

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 20, 2006

1:17 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 502

"An Act amending the Alaska Stranded Gas Development Act to eliminate the opportunity for judicial review of the findings and determination of the commissioner of revenue on which are based legislative review for a proposed contract for payments in lieu of taxes and for the other purposes described in that Act; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 502

SHORT TITLE: COURT REVIEW OF STRANDED GAS DECISION

SPONSOR(S): JUDICIARY

04/18/06	(H)	READ THE FIRST TIME - REFERRALS
04/18/06	(H)	JUD
04/19/06	(H)	JUD AT 1:00 PM CAPITOL 120
04/19/06	(H)	Heard & Held
04/19/06	(H)	MINUTE(JUD)
04/20/06	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

PAUL FUHS, Volunteer Lobbyist

for Backbone II
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 502, expressed concerns and responded to questions.

LORI BACKES
Fairbanks, Alaska

POSITION STATEMENT: During discussion of HB 502, expressed concerns and responded to questions.

LARRY OSTROVSKY, Chief Assistant Attorney General - Statewide
Section Supervisor
Oil, Gas & Mining Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 502.

STEVEN B. PORTER, Deputy Commissioner
Office of the Commissioner
Department of Revenue (DOR)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 502.

ACTION NARRATIVE

CHAIR LESIL MCGUIRE called the House Judiciary Standing Committee meeting, which had been recessed on 4/19/06, back to order at [1:17:03 PM](#). Representatives McGuire, Coghill, Gara, Wilson, and Gruenberg were present at the call to order. Representatives Kott and Anderson arrived as the meeting was in progress.

HB 502 - COURT REVIEW OF STRANDED GAS DECISION

[Contains brief mention of HB 71.]

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CHAIR MCGUIRE announced that the only order of business would be HOUSE BILL NO. 502, "An Act amending the Alaska Stranded Gas Development Act to eliminate the opportunity for judicial review of the findings and determination of the commissioner of revenue on which are based legislative review for a proposed contract

for payments in lieu of taxes and for the other purposes described in that Act; and providing for an effective date."

CHAIR MCGUIRE, in response to comments, relayed that she would be holding HB 502 over but would not be assigning it to a subcommittee.

REPRESENTATIVE COGHILL noted that members' packets now contain both the original version of the Alaska Stranded Gas Development Act - House Bill 393 - and a later version - CS for House Bill 393(O&G).

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PAUL FUHS, Volunteer Lobbyist for Backbone II, indicated that he has some suggestions for the committee, and then offered some historical information. He relayed his understanding that one of the points stipulated in the Alaska Stranded Gas Development Act is that the legislature shouldn't [simultaneously] be negotiating about oil [taxes], because the state will get leveraged against its oil taxes for a gas pipeline. He added, "The economic limit factor (ELF) wasn't working, so ... we're not against looking at the production profits tax (PPT); what we are against is the stated linkages to a gas [pipeline] every time the testimony is taken" [because] that was one thing that wasn't supposed to happen.

MR. FUHS offered his understanding that the Alaska Stranded Gas Development Act also stipulates that it must be shown, via a best interest finding, that the gas is stranded, which means that the gas would not otherwise be developed except for the provisions in "this contract." Furthermore, the findings must also contain an economic analysis which shows that the project is not economic without some changes [to the tax laws]. If that analysis isn't done correctly or is performed "on a political basis," the Alaska Stranded Gas Development Act stipulates that one can go to court and claim that the contract is based on a faulty foundation. That's what the judicial review is about, he opined, that particular element of the best interest finding that supposedly illustrates whether the gas is in fact stranded.

MR. FUHS suggested that these guidelines were meant to address concerns that there could be situations arising from "a complete, political free-for-all"; for example, a situation wherein people from the industry begin using their extensive economic resources - garnered from developing Alaska's oil - for the purpose of taking out multimillion-dollar ad campaigns

designed to show legislators in an unflattering light, or setting up and paying for front groups like "Alaska's Future," or threatening the Boy Scouts with "taking away their contributions," or "filling the legislature" with more lobbyists than there are legislators. The potential to have such a situation is of concern to Backbone II, so if some "of the rules" are going to be changed, at least keep "the referee" in the game - the referee being the judicial branch - so that the public has some way to ensure that the findings are based on a [firm] foundation.

MR. FUHS said that although members of Backbone II are not lawsuit happy, if this type of legislation winds up with a provision that takes away the right of the people to petition their government regarding this contract, it probably will engender a lawsuit, notwithstanding the likelihood that such a lawsuit could result in another delay of a gas pipeline. He then remarked:

If you're going to change all the rules and you're going to take the referee out, you have to ask: "Why would [we] even have the [Alaska Stranded Gas Development Act]?", "What does it even mean anymore?", [and] "Why would you do that?". If you do that, you should just pass a gas law of general applicability, where you can make amendments to it - where it's not an up or down vote, [and where] you can put in proper credits and incentives like you're doing with the PPT. And ... then also look at this [HB 71] ... which would give an administration the tools that it needed to actually go after the leases if there was a refusal to develop them, or for [the administration] ... to sell [the leases] ... to somebody else. And I think those are the items which would put the state in a stronger negotiation position, and also apply some truth serum to this whole process. ...

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REPRESENTATIVE COGHILL indicated that he is considering the questions of whether the "referee" is in the right place, and whether the discovery timeframe is appropriate and sufficient.

MR. FUHS noted that the Senate is considering [those issues] as well, to the point of considering an amendment to place [judicial review] at the end of the process; this would be appropriate as long as one is still allowed to challenge the

best interest finding, which goes back to the rules of discovery because the "line-level" people in the administration will be asked things like: how did they do the analysis, what instructions were they following, what was the scope, what was the analysis they came up with, and were they asked to change it.

REPRESENTATIVE COGHILL questioned whether that process properly belongs where it currently is, and whether the amount of discovery under a judicial review will be more in depth.

MR. FUHS said that by passing HB 502, one could never get to the discovery process because the Alaska Stranded Gas Development Act specifically says that the only things that can be the subject of the court order is whether the application was complete and correct or whether the best interest finding was legitimately met. He posited that this stipulation is intended to keep somebody from filing a lawsuit on the grounds, for example, that the gas will be used to develop the tar sands in Canada and thereby pollute the air. In other words, the only lawsuits will be those challenging the economics of the finding.

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REPRESENTATIVE GRUENBERG, in response to a question, offered his belief that the legislature has the power to subpoena both records and people. He suggested that in addition to using its subpoena power, [the legislature] should also have witnesses testify under oath occasionally.

REPRESENTATIVE COGHILL offered his belief that the discovery process is not really that public, though the public may be able to get information. However, the legislature, through its process, could ensure that information becomes very public. He indicated that the legislature could investigate whether the project is economically possible or even economically right under stranded gas conditions. He suggested going cautiously on this issue, and that the legislature might be the best body to ensure that the public gets the information it needs. He also pondered the question of whether the administration and the legislature might end up being subject to the court's fiscal finding.

REPRESENTATIVE GRUENBERG said:

That's called scope of review, and the question of the scope of review involves what deference you make, as a

court, to either the agency finding, which is what it normally is, or in this case a legislative finding. And you can say such things as ... that it shall be affirmed unless it's clearly erroneous - which means that the review in court is left with a, quote, "definite and firm conviction that a mistake of fact has been made" - [or] you can limit it even beyond that. But what we can deal with in this is broadening it or narrowing it down as we choose. But I think that you're right, ... that one of the issues that we need to address is what the scope of review is.

MR. FUHS said it seems that it would be better to have the finding declared sound before the legislature takes action on it. One option might be to simply limit the timeframe in which someone can bring a challenge; another option might be to provide some way of expediting the proceedings.

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MR. FUHS, in response to a question, surmised that the legislature has the same power as the court when using subpoena power, and suggested that the question the legislature would want to have answered to its satisfaction is whether the gas would not otherwise be economical, rather than there just being a finding that the oil industry won't undertake this project unless it gets everything it wants.

CHAIR MCGUIRE questioned whether judges will have the expertise necessary to determine whether the gas is truly stranded. Therefore, perhaps the legislature might be the better venue for review, because of the varied backgrounds of its members.

REPRESENTATIVE GRUENBERG said that is part of this issue of scope of review, as is the deference that the reviewing court would make to the lower finding, and it would depend on the kind of finding that's reviewed. For example, if it's a technical finding, a court of law would give a lot of deference to the agency or the legislature because it would lack the expertise, and an economic finding would normally be subject to a lot of deference. Also, it is only one judge that's doing the initial reviewing if the challenge goes to the Alaska Superior Court, although the legislature could expedite such cases by creating a statute that says such challenges must go immediately to the Alaska Supreme Court. Two of the main issues, he surmised, are scope of review and speed of review.

CHAIR McGUIRE noted that the question of which court such challenges should go to first has been the subject of discussions, and suggested that perhaps they could merge that issue into this bill. It's important, she remarked, that the committee have a view of how the whole process is going to look - what's the timeline in which a challenge can be made, to what court will a challenge be made, to what extent does the legislature's authority reach, and where does that authority come in - because it will be harder for the public to digest what's being done if it's done piecemeal.

REPRESENTATIVE GRUENBERG mentioned that for many years he had served on the "Supreme Court Appellate Rules Advisory Committee," and that there is a real question regarding whether it's really a good idea to have the [Alaska] Superior Court sitting as a court of appeal; this is because "they" don't give any deference to the [Alaska] Superior Court, either its interpretation of law or its interpretation of factual finding - the only time it really makes a difference would be if the [Alaska] Superior Court were to remand. Therefore, he relayed, he would suggest that they have such challenges go directly to the [Alaska] Supreme Court.

CHAIR McGUIRE and REPRESENTATIVE GARA concurred.

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REPRESENTATIVE GARA noted that former Governor Hickel and former Attorney General Cole have done a lot of work on this issue, and asked whether Mr. Cole would be available to assist the committee with creating language for HB 502.

MR. FUHS indicated that Mr. Cole might be available though he is not directly affiliated with Backbone II.

REPRESENTATIVE GARA offered his understanding that currently the commissioner comes up with a best interest finding, a finding that a particular project will be in the best interest of the state. However, what's relevant to him, he relayed, is not that the court gets to make that determination, but rather that that determination - whether a project is in the best interest of the state - governs what documents are made available to the public. And so once the issue becomes one of, is this in the best interest of the state, in the court system that [means] all documents relevant to whether a project is in the state's best interest become available to the parties or the public. He asked, therefore, whether, if he wants to ensure that all

documents relevant to that issue are made available to the public, getting rid of the best interest finding would also get rid of the public's right to access those relevant documents.

MR. FUHS offered his understanding that HB 502 wouldn't do away with the best interest finding, but would raise the question of whether the public would really have access to what actually went into making the best interest finding - for example, access to the models and inputs.

REPRESENTATIVE GARA offered his understanding that it is the public's right to challenge the best interest finding in court that gets them access to the documents, but the bill takes away that right, thus also taking away the public's access to the documents.

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MR. FUHS characterized that summation as correct, but noted that the legislature could still compel those documents to be brought, and he encouraged the legislature to do just that regardless of what happens to HB 502.

REPRESENTATIVE ANDERSON asked whether a challenge is eminent.

MR. FUHS pointed out that Backbone II is concerned that "these lawsuits" will be filed and further delay the project.

REPRESENTATIVE ANDERSON suggested that the public could be given too much latitude regarding discovery and the right to challenge the project.

MR. FUHS offered his belief, however, that everyone wants a gas pipeline, and so if it's a real deal, no one will try to block it. The biggest factor that people are concerned about is whether the contract will really compel the industry to build the project, or whether it will merely be a way of delaying the project further.

REPRESENTATIVE GARA clarified that his concern pertains to what documents will be made available to the public. The current process makes the documents available to the public, and so if that process is not replaced with some meaningful method of ensuring public access to the documents, the public won't get a change to provide meaningful input. He added:

I'm not going to trust that the administration is going to give me the documents I want to see because they haven't even let me see the contract; if they're not forthcoming with the contract ever, after three months of people saying, "Let us see the contract," how are we going to trust that they're going to be forthcoming with the documents that we want to see that backs up the findings.

REPRESENTATIVE WILSON raised the issue of protecting the oil companies from discovery with regard to trade secrets.

REPRESENTATIVE GRUENBERG responded:

There are two different questions. Number one is what is produced to this committee, and number two [is] what is made available to the public. And the subpoena, for example, could require that certain classes of documents be produced to this committee, and then presumably the entity that was producing the documents would either, in advance, submit a memorandum requesting a protective order, or, at the time, do so and say, "We would like an order from this committee" under such and such a statute or something "that these documents are only reviewable by the committee in a confidential setting," and you sign a confidential agreement, and potentially [documents] ... could even be given back at the end of that time. But that is easily solvable.

MR. FUHS added that what one would expect is to not need to have that proprietary information; rather, what the legislature would be looking at is a finding regarding profitability in order to come to the conclusion that the gas is in fact stranded and is therefore not economic unless there are changes in the tax laws - that's what would justify the tax changes.

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REPRESENTATIVE COGHILL noted that AS 43.82.400(a) says:

(a) If the commissioner develops a proposed contract under AS 43.82.200 - 43.82.270, the commissioner shall

(1) make preliminary findings and a determination that the proposed contract terms are in the long-term

fiscal interests of the state and further the purposes of this chapter; and

(2) prepare a proposed contract that includes those terms and shall submit the contract to the governor.

REPRESENTATIVE COGHILL surmised, therefore, that AS 43.82.400(a)(2) could be amended if they wished to ensure that the contract is also delivered to the legislature.

REPRESENTATIVE GRUENBERG concurred, pointing out that AS 43.82.410(2) already states that the commissioner shall provide copies of the contract and supporting documentation to the legislature.

MR. FUHS remarked these are the rules that the legislature set out for itself - these are not rules imposed on the legislature by either the court system or the executive branch.

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LORI BACKES said she has great concern with HB 502 because it would remove a very important piece of a carefully crafted process that is the Alaska Stranded Gas Development Act. She went on to say:

I understand the legislature's interest in removing impediments to a gas [pipeline] project. However, with this action, I don't believe you're removing a potential unnecessary delay but in effect removing legitimate judicial review of whether the contract and associated findings conform to the intent of the [Alaska Stranded Gas Development Act]. I believe that to remove the opportunity for judicial review from this step in the process would effectively render any judicial review moot, because, for example, the [Alaska Stranded Gas Development Act] specifically prohibits including oil taxes in the gas [pipeline] contract - a provision deliberately and for good reason included in the act - and yet the administration has ignored that provision in its negotiations and is now insisting that you take action to change it, [and therefore] if the legislature, in the passage of one or more pieces of legislation, approves the contract and amends the [Alaska Stranded Gas Development Act] to make the law conform to that contract, then any judicial review of that would be

based on the newly amended law - not on the law that was in place during the negotiations.

The legislature and the public accepted and obeyed the terms of the [Alaska Stranded Gas Development Act], yet the governor excluded other proposals that in his opinion did not strictly conform to the [Alaska Stranded Gas Development Act] while manipulating the process without regard to compliance, and now is expecting you to pass legislation, giving responsibility for approving that action to you. It's been said that there will be plenty of opportunity for public comment prior to the legislature taking action on the contract. But public comment, unlike judicial review, can be ignored. An aggrieved party that might take issue with the best interest findings would not have any legal recourse and, in fact, would not have the ability to justify their position because there would be no mechanism in place to require access to the documents they would need and the models that would be the basis for those findings.

It doesn't make sense for this legislature to amend the [Alaska Stranded Gas Development Act] prior to seeing a contract, in order to be able to determine, with full information and input, whether this or any amendment is truly necessary and wise. If the legislature can amend the [Alaska Stranded Gas Development Act] to effectively take away the public's right to review by the court in order to remove unnecessary delay, how can the public be assured [that] the next step won't be to remove the 30-day public [comment period] as well. The public does not have a lot of trust in the way this process has been going so far. Therefore you and the other branch of government, the judiciary, are really ... [the public's] only hope. I would caution you not to risk damage to the public trust that you have already by removing [the public's] ... only other recourse. Thank you.

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REPRESENTATIVE GARA asked whether the governor could enter into a contract of this sort without the legislature's approval.

LARRY OSTROVSKY, Chief Assistant Attorney General - Statewide Section Supervisor, Oil, Gas & Mining Section, Civil Division (Anchorage), Department of Law (DOL), relayed that the governor has said he will follow the process set out under the Alaska Stranded Gas Development Act. He also remarked that sometimes the court will sever unconstitutional provisions of legislation from constitutional ones, and he thinks that there is probably a good argument to be made that when the legislature passed the provision in the Alaska Stranded Gas Development Act acquiring legislative approval, that that was part and parcel of the package and not some secondary, easily-severable provision. In conclusion, he offered his belief that it is unlikely that the governor would sign a contract without legislative approval.

REPRESENTATIVE GARA clarified that his question is whether it is still an open legal question as to whether the legislature has a constitutional right to say yes or no to a contract negotiated by the governor.

MR. OSTROVSKY said, "I think it's a unique statute and there might be unique issues."

REPRESENTATIVE GARA noted that that response doesn't answer the question.

MR. OSTROVSKY said he doesn't mean to be evasive but it isn't an issue he came prepared to talk about.

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REPRESENTATIVE GARA offered a hypothetical situation in which the court determines that the legislature doesn't have the constitutional right to approve the contract and the legislature also passes legislation removing judicial review. Wouldn't that leave no one, outside of the governor's office, with the ability to review whether the governor's contract satisfies the terms of the Alaska Stranded Gas Development Act?

STEVEN B. PORTER, Deputy Commissioner, Office of the Commissioner, Department of Revenue (DOR), characterizing that as a pretty unique hypothetical situation, offered his belief that someone could still make the claim that the contract was not consistent with the Alaska Stranded Gas Development Act and so all those questions could be addressed in that litigation.

REPRESENTATIVE GARA disagreed, and pointed out that the bill stipulates that there will be no court review of that type of issue.

MR. PORTER agreed, but opined that someone could still bring suit on the issue of the contract itself.

REPRESENTATIVE GARA asked to be shown the current statutory provision that describes what issues would be left for the public to challenge on.

MR. OSTROVSKY offered his understanding that there is case law that says administrative decisions are always reviewable.

REPRESENTATIVE GARA again asked to be shown where in the Alaska Stranded Gas Development Act is the list of the other items about which someone could challenge the contract.

MR. OSTROVSKY and MR. PORTER cited AS 43.82.440, which read:

Sec. 43.82.440. Judicial review.

A person may not bring an action challenging the constitutionality of a law authorizing a contract enacted under AS 43.82.435 or the enforceability of a contract executed under a law authorizing a contract enacted under AS 43.82.435 unless the action is commenced within 120 days after the date that the contract was executed by the state and the other parties to the contract.

MR. OSTROVSKY, in response to questions, offered his belief that currently a person could challenge the commissioner's determination that the gas is stranded, but not if HB 502 is adopted.

REPRESENTATIVE GRUENBERG noted that if a challenge is not brought on either of the two theories listed in AS 43.82.440, then that provision - and thus its 120-day statute of limitations - won't apply.

MR. OSTROVSKY offered his understanding that there is also a 30-day statute of limitations on challenges of a final agency determination.

REPRESENTATIVE GRUENBERG characterized that as a typical appeal period, and noted that AS 43.82.440 provides for four times that amount of time.

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REPRESENTATIVE GARA reiterated that he simply wants the public to be able to look at all of the relevant documents that it needs to in order to be able to provide meaningful input during the public comment period, and pointed out that passage of HB 502 will take away the public's right to access documents through the court process, and therefore he wants something put in its place. He said he believes that it is the legislature's right to determine whether the contract is a good contract or a bad contract, but simply passing HB 502 leaves no way for the public to access documents other than those the administration wants to let the public to see.

MR. PORTER offered his belief that passage of HB 502 won't change the amount of information the public can access, and that a Public Records Act information request could be used to obtain that information in the same timeframe as the judicial process under current law.

REPRESENTATIVE GARA argued that such a request would take far longer and result in less documentation being accessed. He said he wants there to be a provision of law that provides the public with an expedited method of accessing the information, as well as an expedited method of appeal should the administration not produce the relevant information.

MR. PORTER raised the issue of confidentiality.

REPRESENTATIVE GARA asked Mr. Porter and Mr. Ostrovsky to provide the committee with suggestions for statutory language that will satisfy his concerns - language that will provide the public with quick and full access to the documents and with a meaningful review process.

MR. PORTER said he has staff working full time trying to collect every available document used in making the determination, that his staff has been doing this for months, and that he is attempting to organize it in such a way that the public can make use of it.

REPRESENTATIVE GARA asked the committee to formally request from the administration suggestions for new statutory language.

CHAIR McGUIRE agreed to have the committee make that request.

REPRESENTATIVE GARA, in response to a question, said that if current law provides an enforceable way for the public to get access to all the relevant documents in time for it to make public comment, and a way to resolve all issues regarding the withholding of those documents, then he wants substitute language that will also provide those things, since adoption of HB 502 is going to delete the current provisions.

CHAIR McGUIRE remarked that the bill will look different if and when it passes from committee; therefore, to the extent that the administration wants to continue to be a part of the process, it should consider providing the committee with suggestions for change that the administration can support, such as perhaps language that will modify the Public Records Act.

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MR. OSTROVSKY said that it is the administration's intent to release relevant documents, though he also raised the issue of confidentiality. However, under the Alaska Stranded Gas Development Act, once a proposed contract is forwarded, "documents lose the protection" of the Alaska Stranded Gas Development Act and all records become public records subject to all the normal privileges. He also remarked that the timelines under the Public Records Act information requests are probably the tightest in law, and thus it is a very fast process. He offered his believe that there are adequate provision in law to ensure the release of documents that aren't otherwise protected under a privilege, which is a point decided by a judge.

CHAIR McGUIRE reiterated that that the bill will look different if and when it passes from committee, and so to the extent that the administration can assist the committee, the more satisfied it might be with the end product.

[HB 502 was held over.]

ADJOURNMENT

2:28:40 PM

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:28 p.m.