

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

July 24, 2006

10:43 a.m.

**MEMBERS PRESENT**

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

**MEMBERS ABSENT**

Representative Tom Anderson

**COMMITTEE CALENDAR**

HOUSE JOINT RESOLUTION NO. 301

Proposing amendments to the Constitution of the State of Alaska requiring legislative approval of certain state contracts for the development of natural gas resources.

- HEARD AND HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HJR301

SHORT TITLE: CONST. AM: LEG. APPROVAL OF GAS CONTRACTS

SPONSOR(S): JUDICIARY

07/13/06	(H)	READ THE FIRST TIME - REFERRALS
07/13/06	(H)	JUD, FIN
07/24/06	(H)	JUD AT 10:30 AM CAPITOL 120

**WITNESS REGISTER**

JAMES CLARK, Chief of Staff  
Office of the Governor  
Juneau, Alaska

POSITION STATEMENT: During discussion of HJR 301, provided comments and responded to questions.

**ACTION NARRATIVE**

**CHAIR LESIL MCGUIRE** called the House Judiciary Standing Committee meeting to order at [10:43:12 AM](#). Representatives McGuire, Gara, Wilson, Gruenberg, and Kott were present at the call to order. Representative Coghill arrived as the meeting was in progress.

HJR 301 - CONST. AM: LEG. APPROVAL OF GAS CONTRACTS

[10:43:28 AM](#)

CHAIR MCGUIRE announced that the only order of business would be HOUSE JOINT RESOLUTION NO. 301, Proposing amendments to the Constitution of the State of Alaska requiring legislative approval of certain state contracts for the development of natural gas resources.

CHAIR MCGUIRE indicated that several members of the committee wish to clarify that the legislature has a role in any contract coming forward to build a natural gas pipeline, and one proposal to ensure that that clarification occurs has come in the form of HJR 301. The goal of this resolution is to make it eminently clear that the administration respects the role of the legislature and the efforts it has put into reviewing the proposed Alaska Stranded Gas Fiscal Contract ("ASGF Contract") on behalf of constituents.

REPRESENTATIVE GRUENBERG offered that the goal of HJR 301 is to ensure that the legislature's constitutional role "in this" is recognized. He added, "I think we all favor a good gas pipeline - it's important for the state - but the balance of power requires that both the legislative branch and the governor participate in that effort."

[10:45:34 AM](#)

JAMES CLARK, Chief of Staff, Office of the Governor, relayed that he has been the chief negotiator in the ASGF Contract [discussions], and indicated that the administration takes seriously the point raised by the committee as well as other legislators; the administration respects the role of the legislature, is very cognizant of it, and has been proceeding all along under the notion that the legislature's role is critical. He added:

We've said over and over again that the [amendments to the Alaska Stranded Gas Development Act] needed to be passed to give us the legislative authorization to go

forward. There's just no doubt we've told people over and [over] again that we don't have the authority with respect to fiscal certainty, and we've made that clear to the producers, the public, and to the legislature that we need that authority from the legislature. So we were quite surprised by your legislative counsel's opinion that there was a separation of powers issue such that we didn't have to come to the legislature.

We of course rely on our own attorney general for what the law is in this area, ... [and will provide to the committee] a letter from the attorney general which I believe makes it absolutely clear that we see the law as requiring legislative approval and ratification. And the governor is aware of the attorney general's opinion as is stated in the last sentence of the first paragraph of the letter and in the ... penultimate paragraph of the letter. We - the attorney general and I - have been participating in these meetings and made clear to the governor that the law requires, as he thought it did, ... [the] legislature's role in this.

And so when we say we're going to follow the law, we believe the law requires that the legislature pass the amendments, which we'd urge you to pass as soon as possible, and ratify the contract, which we believe is in the interest of the state given what the gas line will do for us and what will happen to us in terms of revenue sources if there is no gas line. So with the notion of ... at least our internal analysis showing [the Trans-Alaska Pipeline System (TAPS)] running dry by 2030, and the lead time it takes to put in infrastructure of this type, we would urge us all to focus on the amendments and getting your approval of those amendments and moving on to ratification.

MR. CLARK concluded by saying that what is contained in the aforementioned letter by the attorney general is the working understanding of the administration "since day one."

[10:49:39 AM](#)

REPRESENTATIVE GRUENBERG said he has reviewed the attorney general's letter, he agrees with Mr. Clark's summation of it, and he takes the governor at his word. He asked that the letter be disseminated to other members of the legislature, the press,

and the public. He went on to say, "And with that I don't see a need for the resolution."

REPRESENTATIVE GARA said:

Let's be clear about this, Mr. Clark, because this answer's a long time coming. Are you committing to us that if the legislature says, "No, we want a better contract," if a court says, "You don't need legislative approval," so that part is irrelevant, if we give you the amendments you want, the law changes you want, so that you can sign this contract - so if those three things happen, we give you the amendments you want, the legislature thinks the contract doesn't protect the people of the state of Alaska, and a court says you don't need legislative approval - will the governor commit not to sign a contract that we have rejected?

MR. CLARK replied:

We believe that this contract will go forward to the [Alaska Supreme Court], and when it does - as we say in the letter - we don't want legislative approval or the lack thereof to be one of the issues that comes up before the [Alaska Supreme Court]. We have a different view of ... how separation [of] powers works in this case than your legislative counsel does, so we are not going to argue about the legislature having a role here. ... Again, we believe that having your approval will help us before the [Alaska Supreme Court].

So what have we been doing? Actions speak louder than words, and we have called two special sessions. If we didn't think we needed your approval we wouldn't have done that. We wouldn't have told everybody at every public meeting that we don't have authority under the [Alaska Stranded Gas Development Act] to pass, for example, the [production profits tax (PPT)] or grant fiscal certainty on oil without the legislature. We've been very, very public in saying what we think the legislative role is, which is consistent with the letter - as Representative Gruenberg has said - and we're just going to continue to plow that course; we're going to do everything we can to work with you to persuade you that we have heard the public. ...

We have been out going back with our third phase of our public process, and we have held hearings all over the state ... to inform people of areas where we understand the legislature wants changes. One of those areas is ... the need to [have] something with respect to fiscal certainty. This committee, before the ... [last special session] ended, had a committee substitute before it that spoke to those issues. Of course we're going to work with you and the public to try to get a resolution so we can move on with this.

I don't think that our administration has done enough to explain to the public the two futures we have, one without a gas line and what happens to state revenues when we hit 2030 and the TAPS grinds to halt; imagine if you will what Alaska [will] be like without [the] TAPS and what would happen if we didn't have those revenues. ... Last week the TAPS put out [638,000] barrels of oil ... [and] it's going down at 6 percent a year; we need to replace that revenue.

It is just the high cost of oil that's masking the decline that's going on, and any responsible official that sits in the governor's office and sees what's going to happen to our revenue over time and what we need by way of a budget to run this state fairly and equitable for the people of the state would just plead with you to focus on getting a gas line for the state, and if we need to make changes to make that work, we'll work with you to make those changes. You've been responsible, we've been responsible, but Alaska has to have a gas line; that will extend the life of [the] TAPS for 20 years, give us a chance to be able to do the research and development necessary to reach the heavy oil that we think is about 13 billion barrels (indisc.) Prudhoe Bay, [and] we can reach the gas necessary to keep that gas line alive, we think, with the potential for gas hydrates for 50-100 years. So we need the gas line.

[10:55:11 AM](#)

CHAIR MCGUIRE noted that the unique aspect of the ASGF Contract is that the governor and the administration decided to negotiate it under the Alaska Stranded Gas Development Act, which has the framework to provide certain incentives, Payments in Lieu of

Taxes (PILT), and other things that are traditionally a legislative function. So the concern, she surmised, is that because the packet of legislation placed before the legislature will allow the administration to negotiate a contract under the terms of the Alaska Stranded Gas Development Act, the ASGF Contract could be disapproved by the legislature and yet the governor or administration could still go forward with it despite that disapproval. Ordinarily the governor enters into many contracts, but the ASGF Contract is a very specific and unique contract - the magnitude of it, the fact that it provides for PILT and that takes away the legislature's historic powers - and this has raised the concern of the House Judiciary Standing Committee. She added:

We just wanted it clear on the record ... that our work here is important and that it will be recognized. Certainly ... there are members that have felt ... [that] digging in, rolling up their sleeves, and working on the [Alaska Stranded Gas Development Act] amendments wouldn't really be worth their time if at the end of the day their role wasn't envisioned.

MR. CLARK indicated that the administration believes that having legislative approval is the law, and that the administration's position before the Alaska Supreme Court will be enhanced by having that approval. He said he is not sure why Legislative Legal and Research Services has a different opinion on this issue.

[10:57:51 AM](#)

REPRESENTATIVE GRUENBERG said he agrees with Mr. Clark's comments regarding the pipeline and the need to continue [to pursue] a solid and foreseeable [source of revenue] for the state. However, he remarked, he has seen circumstances wherein a governor has signed an agreement despite legislative disapproval, and that precedent disturbs him and was the impetus for having HJR 301 drafted. He offered his belief that AS 43.82.435 requires legislative authorization, and that by signing that provision into law the governor was agreeing that any contract developed under the Alaska Stranded Gas Development Act must be brought to the legislature and that the Act binds or estops the executive branch from taking a position contrary to that statute. He said he is glad to see that the administration is taking that view as well, that the governor will defer to the legislature.

REPRESENTATIVE KOTT expressed doubt that the aforementioned contract that was signed without legislative approval was of the same magnitude as the ASGF Contract. He said that in viewing the attorney general's letter, he agrees with Representative Gruenberg that HJR 301 is no longer necessary, though that is not to say that perhaps that issue shouldn't be taken up again at a later point in time. He said he has no qualms about believing what the administration has said via that letter. Furthermore, should the administration act contrary to the position stated in that letter, the legislature still has recourse via the filing of an injunction through Legislative Council.

[11:02:28 AM](#)

REPRESENTATIVE WILSON said she agrees with Representatives Gruenberg and Kott. She noted that going forward with the ASGF Contract will require funds, and the legislature has control over that. With regard to the administration, she added, "I trust what they say is actually what they will do."

MR. CLARK concurred on the issue of funds.

REPRESENTATIVE GARA said:

I know it's a complex question, but this is the one I want the answer to: Assume the legislature says, "No," assume the courts say, "You don't need legislative approval," and assume we've now given you all the amendments you need to make this contract "a go" - the governor's sitting there at his desk and he's deciding whether or not to sign this contract anyway now that he realizes legislative approval's not required - will the governor commit to not sign that contract, and will the governor commit, then, to negotiate and try [to] ... correct the problems the legislature's identified. That's the question. You may have intended to answer that, but I heard some wiggle room.

MR. CLARK stated:

What you're talking about is inconsistent with Article IX, Section 4, [of the Alaska State Constitution] which requires a legislative act to provide exemptions necessary ... to give us the authority for fiscal certainty. Fiscal certainty is

one of the key elements of the deal, so ... your hypothetical doesn't hold water; ... it is not a construct that could occur, just based upon a reading of Article IX, Section 4. ... We need your approval, we want your approval, and ... we're very anxious for this committee to move forward on the [Alaska Stranded Gas Development Act] amendment package and other matters that are pertinent to this legislation. ...

If we don't have a legislative action [in] the form of an exemption, we ... can't get fiscal [certainty], and without fiscal certainty we don't have a contract. So in some form or other we have got to come up with an amendment that you approve [of] that allows for fiscal certainty; that's what we will take to the [Alaska Supreme Court] as our rationale for our justification for getting fiscal certainty. Now, that's not going to be the end of the question before the [Alaska Supreme Court], but if there is ... nothing that amounts to legislative approval for fiscal certainty, we see ourselves in a very difficult (indisc).

[11:08:05 AM](#)

CHAIR McGUIRE surmised that Representative Gara is merely pointing out that the courts have surprised the legislature in the past and that the court system is a separate branch of government. Given those points, just suppose the Alaska Supreme Court says that the legislature does not have a constitutionally mandated role with regard to the ASGF Contract. Will the governor go ahead and sign it anyway?

MR. CLARK said that hypothetical is so remote and so at odds with how the administration is reading the law that he does not want to continue discussing the issue. He stated that if the legislature doesn't move forward with the Alaska Stranded Gas Development Act amendments, the administration won't sign the ASGF Contract. He added:

If the [Alaska Supreme Court] were to come up with something shocking and completely at odds, obviously we'd sit down and talk with you and figure out what we'd do; we are not unmindful of the important role the legislature plays here under any circumstances because of what Representative Wilson brought up, namely the power of the purse strings.

CHAIR McGUIRE relayed that many members of the legislature are trained to think about the unexpected, and so if the goal is to recognize the role and the power of the legislature, one has to anticipate that there might be many roadblocks along the way [towards building a gas pipeline], and so the questions being asked pertain to how far the administration is willing to go [to ensure that the legislature has a role]. She surmised that the administration is willing to only as far as the aforementioned attorney general's letter and does not want to speak further on this issue, regardless that the questions are fair ones.

REPRESENTATIVE GRUENBERG noted that the legislature disapproved of the Exxon Valdez oil spill settlement but the governor signed it anyway. The issue of whether legislative approval is constitutional will apply to contracts other than the ASGF Contract, he remarked, but he is simply attempting to ensure, via HJR 301, that the ASGF Contract doesn't get signed without legislative approval regardless of who the next governor is or who the next year's legislators will be. Representative Gruenberg said he appreciates Representative Kott's comments pointing out that the courts are there if necessary. He added:

I would anticipate that if this governor were to sign the contract without legislative approval, that any lawsuit would involve the legislature as a party weighing in on just this issue. And in the court of public opinion I have no doubt that the public wants the balance of power to be in full play here.

[11:14:43 AM](#)

MR. CLARK predicted that if the legislature were to agree to "an amendment package" and agree to ratify the contract that came out of that amendment package - and assuming that the administration had successfully negotiated any changes with the producers - the contract would be signed within 60 days of that. And currently one could then bring a lawsuit within 120 days regarding the constitutionality of "the Act," and then there will be a period of a year in which the Alaska Supreme Court could [make a determination] while the administration goes forward with the planning phase of the [project]. In such a lawsuit, if the Alaska Supreme Court decides that the ASGF Contract violates the Alaska State Constitution, it will also outline why. At that point the administration, the legislature, and the producers can then review that opinion and decide what steps to take next. Getting a gas line is so critical to the state, he opined, that it would be irresponsible to lose the

chance to get a gas line contract in place. With that in mind, he surmised, the administrative branch and the legislative branch will have to consult with each other if there is an adverse ruling from the Alaska Supreme Court about how to proceed.

REPRESENTATIVE GARA again repeated his question.

MR. CLARK reiterated his responses.

CHAIR McGUIRE offered her observation that the administration has answered that question as much as it is ever going to. She added: "Turning our eye toward the [Alaska Stranded Gas Development Act] amendments, ... I think that's where it will be incumbent upon this committee to see what type of amendments we want to approve ..., what that contract is going to look like, ... [so as to ensure] that what comes out of here reflects what we envision ... as part of a contract."

[11:23:19 AM](#)

REPRESENTATIVE KOTT pointed out that if Representative Gara's hypothetical example were to play out - the legislature rejects the contract, the legislature's authority to approve a contract is challenged and shot down, and the governor signs the contract without legislative approval - nothing would prevent the legislature from calling itself into special session and taking this proposed constitutional amendment up at that time in order to put the issue before the voters.

CHAIR McGUIRE mentioned that Representative Gruenberg has received and distributed a series of memorandums from Legislative Legal and Research Services regarding impairment of contracts, and that the legislature could call itself into special session with the goal of repealing the entire Alaska Stranded Gas Development Act, though doing the latter could raise the question of whether [that] legislative action was in fact an impairment of a contract that had [already] been negotiated.

REPRESENTATIVE GARA yet again asked: "If the legislature says no, and a court said you didn't need our approval, will you agree not to go ahead with the contract?"

MR. CLARK reiterated that the administration would first need to see any such court opinion and then the administration would consult with the legislature because there is no way to avoid

working with the legislature on this contract and any resulting project. He concluded by saying that if the Alaska Supreme Court stipulates any constraints regarding how the administration is to work with the legislature on these matters, then the administration will have to follow the law. Acknowledging Representative Kott's comments regarding introducing a constitutional amendment later if it is deemed necessary, Mr. Clark expressed a preference for dealing with such an issue only if and when it actually arises.

[HJR 301 was held over.]

[Following was a brief discussion regarding how the committee would be proceeding on a different bill.]

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 11:29 a.m.