

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

June 4, 2006

12:37 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. 2002

"An Act conferring original jurisdiction on the Alaska Supreme Court for the purpose of providing judicial review of a contract executed under the Alaska Stranded Gas Development Act, and setting the time in which a contract developed under that Act, or a statute of limitations regarding that contract, must be legally challenged; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 2002

SHORT TITLE: GAS PIPELINE CONTRACT: COURT JURISDICTION

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

05/31/06	(H)	READ THE FIRST TIME - REFERRALS
05/31/06	(H)	JUD
06/02/06	(H)	JUD AT 10:00 AM CAPITOL 120
06/02/06	(H)	Scheduled But Not Heard
06/03/06	(H)	RULES TO CALENDAR PENDING REPORT
06/03/06	(H)	IN JUDICIARY
06/03/06	(H)	JUD AT 11:15 AM CAPITOL 120
06/03/06	(H)	Scheduled But Not Heard
06/04/06	(H)	JUD AT 12:00 AM CAPITOL 120

WITNESS REGISTER

JAMES L. BALDWIN, Attorney at Law
Juneau, Alaska

POSITION STATEMENT: As counsel to the Office of the Attorney General, presented HB 2002 on behalf of the administration.

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 2002.

PHILLIP C. GILDAN, Attorney at Law
Greenberg Traurig, LLP
West Palm Beach, Florida

POSITION STATEMENT: Responded to questions during discussion of HB 2002.

ACTION NARRATIVE

CHAIR LESIL MCGUIRE called the House Judiciary Standing Committee meeting to order at [12:37:46 PM](#) [stated as 12:35 p.m.]. Representatives McGuire, Wilson, Gruenberg, Gara, Kott, and Coghill were present at the call to order. Representative Anderson arrived as the meeting was in progress.

HB 2002 - GAS PIPELINE CONTRACT: COURT JURISDICTION

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CHAIR MCGUIRE announced that the only order of business would be HOUSE BILL NO. 2002, "An Act conferring original jurisdiction on the Alaska Supreme Court for the purpose of providing judicial review of a contract executed under the Alaska Stranded Gas Development Act, and setting the time in which a contract developed under that Act, or a statute of limitations regarding that contract, must be legally challenged; and providing for an effective date."

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JAMES L. BALDWIN, Attorney at Law, as counsel to the Office of the Attorney General, presented HB 2002 on behalf of the administration. He relayed that HB 2002 is intended to provide

for original jurisdiction in the Alaska Supreme Court with regard to reviewing legal challenges to the Alaska Stranded Gas Fiscal Contract ("ASGF Contract"). This ties in with some agreements that were made and that appear in the ASGF Contract in Article 27, where the parties have agreed that under the normal terms of the ASGF Contract there can be a suspension of the obligations in the face of a legal challenge to the underlying authority for the contract. However, also under that provision, there would be no right to suspend for a period of 15 months in order to advance planning of the project. That 15-month period was set as the time frame to determine how long it would take to get an expedited process through the courts regarding major issues involved in the Alaska Stranded Gas Development Act.

MR. BALDWIN noted that HB 2002 also provides for a limited statute of limitations period of 60 days for bringing "these kinds of actions"; currently the statute of limitations period outlined in the Alaska Stranded Gas Development Act is 120 days. In response to a question, he relayed that the current statute of limitations applies to bringing an action; again, HB 2002 would change AS 43.82.440 such that it would provide for original jurisdiction in the Alaska Supreme Court, and would shorten the statute of limitations period to 60 days. He indicated that the administration believes that the authority for the proposed jurisdictional change is found in the Alaska State Constitution under Article IV, Section 1, which says that the legislature may establish the jurisdiction of the courts; additionally, the legislature has the authority to set limits on the state's statute of limitations periods.

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REPRESENTATIVE GRUENBERG asked whether the Alaska Supreme Court has original jurisdiction in any other kind of case.

MR. BALDWIN relayed that it does in recount appeals, and that Alaska Rules of Appellate Procedure Rule 404 says that the court can exercise original jurisdiction in aid of its appellate jurisdiction.

REPRESENTATIVE GRUENBERG noted that Rule 404(a)(1) says:

An original application for relief may be filed with the appellate court or a judge or justice thereof in any matter within its jurisdiction, whenever relief is not available from any other court and cannot be

obtained through the process of appeal, petition for review, or petition for hearing. Grant of the application is not a matter of right but of sound discretion sparingly exercised.

REPRESENTATIVE GARA said he agrees with the concept of providing a quick way to resolve "these" cases, but thinks that a better way to accomplish that goal might be to provide for an expedited case at the trial court level and an expedited appeal to the Alaska Supreme Court. He also said there don't appear to be any procedures in the Alaska Supreme Court to accommodate what's being proposed via HB 2002.

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MR. BALDWIN said:

The way we perceive this as unfolding ..., and what we intend, is that this be a procedure that's available for dealing with, basically, questions of constitutional law or questions of law. In which case the [Alaska] Supreme Court, in many cases, has proclaimed that it's the final arbiter of questions of law and implied that the [Alaska] Superior Court is sometimes like a speed bump in the way towards that ultimate decision-making. And so, for those kind of cases, I think ... the [Alaska] Supreme Court is well endowed to deal with those cases, but it is possible that there could be factual disputes that could be brought forward in the way the cases are pled or the issues are identified by the parties. In that instance ..., I believe, ... the court would appoint a master.

REPRESENTATIVE GARA asked whether there is authority in the rules for that.

MR. BALDWIN surmised that either the court would make a rule or the master would establish a procedure for the parties.

REPRESENTATIVE GARA said:

I just don't see the rules that allow that to automatically happen, and if you're going to say the [Alaska] Supreme Court shall adopt rules, again, that's one of the reasons why I'm worried that this is going to take longer than just an expedited trial and

appeal process, because when the [Alaska] Supreme Court adopts rules, it takes time - they have to do notice provisions, publication provisions. So if you're going to set a process and say "The [Alaska] Supreme Court has no rules for conducting a trial, no rules for conducting discovery, no rules for processing evidence, you shall adopt this by rule," and then we have to wait for the [Alaska] Supreme Court to adopt rules, have you thought about whether that is going to cause you delay?

MR. BALDWIN replied:

What we've thought about is looking at the [Alaska Judicial Council (AJC)] statistics for the length of time it takes for civil actions to move through the courts. Those statistics basically say that if you've got a case that involves more than \$15,000 at risk, you're looking at, at least, a year to get it through the [Alaska] Superior Court. ... That's just the fact of it. But if you've got a case like this, where you've got billions of dollars at stake, we could be involved for years at the lower court level without any sign of relief. And we have here a situation where the parties have agreed to perform notwithstanding judicial challenges and spend over \$100 million (indisc.). So our intent here is to try to advance the process, and it may be effective or may fall into the kinds of pitfalls you're describing, but we think this is probably the most effective and active thing we can do to advance that cause.

CHAIR McGUIRE referenced a memorandum by Jack Chenoweth, Legislative Legal and Research Services, regarding the Trans-Alaska Pipeline Authorization original jurisdiction issue and timeline, and remarked on the similarity between that mega-project and the proposed gas line project with regard to certain issues, dollar amounts involved, time constraints, and concerns about challenges.

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MR. BALDWIN noted that the Trans-Alaska Pipeline Authorization played out in the federal system, and although he can't recall the exact timeline that occurred with that project, it was effective in moving claims through the federal court system, and was part of the motivation for attempting to proceed in that

same fashion at the state level via HB 2002. He added: "And we were encouraged by the comments that we heard, on the Senate side, from the [Alaska Court System (ACS)] indicating that ... they would, to the extent they can, give comity to such a statute coming from the legislature conferring that kind of jurisdiction."

CHAIR MCGUIRE asked Doug Wooliver to speak to that issue.

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DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), first, with regard to an earlier question, said he is aware of two statutes conferring original jurisdiction, one current statute - that being the one that confers original jurisdiction on the Alaska Supreme Court for challenges to election recounts - and a statute related to election issues that is no longer on the books. He said he is aware of five reported opinions from those two statutes; in three of those cases, the Alaska Supreme Court resolved the issues without the appointment of a special master, but in two of those cases the Alaska Supreme Court did appoint a special master. Typically the distinction between those two types of cases is whether there are depositions and discovery, the taking of evidence, and challenges to evidence - the types of things that would happen in a trial - and what has happened in the past in the Alaska Supreme Court when a special master has been appointed in cases of original jurisdiction is that the court simply appoints a superior court judge to serve as a special master and then the trial essentially proceeds much like a superior court trial.

MR. WOOLIVER stated that the ACS is neutral on HB 2002, neither supporting it nor opposing it. On the issue of timelines, he mentioned that there are constitutional restrictions on the legislature's authority to impose timelines with regard to how long judges have to resolve issues. Nevertheless, when timelines are imposed, the court has worked very hard and will continue to work very hard to meet those timelines whether doing so is constitutionally required or not. "In this case, with or without timelines, ... the court is very much aware of the importance of these cases and would give them [the] appropriate level of priority," he added.

REPRESENTATIVE GARA asked whether the Alaska Supreme Court would have the authority to appoint a master and conduct a trial and

provide for discovery procedures without having to add language to the bill.

MR. WOOLIVER indicated that the Alaska Supreme Court does have that authority already and so will simply exercise its inherent authority to conduct its proceedings to appoint a master if it feels that that's the appropriate route to take with a particular case.

REPRESENTATIVE GARA asked how long it would take for the Alaska Supreme Court to adopt rules.

MR. WOOLIVER said he is not sure that the Alaska Supreme Court would adopt rules for the purpose of this proposed legislation, though it may, and noted that although the rule-making process varies in length of time, it can be expedited.

REPRESENTATIVE GARA suggested that it might be better to simply provide that the Alaska Supreme Court can "do this" by order rather by a cumbersome rule-making process.

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REPRESENTATIVE GRUENBERG mentioned that Alaska Rules of Appellate Procedure Rules 520 and 521 allow the courts to relax or dispense with the other rules in the interest of justice, and that the Alaska Rules of Civil Procedure and the Alaska Rules of Criminal Procedure contain similar rules. He also mentioned a couple of examples wherein the courts did just that, and surmised that [in addition] the courts can either promulgate rules or issue a comprehensive order.

REPRESENTATIVE GARA asked whether a citizen bringing a challenge under this bill will be provided adequate time to prepare a case.

MR. WOOLIVER again relayed that the ACS doesn't take a position on statute of limitations issues.

REPRESENTATIVE GARA asked whether the legislature needs to add "rules of fair play" into the bill so that a citizen will have time to prepare a case.

MR. WOOLIVER pointed out that courts grant continuances all the time, and that continuances are meant to ensure that parties aren't forced to litigate before they are ready, and this is typically done without specific direction from the legislature

and is simply left up to the discretion of the judge to manage the case as he/she thinks is most appropriate. Although the legislature could add "rules of fair play," he said he is not sure what they would look like. Again, typically "those decisions" are simply general case management decisions that the judge makes.

REPRESENTATIVE GRUENBERG offered his understanding that "discovery rules and briefing rules" and similar items are usually found exclusively in the rules of court rather than in the statutes themselves. He again mentioned one of the examples he'd referred to previously, and offered his recollection that the court had been very reasonable and had relaxed the normal appellate rules.

REPRESENTATIVE GARA mentioned that he is considering offering an amendment that would say the [Alaska] Supreme Court shall give the parties adequate time to prepare and present their case.

MR. WOOLIVER, in response to questions, said that although such language wouldn't hurt, it isn't actually necessary, adding that he has a fair bit of faith that the court will do the right thing. He noted that the Alaska Supreme Court is sometimes considered to be deliberative to a fault and doesn't like to rush cases. In response to another question, he said the ACS has no suggestions for change to either HB 2002 or the latest version of the Senate companion bill.

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REPRESENTATIVE COGHILL made a motion to adopt Amendment 1, which read [original punctuation provided]:

Delete language on Page 1, line 8 through page 2, line 2:

Insert:

Sec. 42.82.440. Judicial review. (a) The Alaska Supreme Court has original and exclusive jurisdiction of any judicial review of a contract developed under this chapter. Notwithstanding any other provision of law, a person may not bring an action challenging a final agency decision of the commissioner of revenue made under AS 43.82.430(c), 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 this chapter

until that contract has been executed and unless the action is commenced within 120 days after the date that the contract was executed by the state and other parties to the contract. A "person" in AS 48.82 is a person as defined in AS 02.25.110

(b) In this section, "person" means an individual, firm, copartnership, corporation, company, association, joint stock association, of [sic] body politic, and includes a trustee, receiver, assignee, or similar representative.

REPRESENTATIVE KOTT objected.

REPRESENTATIVE COGHILL explained that Amendment 1 somewhat mirrors language adopted in the Senate including retaining current law's 120-day statute of limitations period. The items that can be challenged within that 120 days are the final agency decision, the constitutionality of a law authorizing a contract enacted under AS 43.82.435, or the enforceability of a contract executed.

CHAIR MCGUIRE asked Representative Coghill to consider bifurcating Amendment 1, given that it appears to contain three separate concepts.

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REPRESENTATIVE KOTT expressed favor with bifurcating Amendment 1, adding that he is not that comfortable with following the other body. He said he is concerned that 120 days provides too long a period of time in which to file an action, particularly given that federal law allowed 60 days for a challenge regarding the Trans-Alaska Pipeline Authorization, and then drew attention to the definition of the word, "person".

REPRESENTATIVE COGHILL mentioned that there is another proposed amendment that would address that latter issue by deleting reference to the word, "person" and likewise the need to define it.

REPRESENTATIVE GRUENBERG made a motion to amend Amendment 1 conceptually such that all reference to "person" is deleted. There being no objection, Amendment 1 was amended.

MR. BALDWIN said the administration does not support Amendment 1, as amended, for a number of reasons, one being that the administration would prefer a statute of limitations period of

60 days, and another being that the language allowing a challenge of a final agency decision will be problematic. He said it is the administration's view that when the legislature authorizes the governor to sign the ASGF Contract, the issues of final agency action are all consumed by that action and are not something that can be litigated within a court - the final agency action is made moot by the legislature's action. To raise that issue via the language in Amendment 1, as amended, may be interpreted to mean that the right of action on that issue still exists. The fiscal interest finding, the permanent finding, the final finding, and the preliminary finding are all exercises of discretion by the commissioner which serve as a recommendation to the legislature, and when the legislature takes it up and considers it, it becomes subsumed in the legislature's lawmaking power.

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MR. BALDWIN, in response to a question, said: "The legislature's consideration leads to final agency determination, which is, the legislature will tell the governor he can sign the final contract. When the governor signs the final contract, that's when it's final, that's when the case is ripe for adjudication and not before."

REPRESENTATIVE COGHILL said he's heard that until "we" actually have a final draft, that a challenge is premature. So until the legislature has given its authority, there isn't a final determination that can be challenged. Representative Coghill remarked that it appears as though Mr. Baldwin is saying that the administration doesn't want a challenge to occur after the legislature has accepted the findings of the commissioner.

MR. BALDWIN said that he is saying that it is of questionable validity that it's a challenge to a finding or a determination of the commissioner which has become subsumed within legislature's lawmaking power; this is really not a controversy that the courts could adjudicate.

REPRESENTATIVE COGHILL surmised that Mr. Baldwin is saying that the fact that the legislature has accepted the findings of the administration "under these conditions" precludes a challenge to those findings.

MR. BALDWIN attempted to clarify that the legislature's power to consider this matter is based on its constitutional power to make law, and when it takes these matters up and considers them,

it does so, presumably, independently, similar to what it does with bills submitted by the administration. Such bills generally don't remain unchanged, and so when the legislature takes up the ASGF Contract, he is presuming, he remarked, that the legislature will exercise its independent judgment and make any changes it feels necessary. Thus by the time the ASGF Contract is authorized by the legislature, any discussion regarding the fiscal interest finding should be over with. He offered his hope that the courts will consider any such matter as un-judiciable and say they don't want to get involved.

CHAIR MCGUIRE offered her understanding, though, that the vote on the ASGF Contract will be an up or down vote, without any leeway for modification; regardless of what changes are made to legislation pertaining to the contract or project, the ASGF Contract itself will be presented to the legislature in the form of an ultimatum, and so there isn't really a place for the deliberative amending process mentioned by Mr. Baldwin.

REPRESENTATIVE COGHILL concurred, and asked when is it not appropriate to challenge the final action of the administration. He opined that a person ought to be able to challenge [the ASGF Contract] on its merit when it is finalized but not before then.

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MR. BALDWIN said the concept of "justiciability" deals with whether a controversy is ripe, and that is usually articulated as whether something is final; in this case, nothing will be final until the governor signs [the ASGF Contract]. The problem with the Alaska Stranded Gas Development Act is that it could be construed to mean that there would be a final action when the final fiscal interest finding was presented to the legislature, and the administration doesn't want that to intervene to prevent the legislature from being able to consider the ASGF Contract. So to have the issue raised again via Amendment 1, as amended, would give more credence to that kind of a cause of action than is desired by the administration.

REPRESENTATIVE WILSON surmised that although the legislature can only vote up or down on the ASGF Contract, if the legislature doesn't approve of aspects of it and thus doesn't approve it, the governor can simply negotiate for language that the legislature would approve of. She asked whether deleting from Amendment 1, as amended, the language regarding a challenge to a final agency decision of the commissioner of revenue made under AS 43.82.435 would alleviate the administration's concerns.

CHAIR McGUIRE noted that the current version of HB 2002 doesn't contain the language that concerns the administration.

MR. BALDWIN concurred, and again expressed a preference for not including language regarding a final agency decision.

CHAIR McGUIRE surmised that the administration prefers HB 2002 as currently written because it doesn't reference the final agency decision and it provides for a 60-day statute of limitations period.

MR. BALDWIN concurred.

CHAIR McGUIRE, in response to comments, surmised that Mr. Baldwin's point is that once the contract is signed by the Governor, then it is ripe for consideration by the courts, but not before.

MR. BALDWIN concurred.

REPRESENTATIVE GRUENBERG remarked that agency determinations are reviewable on the basis of whether there has been a clear error or an abuse of discretion, whereas legislative determinations are not generally reviewable except on the basis of constitutionality. Having the legislature approve the contract essentially insulates the commissioner's findings from judicial review, he surmised.

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CHAIR McGUIRE concurred, adding: "In pushing that point of ripeness and the place where you can challenge it to the signing of the contract, you are changing the scope of what it is you can challenge, because it is not an agency decision, but that ... is in keeping with the one other mega-project that we know of in Alaska, so it's a policy call."

REPRESENTATIVE GRUENBERG noted that the Trans-Alaska Pipeline Authorization legislation contained language stipulating that the courts could consider a challenge based on whether an action was beyond the scope of authority conferred by the title, and that HB 2002 does not contain similar language.

CHAIR McGUIRE said that issue could be dealt with via an amendment.

MR. BALDWIN, in response to comments, suggested that the language, "the enforceability of a contract executed under a law authorizing a contract entered into under AS 43.82.435" already addresses that issue.

REPRESENTATIVE GRUENBERG pointed out, though, that under AS 43.82.435, the legislature has become part of the process, whereas nothing similar was provided for in the Trans-Alaska Pipeline Authorization legislation.

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PHILLIP C. GILDAN, Attorney at Law, Greenberg Traurig, LLP, in response to a question, pointed out that Amendment 1, as amended, proposes to insert the phrase, "a final agency decision of the commissioner of the revenue made under AS 43.82.430(c)" into a statute of limitations provision, and so an unintended consequence of removing that language might also be to remove the aforementioned statute of limitations on that particular issue.

REPRESENTATIVE GARA said that would not be the intention. He expressed concern that removing such language would also preclude a person from challenging substantive issues such as whether the gas is actually stranded, for example, or whether the best interest finding is permissible.

MR. GILDAN said he does not see anything "in the statute that was put together" that would preclude a party from raising any of those issues, though that's not to say that anyone bringing that action would be able to get past a summary judgment or a motion to dismiss based upon "the position that the administration has raised." In response to a question, he reiterated that the provision the aforementioned language would be inserted into is a statute of limitations clause rather than a "preclusion from challenge" clause.

REPRESENTATIVE GARA asked whether - if the goal is to ensure that all of the aforementioned issues are decided in the same court within the same timeframe - Amendment 1, as amended, should be adopted as is, with nothing further removed.

MR. GILDAN said that appears to be the case. In response to another question, he said he has no opinion regarding whether the statute of limitations should be 60 days or 120 days, but does believe that the changes made in the Senate are an improvement over the original bill.

MR. GILDAN, in response to a further question, said that using the phrase, "Notwithstanding any other provision of law," is the safer mechanism by which to ensure that the issue of conflict of law does not arise, though a further review of how the Alaska Supreme Court deals with conflict of law cases might reveal whether such a mechanism is actually necessary with regard to potential conflicts with other Alaska laws.

MR. BALDWIN offered his belief that Amendment 1, as amended, is negating the provision in the Alaska Stranded Gas Development Act that declares "it to be a final agency action when ... the final finding is fine." In response to another question, he said that the administration is attempting to address the ASGF Contract and the state's obligation to the co-parties of that proposed agreement to expeditiously resolve the "marquee" constitutional and enforcement issues surrounding the ASGF Contract.

REPRESENTATIVE GRUENBERG suggested, then, that Amendment 1, as amended, ought to contain language that defines the term "contract" as used therein.

CHAIR MCGUIRE pointed out that the question of whether to adopt Amendment 1, as amended, is before the committee.

REPRESENTATIVE WILSON indicated that she still has a concern regarding the length of the statute of limitations period.

CHAIR MCGUIRE noted that that issue could be addressed via another amendment.

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A roll call vote was taken. Representatives Coghill, Gruenberg, and Gara voted in favor of Amendment 1, as amended. Representatives Anderson, Wilson, Kott, and McGuire voted against it. Therefore, Amendment 1, as amended, failed by a vote of 3-4.

CHAIR MCGUIRE indicated that HB 2002 would be held over to allow members time to draft further proposed amendments.

ADJOURNMENT

The House Judiciary Standing Committee was recessed at 1:55 p.m. to a call of the chair. [The meeting was never reconvened.]