

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

April 26, 2004
3:40 p.m.

TAPE(S) 04-43, 44

MEMBERS PRESENT

Senator Scott Ogan, Chair
Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Kim Elton
Senator Georgianna Lincoln

MEMBERS ABSENT

Senator Ben Stevens

COMMITTEE CALENDAR

SENATE BILL NO. 132

"An Act removing the Old Minto townsite from the Minto Flats State Game Refuge; and authorizing the Department of Natural Resources to convey certain land at the historic Old Minto site to the Minto Village Council."

MOVED CSSB 132(RES) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 132

SHORT TITLE: MINTO FLATS GAME REFUGE & TOWNSITE

SPONSOR(S): SENATOR(S) LINCOLN

03/10/03	(S)	READ THE FIRST TIME - REFERRALS
03/10/03	(S)	CRA, RES
04/07/04	(S)	CRA AT 1:30 PM FAHRENKAMP 203
04/07/04	(S)	-- Meeting Canceled --
04/14/04	(S)	CRA AT 1:30 PM FAHRENKAMP 203
04/14/04	(S)	Moved CSSB 132(CRA) Out of Committee
04/14/04	(S)	MINUTE(CRA)
04/15/04	(S)	CRA RPT CS 4DP NEW TITLE
04/15/04	(S)	DP: STEDMAN, LINCOLN, WAGONER, ELTON

04/19/04 (S) RES AT 3:30 PM BUTROVICH 205
04/19/04 (S) Heard & Held
04/19/04 (S) MINUTE(RES)
04/26/04 (S) RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Mr. John Baker, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on SB 132.

Mr. Ted Popely
Counsel to the Majority
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 132.

Mr. Don Bullock
Legislative Legal Services
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 132.

Mr. Dick Bishop, President
Alaska Outdoor Council
Anchorage AK
POSITION STATEMENT: Opposes SB 132.

ACTION NARRATIVE

TAPE 04-43, SIDE A
^#SB132

SB 132-MINTO FLATS GAME REFUGE & TOWNSITE

CHAIR SCOTT OGAN called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present were Senators Thomas Wagoner, Fred Dyson, Ralph Seekins, Kim Elton, Georgianna Lincoln and Chair Scott Ogan. The first order of business to come before the committee was CSSB 132(CRA).

SENATOR RALPH SEEKINS moved to adopt Amendment 1.

23-LS0578\Q.1

A M E N D M E N T 1

OFFERED IN THE SENATE

BY SENATOR SEEKINS

TO: CSSB 132(CRA)

Page 3, following line 5:

Insert a new subsection to read:

"(c) The conveyance shall also be made subject to the following terms and conditions:

(1) the Native Village of Minto waives any claim to sovereign immunity with respect to the land, activities on the land, or persons while they are on the land;

(2) the land remains under the sovereign jurisdiction of the state;

(3) the land immediately reverts to the state if the Native Village of Minto or a future successor receiving the land or an interest in the land

(A) claims that the land is Indian country, as defined in 18 U.S.C. 1151, in an administrative or judicial proceeding; or

(B) takes any action relating to the land that is incompatible with the state's claim of sovereignty over the land."

Reletter the following subsection accordingly.

SENATOR GEORGIANNA LINCOLN objected.

SENATOR SEEKINS said he fully supported the intent of SB 132 to transfer the old Minto Village site to the people who are connected to it. His concern is that the transfer doesn't affect the issue of sovereign immunity to the State of Alaska. Amendment 1 gets the assurance from the Indian Reorganization Act (IRA) Council that it will not try to assert sovereign immunity over the land as a precondition of the conveyance.

SENATOR LINCOLN responded that she asked both the Department of Law (DOL) and the Department of Natural Resources (DNR) to be present to explain the implications of the amendment. She had two e-mail responses; one from John Baker, DOL, and the other from Mr. Joiner, DNR. The Department of Law wanted some clarification first saying, "Legislative Legal's analysis suggests that sovereign immunity attaches to the land. It does not."

Second, Alaska Native tribes are not currently recognized as having territorial jurisdiction over the land they own.

There is, Mr. Chairman, no sovereignty over that land.... DNR also says:

We are concerned about a reverter clause that would require the state to monitor actions involving the parcel and to enforce the reversion of the land back into state ownership for any reason. We do not support this provision on the same grounds that we oppose the similar one regarding land use.'

It would be potentially far more costly to the state to take back contaminated lands than the miniscule risk of losing state jurisdiction over this tiny parcel. We're talking about 32 acres.

SENATOR LINCOLN said the findings of fact for the Mat-Su Hatcher Pass area of 1999 say that:

Making the land of this act available to the Mat-Su Borough for conveyance is consistent with the testimony and position of the DNR at the time the Hatchery Pass use area was created. Furthermore, the selection is consistent with the public use area that is contained within the...management plan."

The Minto site is being secured for Minto people and a lease exchange is in the plan that was developed for state management.

SENATOR LINCOLN emphatically stated that sovereign immunity does not attach to the land in Alaska and Alaska Native tribes are not recognized as having jurisdiction over land and, therefore, not this parcel of land. She said the Minto Natives moved to the new site because the state said they had to, but they never thought they were giving up use of the land there where it continues to be used for an alcohol recovery camp for whole families and as a place to give children hope.

CHAIR OGAN commented that the sponsor statement says the Native Village of Minto is the governing body of Minto and is not a political subdivision of the state. He predicted this would end up being litigated.

SENATOR LINCOLN clarified that the Village of Minto is a recognized tribe under the Secretary of Interior.

CHAIR OGAN said the Mat-Su [Hatcher Pass] comparison is a subdivision of the state whereas the Native Village of Minto is not a subdivision of the state, but is federally recognized. That's the problem.

SENATOR SEEKINS reiterated that he wasn't worried about the purity of the intent of the people of Minto to use that land, but he was concerned about the unintended consequences of the act. If there is no ill intent, why not agree to the precondition of conveyance that they will not attempt to assert any sovereign immunity over that land. He had no problem with deleting paragraph 3, the reconveyance section.

SENATOR ELTON addressed his question to the Department of Law. On line 6, provision 1 says, "The Village of Minto waives any claim to sovereign immunity with respect to the land." He asked if that language is needed if sovereign immunity does not attach to the land now.

MR. JOHN BAKER, DOL, answered that the point of his e-mail is to try to draw a distinction between sovereign immunity and territorial sovereignty by tribes, which are not the same concept. The state routinely requires waivers of sovereign immunity from private organizations before entering into contracts with them. However, the extent of the waiver on page 6, subparagraph (c)(1) might be questioned.

SENATOR ELTON asked why persons would have to waive sovereign immunity while they are on the land.

MR. BAKER answered that it is a question of how enforceable the language would be. Limiting the language to conduct of the individual tribal officers acting in their official capacity might work.

SENATOR ELTON asked if it is automatically assumed that an elder acting in his capacity on state land has waived

sovereign immunity. "If not, why would we want to apply that to private land?"

MR. BAKER replied that it's not automatically assumed that an individual has waived sovereign immunity. It is commonly asserted as a legal defense. In this case it is just a condition of land being conveyed to a tribe. "The efficacy is the legislative prerogative...."

SENATOR ELTON asked if "the land remains under the sovereign jurisdiction of the state" on line 8 meant the state has more liabilities.

MR. BAKER deferred the intent of that language to the sponsor, but legally he couldn't guarantee that language would necessarily insulate the state in the future from an Indian country claim. The status quo is that the state retains jurisdiction over all the land unless it has been preempted.

SENATOR ELTON asked if the net effect of line 8 is nothing.

MR. BAKER responded that line 8 doesn't provide the state with any protections that it doesn't have now, but it does state the legislature's intent that the conveyance doesn't change the status quo.

SENATOR LINCOLN asked how deleting the sovereign immunity amendment would affect the bill.

MR. BAKER replied that the sovereignty of the state would not be affected.

CHAIR OGAN asked what the legal issue was in the Venetie case.

MR. TED POPELY, Counsel to the Majority, explained the court was inquiring whether or not Indian country existed in Alaska, specifically ANCSA corporation lands as was claimed by the Native Village of Venetie. The answer from the Supreme Court was no. Sovereign immunity relates to an organization's ability to avoid liability and the jurisdiction of other sovereign entities like the state.

The notion of sovereign immunity is a concept that is not necessarily tied to the land. It can operate independently. In fact, in Alaska, of

course, we have a unique situation in the wake of the Venetie case because we have a state supreme court and a former administration who has determined that there may be federally recognized Indian tribes in the State of Alaska. And yet the court has indicated that there is no land base for any tribes that may or may not exist. It creates some confusion....

SENATOR LINCOLN asked Mr. Popely if he had any conflict with what Mr. Baker said.

MR. POPELY pondered:

The only thing that makes it confusing if land is transferred to an IRA council is that the land is not being transferred to a corporation. It's not being transferred as Indian country, it's being transferred to what may or may not be an Indian tribe with no land base. So, it's created an almost third-tier hybrid land ownership status that is unclear and is unique up here. So, without the language that the amendment would add to the bill, it leaves some uncertainty from the state's jurisdiction perspective. The question would be, then, well what does happen when an IRA council who is going to argue that it possesses federally recognized Indian tribe status with sovereign powers of governmental immunity owns land vis-a-vis its position as a self-proclaimed tribe without a land base in Indian country? It's a question I'm not sure anybody knows the answer to....

Without the language what does it mean? Well, without the language in there, the attorneys who testified are right to some extent. Tribal sovereign immunity would apply conceptually as opposed to attached to a land base. But without the language, what does it mean? While tribal sovereign immunity wherever it does exist by law and a federally recognized tribe exercises immunity, it's a very powerful effect. It essentially exempts that sovereign from liability in suits in civil court, but also from virtually any other state that claims jurisdiction over that group. So, it could apply to any land use

that you might imagine that the state normally exercises jurisdiction over. That could include anything from access issues or pollution standards, transfer of the land, leasing of the land, injuries that occur on the land - anything that I could conceive of that is closely tied to the land could conceivably be subject to an immunity defense. I would disagree to the extent that if I were asked, I would say that it's advisable to have the language in there if the state wants to do everything it can to insure that it never loses the potential jurisdiction over the land base that it now exercises....

SENATOR LINCOLN said all the new Minto is trying to do is get title to 32 acres for the old site that they never thought they were giving up. She asked if there were concerns over the tribal sovereignty it has now.

MR. POPELY replied no to the extent that the land is corporation land.

SENATOR LINCOLN interrupted to clarify that she is talking about the Native village of Minto, the IRA.

MR. POPELY admitted that he didn't know the answer and added:

The land that exists there now is going to be subject to whatever the courts tell us it is going to be subjected to with respect to this arena of questions. If there is a lawsuit brought with respect to the land ownership that's there now, if the owners of the land try to exempt themselves from state jurisdiction, I can't say what the result will be. That's going to be left up to the courts.... The smartest course is the most conservative course, which is protecting yourself....

SENATOR ELTON asked if his concerns would be addressed by deleting numbers 1 and 3 and inserting a new subsection to read: "(c) The conveyance shall be made subject to the condition that the land remains under the sovereign jurisdiction of the state."

MR. POPELY replied that he wasn't sure that would cover a future claim.

SENATOR ELTON said the problem he had is that line 6 essentially says the Native Village of Minto waives any claim to sovereign immunity with respect to persons while they are on the land. He asked if it is giving up something now.

TAPE 04-43, SIDE B

MR. POPELY answered that the only thing is that they exercise powers and immunities vis-à-vis the land that exists there now in its current legal status. It isn't clear what changing the land status to become part of the IRA council's potential asserted claim of tribal ownership of land, that's not corporation land and not necessarily Indian country would be. The legislation as amended would require that the new land status would require waiver of those potentially asserted powers vis-à-vis that land.

SENATOR ELTON asked why a council would want to accept land if, in fact, they may be giving up a right that they now have.

MR. POPELY basically answered that the state has good reasons to not want to waive an entity from being subject to state law.

SENATOR SEEKINS asked hypothetically if a member of the IRA council was traveling in downtown Fairbanks, what sovereign immunity he would have.

MR. POPELY answered:

Let me preface my answer by saying that there is still within this body... a controversy as to whether or not any Native entities in the State of Alaska possess powers of sovereign immunity. Having said that, if you assume for purposes of your question that there are powers of sovereign immunity possessed by Alaska Native groups somewhere in the State of Alaska, and if, in fact, they are the groups that the Assistant Secretary put on her list in 1993 and that the Alaska Supreme Court has talked about in John v. Baker in subsequent cases, then generally

speaking, the sovereign immunity is enjoyed by the tribe and not by the individual. So, it's not a blanket shield from liability that extends to any Alaska Native who happens to be a member of a sovereign tribe. It's a shield that exists for the entity. In this case it would be a tribe. Whether or not those exist in Alaska remains an open question.

SENATOR SEEKINS asked if sovereign immunity is transferred by the IRA council, will the amendment do any harm to any one.

MR. POPELY replied no. "You can't take away by law something that does not already exist...."

SENATOR LINCOLN asked if taking away numbers 1 and 2 take away any powers from the state's sovereign jurisdiction over the land.

MR. POPELY replied that no one knows the answer to that.

SENATOR LINCOLN asked if it happened this time.

MR. POPELY replied that it might.

Without those provisions in there, it is possible this legislation could convey land to an entity who under the rulings of the Alaska Supreme Court and actions of the Department of Interior may then possess powers that diminish the state's jurisdiction on those lands.

He explained that the John v. Baker case, in the Supreme Court, recognizes that there are federally recognized Indian tribes in Alaska, yet, there are organizations that believe that is still an open question.

If we disagree with that contention, then it's incumbent upon us to prevent any furtherance of those matters that we can control. This is one of those areas....

SENATOR LINCOLN asked Mr. Popely if this gives the Native Village of Minto any more powers than what they presently have now.

MR. POPELY replied, "Yes, it could."

SENATOR LINCOLN asked him how that could be.

MR. POPELY replied:

Because this is a piece of new real estate and a new law that is passing title to land to an organization that exists on the 1993 Department of Interior list and that the Alaska Supreme Court has recognized, and the former administration has recognized, as federally recognized Indian country. As a new action of the state it is advocating a policy of transferring land to an entity that some very important folks have said are federally recognized Indian tribes with powers of sovereign immunity. So, in the wake of those opinions, passing new real estate to this organization whose status is fluid - at different times in history it may be considered many different things - a tribe, not a tribe, a group within Indian country, a group without Indian country.... It's the conservative course to take.

CHAIR OGAN asked if the concern is that title is being transferred to an entity that isn't recognized anywhere else in statute.

MR. POPELY replied, "Whether it's recognized anywhere else or not, it is in fact an organized entity under the IRA that is listed in the federal list of tribes."

CHAIR OGAN asked if the amendment in any way acknowledges that existence.

MR. POPELY said he didn't think so.

The act of granting land is not in itself an act that federal courts recognize as an act creating tribal status under federal law. But, if you give land to an entity who is a proclaimed tribe and is listed and if we're wrong and they are, in fact, federally recognized Indian tribes, then they will have received the land free of any waivers of immunity and all the attendant powers

that may go with land that is transferred to a tribal entity in the United States.

SENATOR ELTON asked if sovereign immunity accrues to a tribe and not an individual, why is there a waiver of sovereign immunity on line 6.

MR. POPELY replied:

I imagine it was drafted that way because often times organizations are represented by individuals through general principles of agency [acting on behalf of a group and therefore, enjoying the immunities that group enjoys]. I imagine that the drafter intended that this meant that any person who does something in the name [of the entity]....

SENATOR ELTON inferred that, therefore, there were implications for an individual who was walking through Fairbanks.

MR. POPELY said this case says, "vis-à-vis to activities on the land".

SENATOR ELTON pointed out that they may be waiving a right they might already have and lose that right under this wording.

MR. POPELY replied that many in the state believe that they are not enjoying any sovereign immunity right now and this is a measure to prevent that assertion in the future.

4:50 to 4:53 p.m. - at ease

SENATOR LINCOLN moved to amend Amendment 1 on line 6, inserting a ";" after "land" and delete "or persons while they are on the land" and lines 9 - 14.

SENATOR SEEKINS objected. He asked what the importance of the words "for persons while they are on the land" are on lines 6 and 7.

MR. DON BULLOCK, Legislative Legal Services, replied:

That language has to do with the relationship of the Native Village of Minto as far as other

people coming onto the land. It's not talking about the representatives of the Native Village of Minto. But, if somebody is injured on the land and would have a positive action against the Native Village of Minto related to that person being on the land, that the sovereign immunity wouldn't apply.

SENATOR SEEKINS asked if eliminating that phrase would mean someone who was injured by an activity that occurred on behalf of the tribal council enjoys sovereign immunity and can't be sued for that injury.

MR. POPELY replied:

Right, just like the state has its own version of the Tort Claims Act that says under certain circumstances the state waives its immunity. What this section 1 and 2 would do is basically make the Native Village of Minto as a private landowner. So, if the land is going to a corporation instead of the Native Village of Minto, the rules would be the same.

SENATOR LINCOLN said the Native Village of Minto would then be legally responsible for that and considered a private landholder. However, she didn't believe that any of the villages are considered private landholders.

MR. BULLOCK responded:

First of all, there has to be a cause or relationship between whatever injury somebody suffered on the land linked to the Native Village of Minto being responsible for whatever caused harm to that person. There are two things that are happening here if you look at what this section does, what this amendment would do. First of all, it's a transfer of land out of state ownership to an entity. That's the first thing it does. But this isn't just an entity; this is the Native Village of Minto, which is an IRA corporation. Because it's an IRA corporation and the law is unsettled.... I'm not sure what other issues are out there. That's the cautionary language in my memo I wrote on the 23rd.

What paragraphs 1 and 2 of this amendment would be - it would basically treat the land as a transfer to just a regular corporation or a person receiving the land.

SENATOR SEEKINS responded that his intent is to treat the transfer as if it was to a private citizen. He asked if this amendment would give that assurance.

MR. BULLOCK replied that he thought it would. The unknown is what federal jurisdiction is involved because of title being transferred to a Native corporation.

CHAIR OGAN brought the committee's focus back to the amendment to Amendment 1 and asked Senator Seekins if he objected.

SENATOR SEEKINS replied that he didn't object. He only objected to the deletion in lines 6 - 7.

CHAIR OGAN divided the question into Amendment A, which would delete line 6 and Amendment B, which would delete lines 9 - 15. Amendment A was considered first.

SENATOR LINCOLN said she thought all the previous discussion had established that the intent is not that they are talking about a private citizen, but an IRA.

CHAIR OGAN called for the question. A yes vote drops the language and no vote keeps the language. Senators Dyson, Elton, Lincoln and Wagoner voted yea; and Senator Seekins and Chair Ogan voted nay; and Amendment A to Amendment 1 was adopted.

CHAIR OGAN called the question on Amendment B to delete lines 9 - 14 from Amendment 1. A yes vote would drop the language and a no vote would keep it. Senators Wagoner, Elton, Lincoln, Seekins, Dyson and Chair Ogan voted yea; and Amendment B to Amendment 1 was adopted.

SENATOR SEEKINS asked Mr. Bullock if the waiver should include the statement that the Native Village of Minto waives for itself, its lessees, its successors and assigns forever any claims, etc. as a precondition to acceptance of the conveyance.

MR. BULLOCK replied that language could be added.

SENATOR SEEKINS moved conceptual Amendment 2 to add "for itself, lessees, successors and assigns forever as a precondition of acceptance of the conveyance" after "waives" on line 5.

SENATOR LINCOLN objected to say that that language needs a legal opinion since it included "forever". She asked Mr. Bullock if not having that language in the bill created a problem.

MR. BULLOCK stated that the bill transfers land to the Village of Minto and he didn't believe anything in the bill would prevent it from transferring it to another Native village corporation or selling it into private hands.

SENATOR ELTON said the state didn't put those kinds of conditions on any other land transfer. "I mean we're putting something in place here that we're not applying to other entities."

MR. BULLOCK replied:

The issue here is that this is the Native Village of Minto, not another corporation, and there is unsettled law concerning what the affect of the land will be when it's transferred to this type of entity.

SENATOR ELTON followed up saying that the City of Juneau could transfer land to the Native Village of Minto and could do it without that condition.

MR. BULLOCK agreed.

SENATOR SEEKINS pointed out that language is standard and conforms with other reservation language on page 2, paragraph (b).

CHAIR OGAN explained that the section in question preserves the mineral rights.

MR. BULLOCK said that was right, but noted if the Native Village of Minto sold this land to a private individual, then sovereign immunity wouldn't apply because an individual doesn't have any grounds for claiming sovereign immunity.

SENATOR LINCOLN pointed out that language on line 8 says that the land remains under the sovereign jurisdiction of the state.

MR. BULLOCK replied the sponsor's intent was to have state law continue to apply on that land.

SENATOR LINCOLN asked if that wasn't enough protection for the state.

MR. BULLOCK replied that there are two different issues. The Venetie case had to do with what its powers over its land were as a government. The second issue was what is the relation of the Native Village of Minto as a government in the John v. Baker case.

SENATOR ELTON encouraged a no vote for this amendment, because it raises new issues that can be explored by the sponsor later and amended on the floor.

CHAIR OGAN asked for the roll to be called on conceptual Amendment 2. Senators Seekins, Wagoner, Dyson and Chair Ogan voted yea; Senators Elton and Lincoln voted nay; and conceptual Amendment 2 was adopted.

SENATOR ELTON called for the question on Amendment 1 am. Senators Wagoner, Dyson, Seekins and Chair Ogan voted yea; Senator Lincoln and Elton voted nay; and Amendment 1 am was adopted.

MR. DICK BISHOP, President, Alaska Outdoor Council, said he did not support the bill because of the high level of uncertainty about the consequences of transferring land under these conditions and that is not in the state's or the public's best interest.

TAPE 04-44, SIDE A

SENATOR SEEKINS moved to pass CSSB 132(RES) from committee with individual recommendations and attached fiscal notes. There were no objections and it was so ordered.

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There being no further business to come before the committee, Chair Ogan adjourned the meeting at 5:20 p.m.

