets you looking at what other options are there. One is amend the Quiet Title Act, initiate a Navigable Waters Commission and continue with the recordable disclaimers of interest as best you can. It's utilizing all three of the things available to the state.

CHAIR OGAN supposed that Congress could just grant Alaska title in one fell swoop, if it decided to and asked how likely that was to happen.

MR. SOMERVILLE replied that first Congress would have to define what is really meant by transfer of title and agree with the state on what water is navigable and what water is not navigable. He elucidated further:

It's even further complicated by the fact that the conveyances were made by the Bureau of Land Management (BLM) prior to the Gulkana case, which placed an additional clouded title on conveyances to the Native corporations, because a lot of state navigable waters were transferred as part of their upland entitlement.... So, the federal government, in order to just transfer something, the state would have to clearly describe what navigable was and what non navigable was. We're doing it on a case by case basis and at the rate of 13 cases in 45 years, I calculate it will take us 76,153 years to get our entitlement.

CHAIR OGAN asked if a certain size boat going down a river was criteria for navigable water.

MR. SOMERVILLE responded that the Gulkana case changed the criteria for navigability as did the Black, Kandik and Nations Rivers cases. "Those cases set the standard by which BLM must abide in any navigability determinations and that has helped the state in getting reasonable determination from BLM."

He said that a river had to be navigable at the time of statehood to qualify. People who were alive at the time of statehood and can describe the commercial uses of that river to make it navigable are going to be passing away soon and the state could lose its entitlement.

SENATOR SEEKINS said it's easy to see a river is navigable by floating a boat on it, but proving that someone floated a boat on it at statehood is the threshold that Judge Kleinfeld looked at; and whether there was trade or fishing or transportation at the time of statehood.

The federal government has claimed an interest in some of Alaska's rivers also, to facilitate subsistence management. He hinted that there is some discussion about whether that could be a cause to bring an action under the Quiet Title Act. He digressed a little saying the Submerged Land Act indicates that state ownership includes everything in and underneath the water column and is subject to state management. "So, there's a lot at stake in the determination of whether or not those submerged lands belong to the State of Alaska."

CHAIR OGAN said that Joann Grace is probably one of the most knowledgeable people in the state on submerged lands and state sovereignty and asked if she would answer questions.

SENATOR ELTON asked how the concept of state management of everything above and underneath submerged lands [and subject to state management] played into the debate on subsistence.

MS. JOANN GRACE, Department of Law, replied:

If the United States owns the submerged lands, then the river or lake is public lands under ANILCA and is subject to a subsistence priority. If the state owns the submerged lands, then the subsistence priority depends on whether the United State has an interest in the water column, not the land, but the water. If the

court found that the United States had reserved water rights in the water, then the water becomes public land subject to the subsistence priority. So, the subsistence priority doesn't particularly depend on [indisc.] title to the submerged lands. In other words, any navigable water that flows through federal lands that is reserved, like any conservation system unit, is subject to a federal reserve water right and, therefore, is subject to the subsistence priority regardless of who owns the submerged lands.

CHAIR OGAN asked, for the record, if a molecule of water crosses federal land and the quiet title [for that land] hasn't been transferred to the state, does the federal government reserve the right to manage the fisheries in that water column based on the Reserved Water Rights Doctrine.

MS. GRACE replied that it does:

As long as the United States has a water right in a water column, then it's public land as defined in ANILCA and, therefore, a subsistence priority applies to it. That is very well-settled law at this point.

CHAIR OGAN noted that the reason for current land management policy is because a few years ago, the last governor did not appeal a decision on the State of Alaska's right to manage fisheries to the Supreme Court.

MS. GRACE replied that is correct; the governor did not file a serve petition and a final judgment from the Ninth Circuit and that is what is being addressed.

CHAIR OGAN asked if another lawsuit would have to be brought forward if the state chose to litigate the question again.

MS. GRACE replied that is correct.

SENATOR SEEKINS asked if ANILCA applies to lands in which the United States has just an interest or to which it holds title.

MS. GRACE replied that Title VIII, subsistence, applies to public lands, which are defined as land, water and interest therein [indisc.]. So the argument in the Katie John case was if the United States holds title to any part of the water in a river or lake, that river or lake is public land and a subsistence priority applies to it. They have prevailed on that.

CHAIR OGAN asked if managing fish and game was a fundamental element of state sovereignty.

MS. GRACE replied:

I don't think that the Supreme Court has ever said that it's a fundamental attribute of state sovereignty. It certainly is something that every state does - mostly all the lands in the boundaries of the state.

CHAIR OGAN asked if police powers weren't a fundamental issue of state sovereignty.

MS. GRACE replied that traditional state police power is not the same as an essential attribute.

CHAIR OGAN asked if sovereigns are the only ones to have police powers.

MS. GRACE replied that the state has police powers and Congress can preempt those, because it represents a higher sovereign.

CHAIR OGAN noted there were no other questions for Ms. Grace.

SENATOR ELTON asked if the chair was planning on moving all three pieces of legislation since they were all related to the same subject.

SENATOR SEEKINS said that he intended for this bill to stand on its own merit.

SENATOR ELTON said after debating the other bills, there may be a need to add a whereas or resolve clause to SJR 27.

SENATOR SEEKINS moved to pass SJR 27 from committee with individual recommendations with the attached fiscal note. There were no objections and it was so ordered.

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4:00 p.m. - 4:01 p.m. - at ease

^#SB305

SB 305-ASSERTING STATE TITLE TO SUBMERGED LAND

CHAIR SCOTT OGAN announced SB 305 to be up for consideration.

SENATOR GENE THERRIAULT, sponsor, said one of the issues behind SB 305 is that people who remember some historic trails and navigable waters and can help the state assert title will soon be gone. He explained:

With the withdrawal of federal lands at statehood in 1959, Alaska received title to - under the Equal Footing Doctrine - to all submerged lands under state navigable waters and marine waters out to three miles. Unfortunately, the federal government has been slow in conceding this navigability. Since Alaska entered the Union, the federal courts have determined fewer than 20 rivers to be navigable. Unless the state is proactive in asserting its claims, it stands to lose up to 60 million acres of land that were due to it because of becoming a state. In some cases, the federal government has used every possible legal tactic under the federal Quiet Title Act to impede the state's assertion of ownership. The Black, Kandik and Nations Rivers in northeast Alaska are examples. These three rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Although no one has contested the state's claim that these streams meet federal criteria, this case took nine years and millions of state and federal dollars to litigate. Eventually the state won two of the three claims and the third was recently resolved by the federal recordable disclaimer of interest in 2003.

In addition, prior to 1989 the federal government applied incorrect standards to determine navigability and may have mistakenly conveyed state-owned lands to Native corporations, clouding the title to hundreds of thousands, if not millions, of acres. This is a critical topic as Congress considers deadlines for completing the land selection and conveyance processes. Of course, those deadlines are being suggested by our own congressional delegation.

Contributing to the problem is the lack of a reasonable and efficient way for the state to secure title to its submerged lands. SB 305 takes three steps to begin the process of identifying these state claims. First, SB 305 provides notice to all parties that the state is laying claims to all submerged lands

except those withdrawn at the time of statehood that meet the standards and criteria established in the Submerged Lands Act and in various federal court decisions.

So, we're just making a blanket statement that unless it was reserved at the time of statehood, the state is laying claim at this time to all submerged lands that lie under navigable water ways.

Second, it provides authority for the state's agencies to identify in accordance with the appropriate federal and state laws which water bodies the state claims is navigable and non navigable. This will help the state clarify criteria for identifying navigable waters, address conflicts involving clouded titles due to the inaccurate conveyances by BLM management and more clearly delineate its title claims. There the bill directs the Department of Natural Resources (DNR) to give notice to all private property owners, including Native corporations created under the Alaska Native Claims Settlement Act that may have received title to lands that could have erroneously included state submerged lands in their conveyance. This is critical to resolve future problems regarding mineral development, gravel extraction, access and other related land uses.

SENATOR THERRIAULT noted that if submerged land comes out of the Native corporation entitlement, they are due more land. So, he felt it behooved them to work with the state to resolve this problem. He concluded:

This legislation is only a step for the state to eventually resolve the title disputes over its submerged lands and deals only with the issue of state title to submerged lands. It does not address conflicts over federal fish and wildlife management in state navigable waters created by the Federal Reserve Water Rights criteria.

SENATOR ELTON said if this bill passes, he assumes that different entities could challenge it. He asked if Senator Therriault could quantify how many conveyances to village corporations have occurred that would need to be reviewed under this bill.

SENATOR THERRIAULT replied that he didn't know and that folks from the Department of Natural Resources (DNR) could testify on that.

SENATOR ELTON asked if it would be reasonable to assume if land had been conveyed to a village or a regional corporation, that it was because they wanted those submerged lands and that they might want to protect the ownership right they thought they had.

SENATOR THERRIAULT said that could be the case for some, but other corporations may be interested in not having the submerged land count against their acreage and claim additional uplands instead.

SENATOR RALPH SEEKINS asked if lands were conveyed erroneously, wouldn't that be a wrongful conveyance and need to be corrected sooner or later.

SENATOR THERRIAULT replied certainly, the sooner it's cleared up, the better. The trigger would be a determination of navigability on that particular stretch of water. The Gulkana case has established clear criteria from which the state can make assertions.

SENATOR SEEKIN asked if the Native corporations should have an interest in clearing their land titles.

SENATOR THERRIAULT responded that he thought the corporations would want to know what land was theirs, just like the state does.

CHAIR OGAN asked what the following language on page 3, line 13, meant and how he envisioned it working:

(6) in 1989, the United States Court of Appeals for the Ninth Circuit ruled that the Bureau of Land Management had applied incorrect standards in determining navigability for its land conveyances; however, the Bureau of Land Management has not reconsidered most of its pre-1989 determinations;

SENATOR THERRIAULT replied that Dick Mylius, DNR, could talk about the technical details, but the determination would be made under federal law on court criteria that had been established through litigation. He felt it is more important that the state move forward on its assertions than to make a list of rivers for the public, at this point.

MR. DICK MYLIUS, Deputy Director, Division of Mining, Land and Water, DNR, said the department is being asked to inventory all past determinations that had been made, most significantly by the BLM. It envisioned inventorying those lands, but not making a decision on every stream.

CHAIR OGAN asked if the department would be looking mostly at BLM determinations.

MR. MYLIUS replied yes because the BLM has done most of them, but the court had done a few, also. The DNR has made about 100 navigability determinations (although the bulk of them may have come through BLM conveyances).

CHAIR OGAN asked how the department had determined navigability - by floating a boat on it?

MR. MYLIUS replied that is generally correct. The Gulkana case states a raft that can carry 1,000 pounds is navigable criteria.

SENATOR SEEKINS asked if there was any tension between the entities that had determined navigable waters.

MR. MYLIUS replied the department would not limit itself to only BLM conveyances.

SENATOR SEEKINS asked if the state is asserting title on the lands regardless of who determined it.

MR. MYLIUS replied yes, but if the assertion was challenged, the courts would resolve the dispute.

SENATOR ELTON asked if a dispute arises between the state and someone who thought they had been conveyed submerged lands, would that dispute go to state court or federal court or either court.

MS. GRACE jumped in and replied that it would depend on whether the United States was a party. A dispute between a private party and the state would be resolved in state court.

SENATOR WAGONER said Mt. Redoubt erupted years ago and channeled the Drift River into Montana Bill Creek. Since then, the Drift River had switched back to its original channel. Montana Bill Creek probably would not have been classified as navigable at

the time, but the Drift River would have. He asked what classification it would have.

TAPE 04-10, SIDE B

MR. MYLIUS replied that is very difficult to determine. If the river was navigable at statehood and changed because of a natural occurrence and the change could be seen, it's possible that state ownership would still be in the old river corridor.

CHAIR OGAN asked him if he has an inventory of potential navigable waters.

MR. MYLIUS replied that the department doesn't have a comprehensive list of all state rivers, but it does have a comprehensive list of over 200 rivers that are clearly navigable.

CHAIR OGAN asked if this situation was similar to the one a few years ago when the BLM extensively identified and mapped rights-of-way for RS2477s.

MR. MYLIUS replied that the RS2477 project tried to dig up historical information that might not be available in the future. This is more like a project digging through BLM and state files to figure out what's there.

CHAIR OGAN said testimony has indicated that it would take many lifetimes to prove up on the navigable water claims and yet people who have the histories are passing away. He asked if Mr. Mylius thought the state was losing something by not doing that historical research now.

MR. MYLIUS replied that the BLM did historical research and compiled an extensive navigability portfolio and the state wants to get a copy of it. Yes, some information will be lost because people with historical knowledge are dying. He clarified that the standard the state has to prove is that the river was acceptable for use at statehood, not that it was actually used, a somewhat lower standard than for RS2477s.

SENATOR SEEKINS asked if the intent of this effort is to assert title the state was granted under the Equal Footing Doctrine and the Submerged Lands Act.

MR. JOE BALASH, Staff to Senator Therriault, said the Senator had to step out and answered that is correct. One of the

concerns is that another 45 years could pass before someone tries to get title for the state. The court, at that time, could look back and say the state never really tried.

SENATOR SEEKINS read the pertinent part of the Submerged Lands Act into the record:

43 U.S.C. 13.11 Rights of the States [under the Submerged Lands Act of 1953]

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law be, and they are hereby subject to the provisions hereof recognized, confirmed, established and vested in and assigned to the respective states....

(b)(1) The United States hereby releases and relinquishes unto the said states [and persons aforesaid], except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;....

SENATOR SEEKINS said that is the issue the state is battling. We have a quitclaim in the 1953 Submerged Lands Act, but yet the quitclaim has no validity because title hasn't been transferred.

SENATOR ELTON asked if a trapper running his dog team up a stream in the wintertime makes it a navigable waterway - even though the water isn't flowing.

MR. MYLIUS replied no and that the traditional definition of navigable refers to, basically, flowing water.

CHAIR OGAN announced that SB 305 would be set aside.

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^#SB295

SB 295-EXTEND NAVIGABLE WATERS COMMISSION

CHAIR SCOTT OGAN announced SB 295 to be up for consideration.

MR. ZACH WARWICK, Staff to Senator Therriault, sponsor, explained that SB 295 adds two years to the life of the Joint Federal and State Navigable Waters Commission that was established in 2002, but not funded. The hope is that if the state passes legislation again, the federal side of the commission will be funded.

CHAIR OGAN asked why this bill is needed since the Department of Natural Resources (DNR) legislation asks the same thing.

MR. WARWICK replied SB 295 is an attempt to build consensus between the state and federal governments on creating the lists and maps.

MR. RON SOMERVILLE, consultant to the Senate and House Majority, explained:

It's the quickest possible way you could essentially identify those reaches of those particular streams, which both parties agree are navigable. Certainly, that then leaves the remainder to be settled in court.... The concept here was to entice them to sit down, because of the massive size of the state, and cooperatively identify them so we could resolve these clouded titles, if you will, in many areas of the state.

CHAIR OGAN asked what is driving the situation now.

MR. WARWICK replied that the state side of the commission was passed last year, but wasn't funded. Current language says seven members are appointed by the state, which would drop down to four upon federal appointment of their four members. The state members could get some groundwork done before the federal members came on board.

SENATOR ELTON said if SB 305, which asserts state ownership of certain submerged lands, is adopted, the state might not want to have a commission. Why would the state want to sit down with the feds and negotiate away something it has just asserted?

MR. SOMERVILLE answered that the concept in SB 295 is to try to develop a mechanism whereby the state can have title as described by Mr. Mylius. Developing the lists would happen much faster with a commission rather than using recordable disclaimers or by developing a state list.

It seems to me that it's complementary. If the state has its list, it would be submitted to the commission for hopefully ratification by the combined state and federal representatives. It would be similar to the Federal State Land Use Planning Commission that was created out of ANCSA [Alaska Native Claims Settlement Act].

SENATOR ELTON asked if anyone had actually been appointed in the past.

MR. WARWICK replied that no one had been appointed.

CHAIR OGAN remarked that, based on the fiscal note, it doesn't look like the administration intends to appoint anybody until the federal government does and the feds aren't going to do anything until the state does. The commission could be extended for another two-year stalemate.

MR. SOMERVILLE said that Senator Therriault thought the law could be kept on the books and noted that Senator [Ted] Stevens made some mention of the commission that the Secretary of Interior was supportive of at the time. If Congress does pass something, this process would be much quicker than using a supplemental appropriation to quickly initiate the state's portion of the commission.

SENATOR ELTON replied that he didn't dispute that, but the future cost of the commission could be out of the state's hands until the feds enacted their side. He could envision a scenario in which the feds wouldn't pass a law, but the state would still have to fund seven commissioners and not have the BLM information it wanted.

CHAIR OGAN closed public testimony.

SENATOR THOMAS WAGONER moved to pass SB 295 from committee with individual recommendations and attached fiscal note. There were no objections and it was so ordered.

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^#SB305

SB 305-ASSERTING STATE TITLE TO SUBMERGED LAND

CHAIR SCOTT OGAN announced SB 305 to be up for consideration again.

SENATOR THOMAS WAGONER moved to pass SB 305 from committee with individual recommendations and attached fiscal note.

SENATOR ELTON objected to make a statement.

I don't have a good enough grasp, yet, to know whether I should object or not. So, I'm going to sign 'no rec' on this, but clearly this is a rather broad assertion and it seems to me that if, in fact, we do, it's going to be more than just a catalogue exercise on the part of DNR - that, in fact, we may be setting in motion. It's like tugging at the shorts on one end of the clothesline and not watching the pants jump at the other end. I would anticipate it's the kind of sweeping assertion of rights that could lead us into extended litigation with entities who already have conveyed land. I don't understand all of the implications of that. I'm not going to vote no; I'm going to withdraw my objection. Let's just say I have a lot of questions that surround this, yet.

CHAIR OGAN said he felt very strongly about expanding the state's efforts with resource development and this issue is probably one of the most important things the Legislature could do for the future of the state. He noted that Senator Elton's objection had been removed and that SB 305 had moved from committee.

CHAIR OGAN noted that the whole committee was present except Senator Lincoln.

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4:47 p.m. - 4:48 p.m. - at ease

CHAIR SCOTT OGAN announced the next order of business to be the Donlin Creek Project update and felt it was located in a part of the state that desperately needed more development.

MR. GREGG BUSH, General Manager, Donlin Creek Joint Venture, noted that he had passed a brief presentation on the project to the committee. He highlighted a number of points saying that Placer Dome Corporation was formed in 1987 by joining Placer Development, Dome Mines Limited and Campbell Red Lake Mines Limited of Ontario. It is now one of the world's largest gold mining companies employing about 12,000 people around the world, with a market capitalization of almost \$5 billion in 2002. Their

portfolio contains 18 mines that produced \$3.6 million ounces of gold and 400 million pounds of copper in 2003. Placer Dome has three of the top ten undeveloped gold projects around the world; Donlin Creek is one of them. Calista Corporation owns the subsurface rights and is a 15 percent participant in the project.

A total of \$51 million had been spent on the Donlin Creek project that contains 11.1 million ounces of gold at a 1.5 gram per ton cut off, with an average grade of 3 grams per ton and an additional inferred resource of 14.3 million ounces for a total of 25.5 million ounces of contained gold (between measured, indicated and referred resource).

Because this part of Alaska is very poor in infrastructure, Mr. Bush said, that is the key driver in development of this project. There is no current power supply and that is the largest hurdle. The mine requires a peak load of 75 megawatts and would have an average load of 61 megawatts over a 15 to 20-year lifespan. Options being evaluated range from a coal-fired power plant in Bethel, on-site diesel power, alternative fuels (LPG coming up the Yukon River and being stored underground), the possibility of shallow natural gas or coalbed methane, the Railbelt Intertie and various possibilities coming from Cook Inlet (either power or gas pipelines). Along with looking for power, Placer Dome is conducting an internal evaluation of alternatives and trying to minimize the mine's power needs. The preferred options would be known in October.

Other major issues are wetland impacts and water management. The mine's footprint is very large and most of the area it occupies is classified as wetlands. The pit will most certainly require dewatering, although they aren't sure what the water quality will be. Logistics is another concern and new roads have recently been agreed upon. The Kuskokwim River provides access by two to four barges per day with a maximum shipping season of 120 days per year. Large quantities of limestone and fuel will be hauled in. A potential fatal flaw in the project became evident when the pit got so large that the stability of the high walls was uncertain and quite a bit of time has been spent evaluating that.

CHAIR OGAN asked what the limestone is used for.

MR. BUSH explained that Donlin Creek is a refractory ore body, which means the gold is contained in sulphide minerals, which has to be oxidized to get the gold out. The sulphides are

converted to acid and the limestone is used to neutralize the acid before the tailings are disposed of.

He explained that historical baseline data is continuously being collected for water air quality, wetlands delineation and meteorology. The wetlands work is almost completed and preliminary waste rock characterization has been done, particularly in Crooked Creek where facility components would be located. Studies of the socio-economic impacts of the mine have been on-going with local community participation since 1996 and will continue into 2004. Placer Dome is looking at having its major permit applications all submitted by January 2005 with an eye toward having the final environmental impact statement (EIS) issued by the end of 2006. Provided everything goes well, there would be a two and a half year construction period.

5:08 p.m.

TAPE 04-11, SIDE A

CHAIR OGAN asked, "What would the state's take be on it?"

MR. BUSH replied that it would be 7 percent net proceeds tax after the first three and a half years of operation.

CHAIR OGAN asked how net proceeds were figured.

MR. BUSH said after expenses and also after amortization.

CHAIR OGAN asked what kind of revenues this would bring to the state.

MR. BUSH said he didn't have details on those numbers.

CHAIR OGAN asked Mr. Bush to get back to him on that.

MR. BUSH agreed to do so.

SENATOR WAGONER asked, once the road was built to the project, how far would it be to the Yukon River.

MR. BUSH said it was approximately 35 additional miles from Donlin Creek.

MR. JEFF FOLEY, Calista Regional Corporation, testified that Placer Dome and Calista signed an exploration of mining lease in 1995. Placer Dome has spent \$38 million dollars, a significant

part of which has been direct payroll to Calista shareholders. He told members that this project is the single largest economic stimulus the region has seen in modern times and Calista looks forward to continuing the 400 to 500 jobs, as well as support businesses, throughout the mine's life.

MR. FOLEY said Novista, a non-profit formed by Calista to bring lower-cost power to the region, has been partially funded by the state in the form of money for feasibility and power alternative studies. Calista's strategy for getting power has focused on a coal-fired plant in Bethel with a transmission line to the project site, powering nine villages - including Bethel - along the way. This would lower the power costs for those villages and bring the lowest-cost option to the site. He predicted that the feasibility study would be released, at the earliest, in April [2004]. He informed them that Bob Charles, Vice President, Corporate Governmental Relations, Calista Regional Corporation, will be addressing the Joint Energy Task Force on that subject in Anchorage on March 9 and, on March 31, will address the House in Juneau, presenting the results of that study and the Joint Energy Task Force's comments.

SENATOR ELTON asked if the Denali Commission has been involved with the study on alternative power sources and questioned the connection between the region's and the mine's power needs.

MR. FOLEY replied that the Denali Commission has been involved and, to some extent, controls the appropriated federal funds for engineering design permits. He understood that those funds have not been released, yet.

SENATOR ELTON referenced Greens Creek Mine's efforts to establish a working schedule for the mine to provide opportunities for people in communities in the region to access jobs. He asked if conversations with Placer Dome had taken place regarding "how you can best run the camp and set a work schedule so that you maximize the opportunity for people in the region to make those jobs work for them?"

MR. FOLEY affirmed that Placer Dome has taken the lead on this throughout the project, actively visiting and consulting with communities, specifically on employment opportunities, and keeping the villages apprised of upcoming employment schedules.

MR. BUSH said that during production, the answer to the question was also yes. He said there is currently a shareholder hire coordinator, and if the mine gets into an operational phase, the

quality of the training programs in place will determine the number of local people who will be hired.

SENATOR ELTON referred to the challenges of transporting limestone on the river system and asked if there were any other hazardous products or waste that would need to be transported on the river system.

MR. BUSH replied not hazardous waste, but there would be a number of hazardous materials transported up and down the river; the two largest concerns would be diesel and cyanide (the primary leeching agent), and there would be other lesser concerns as well.

CHAIR OGAN asked if limestone was considered as a hazardous substance: he wondered if the change in the PH of the river would be hazardous to fish and so forth.

MR. BUSH said no; he didn't think so.

CHAIR OGAN asked what kind of protections or mitigation measures would be used regarding cyanide, suggesting that EPA and DEC would have fairly strict requirements regarding handling and shipping containers.

MR. BUSH said there would certainly be an emergency response plan in place. He said there is only one cyanide container that has been approved by the U.N. for marine transport. "It's a one-time boxed-bag, it's a double bag, it's a plastic bag and then a PVC bag, and then a box."

SENATOR ELTON pointed out that Juneau has been through several major mine permits, and that cyanide was the focal point for a lot of community interest. He suggested that similar or greater challenges might be faced because this transportation system will be going past a lot of villages. "It was a challenge here in Juneau when we were dealing with the issue."

CHAIR OGAN thanked the presenters for the update, noting that the region certainly needs the development.

CHAIR OGAN adjourned the meeting at 5:24 p.m.