

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 20, 2006

8:52 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Charlie Huggins, Vice Chair
Senator Gene Therriault
Senator Hollis French
Senator Gretchen Guess

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 316

"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

SENATE BILL NO. 313

"An Act relating to scheduling Salvia divinorum as a controlled substance."

SCHEDULED BUT NOT HEARD

SENATE BILL NO. 48

"An Act relating to recommending or refusing psychotropic drugs or certain types of evaluations or treatments for children."

SCHEDULED BUT NOT HEARD

CS FOR HOUSE BILL NO. 446(JUD)

"An Act relating to the amount of a civil penalty for an unlawful act or practice in the conduct of trade or commerce; and eliminating mandatory continuances in these matters after issuance of an injunction."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 316

SHORT TITLE: COURT REVIEW OF STRANDED GAS DECISION

SPONSOR(S): JUDICIARY

04/13/06	(S)	READ THE FIRST TIME - REFERRALS
04/13/06	(S)	JUD
04/19/06	(S)	JUD AT 8:30 AM BUTROVICH 205
04/19/06	(S)	Heard & Held
04/19/06	(S)	MINUTE(JUD)
04/20/06	(S)	JUD AT 8:30 AM BUTROVICH 205

WITNESS REGISTER

Larry Ostrovsky, Chief Assistant Attorney General
Oil and Gas Section
Department of Law
PO Box 110300

Juneau, AK 99811-0300

POSITION STATEMENT: Answered questions regarding SB 316

Steve Porter, Deputy Commissioner
Department of Revenue
PO Box 110400

Juneau, AK 99811-0400

POSITION STATEMENT: Answered questions regarding SB 316

Lori Backes, Executive Director
All Alaska Alliance
Anchorage, Alaska

POSITION STATEMENT: Testified on SB 316

Bill Walker, General Counsel
Alaska Gasline Port Authority
Fairbanks, Alaska

POSITION STATEMENT: Testified in opposition to SB 316

ACTION NARRATIVE

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at [8:52:09 AM](#). Present were Senators Hollis French, Charlie Huggins, Gretchen Guess, and Chair Ralph Seekins.

SB 316-COURT REVIEW OF STRANDED GAS DECISION

[8:52:53 AM](#)

CHAIR RALPH SEEKINS announced SB 316 to be up for consideration.

LARRY OSTROVSKY, Chief Assistant Attorney General, Oil and Gas, Department of Law (DOL) and STEVE PORTER, Deputy Commissioner, Department of Revenue (DOR) introduced themselves for the record.

[8:54:16 AM](#)

Senator Gene Therriault joined the meeting.

CHAIR SEEKINS asked Mr. Ostrovsky to explain what a "final agency decision under this chapter" means.

MR. OSTROVSKY replied "chapter" refers to Chapter 82, which is the Stranded Gas Development Act (SGDA). Once the commissioner goes through the process set out in the SGDA, he issues a "final finding" and those words are the trigger for an appeal.

CHAIR SEEKINS asked Mr. Ostrovsky whether it is the final agency decision is what is appealable.

MR. OSTROVSKY said yes because courts like to deal with final decisions.

Chair Seekins asked him to explain the process of an appeal.

[8:56:25 AM](#)

MR. OSTROVSKY said someone might ask for reconsideration of a decision. Usually they would present facts and circumstances that the commissioner hadn't considered. Normally an appeal is filed with the superior court and superior court would then order the agency record assembled. The court would order briefing. After that it depends on the type of appeal.

[8:58:40 AM](#)

CHAIR SEEKINS asked the timeframe it normally takes.

MR. OSTROVSKY replied in his experience where there is a complex issue with a large record supporting it, it could take six months to a year. The Supreme Court process would take another year and so it would be roughly two years.

CHAIR SEEKINS asked whether the record would be catalogued during the commissioner's decision-making process.

MR. OSTROVSKY said yes. The decision is usually extensive and would comprise of a couple hundred pages. It would generally be a distillation of perhaps 1,500 pages. Under state law the court

has to be able to understand the reason for an agency decision. When the law calls for a best interest finding, a commissioner cannot simply state that he finds it in the best interest.

MR. PORTER agreed that the commissioner's finding would be a thorough analysis of the contract and many reports.

[9:02:32 AM](#)

CHAIR SEEKINS referred to the SGDA and asked what motivated the bill to come down. Currently the final agency decision would go de facto with the contract to the governor and would be forwarded to the Legislature along with the contract if the governor chose to do so. He asked the responsibility of the Legislature.

MR. OSTROVSKY advised it was to look at the contract, the finding, and all documents supporting the finding and deliberate with experts. The Legislature would look at all the data to verify that the commissioner's finding that the contract is in the best interest of the state.

MR. PORTER said during the preliminary finding the Legislature has a responsibility to review the contract and a preliminary finding and to comment to the commissioner.

MR. PORTER based on the review the commissioner will review all the comments, determine whether the contract needed amending and if so, renegotiate the amendments with the applicant. Based on that he will issue a new and final finding and submit a new contract to the Legislature for ratification. Without the final authorization from the Legislature, the governor could not sign the contract.

[9:06:43 AM](#)

MR. OSTROVSKY added if after the review by legislative budget and audit, if the commissioner changes the contract he must renegotiate and secure agreement under AS 43.82.430(b).

CHAIR SEEKINS said the final decision on whether the contract should be executed is the Legislature's. He asked what legal channels someone could pursue to challenge the Legislature. The Legislature has to now prepare and pass the Act. The Act has to be signed by the governor to become law before the governor can execute the contract.

SENATOR GUESS agreed and said there is nothing in 435 that addresses the finding. The Legislature could give the governor

authority to execute the contract without even seeing the contract.

CHAIR SEEKINS said the Legislature has to pass a law in order to accept the contract but they don't have any affirmative responsibility under any law to make sure that the contract meets the terms of the SGDA.

MR. OSTROVSKY countered that there were constitutional provisions that somebody could challenge to assert that the contract doesn't maximize the state's interest, for example.

[9:09:55 AM](#)

CHAIR SEEKINS said the only basis would be a constitutional basis.

MR. OSTROVSKY said that is correct.

SENATOR THERRIAULT pointed out that there is reportedly a whole package of changes to the SGDA coming down from the administration and they are not sure that the Legislature would pass them or what the standard would be for review. He asked whether there was a way to stop the process to make sure the court could look at the constitutional issue as well as the best interest finding.

CHAIR SEEKINS said as he looks at the original SGDA the administration has an affirmative responsibility to make sure the contract meets all of the requirements of the Chapter and that it is in the long-term best interest in the state. Since amending the SGDA in 1998, the administration no longer has that responsibility except in an advisory capacity.

[9:14:18 AM](#)

MR. OSTROVSKY said it seems that the statute now is a process that the Legislature wants the administration to present a contract that address all of the factors of the Act. The effect is that the Legislature, after looking at the contract, could propose changes to it.

CHAIR SEEKINS countered there is nothing that says the Legislature has any bargaining power. In effect, the law approves the contract.

MR. PORTER advised the way the Act was designed it gives the DOR the responsibility to negotiate a contract under specific terms and to report the preliminary finding to the public. After the

public comment period, the Legislature at that time can give the Department the direction to change it. The commissioner would review the public comments and renegotiate the contract and present a final findings and determination along with the contract. After that, the Legislature determines whether or not to ratify the contract. That is the process, he stated.

[9:18:48 AM](#)

CHAIR SEEKINS said the Legislature would have the option to not ratify the contract.

MR. PORTER agreed. That is a prerogative of the Legislature.

CHAIR SEEKINS said it appears that the Legislature has assumed the responsibility to ratify the contract but it lacks the affirmative responsibility to meet any kind of checklist. That is what makes some people nervous, he said.

MR. PORTER agreed.

[9:20:48 AM](#)

SENATOR THERRIAULT noted that there is also no requirement that the administration take action on the comments.

MR. PORTER said the administration would do that at its own peril. The Legislature has the right not to ratify the contract.

SENATOR THERRIAULT commented that the discussion continues whether or not the Legislature has the constitutional right to say no to the contract.

MR. PORTER said he did not understand.

MR. OSTROVSKY replied there is a presumption of constitutionality but regardless the governor's intention is to follow the statute.

SENATOR THERRIAULT said clearly when the original bill was introduced it had no legislative approval.

[9:22:58 AM](#)

SENATOR GRETCHEN GUESS said the transmittal letter on the bill says, "Any contract negotiated by the administration would be subject to legislative review and public hearing. Additionally I would encourage the Legislature to require legislative approval of a contract because of the appropriate role of the Legislature in such a unique and significant decision. Furthermore if such

contract in lieu of taxes was considered a tax, the Legislature may well be required to approve such action by law." That statement makes it seem like there was discussion between the governor and Legislature at the time, she said.

MR. OSTROVSKY speculated the letter was due to some concern about the authority of the administration to set taxes.

CHAIR SEEKINS noted the importance of allowing the public the opportunity and the right to challenge the assumptions on which the contract was based.

MR. PORTER commented that the public has full opportunity to review all the documents and to comment during the public comment period.

[9:27:35 AM](#)

SENATOR GUESS argued that as the bill is written now, the public could comment but could not challenge the findings in court.

MR. PORTER said that is correct and explained the reason for that is because the Legislature has inserted itself into the decision-making process.

SENATOR GUESS disagreed. She said if that were the reason then the Legislature would have the final decision and authority.

[9:30:16 AM](#)

SENATOR FRENCH said if it were just a statute-to-statute conflict, the court would reconcile the two. They would look to see whether the authorization to execute conflicted with the SGDA.

CHAIR SEEKINS said he was conceivably correct if the situation were that the Legislature authorized a contract that they knew didn't meet the conditions of the Chapter. He reiterated earlier statements regarding proposed amendments to the SGDA.

CHAIR SEEKINS noted the Legislature could always amend the Chapter or send the contract back.

[9:34:15 AM](#)

CHAIR SEEKINS said when the Legislature amended the SGDA in 1998, they "left a wide-open path." He asked when the documents that the commissioner considers become public.

MR. OSTROVSKY assumed that would be when the commissioner transmits his final findings to the governor.

CHAIR SEEKINS said there wouldn't be any disagreement if subsection (c) stated that the commissioner should make the documents available to the public when submitting the contract to the governor.

[9:37:42 AM](#)

MR. PORTER understood that would be the process.

CHAIR SEEKINS said he was looking at it from a public standpoint and wants to make sure there is nothing stuck "in the dark." He asked whether the Legislature is required to pay attention to the chain of possession of the contract.

MR. OSTROVSKY said he did not believe there was a requirement.

[9:39:50 AM](#)

SENATOR HOLLIS FRENCH said he keeps coming back to the roll of the Legislature in authorizing the contract and some legislators could vote on the contract without even reading it.

CHAIR SEEKINS expressed concern of the lack of affirmative responsibility to pay attention to the contract even though legislatures have an implied responsibility under the Constitution. If the Legislature were to ignore their duty to ensure that the contract meets the best fiscal interest of the state it would seem that would be a cause for challenge.

MR. OSTROVSKY speculated that there might be. Nothing precludes someone from bringing a constitutional challenge, he stated.

[9:42:25 AM](#)

SENATOR FRENCH added that the morning's discussion illustrates the importance of the final finding and determination as the guidepost. The right of the public to challenge the final finding should be a check and balance that ensures that the Legislature has done its job.

MR. PORTER reminded the committee that the thorough analysis would occur during the public process.

SENATOR FRENCH expressed concern that the public comment period could shrink to 30 days and that the DOR might not make available the 15,000-30,000 pages that the commissioner used to come to his determination. For example, if somebody believes

that the finding was issued for political reasons the public might be hampered in their ability to make their case and to have access to the modeling, data, and assumptions that went in to the two hundred page final determination.

MR. PORTER responded it is the intent of the DOR and is supported by statute that it is their responsibility to provide the reports and documentations leading to the final determination.

[9:45:50 AM](#)

SENATOR GUESS reminded Mr. Porter that the intent of this administration might not be the intent of the future administration and that the committee was still unsure whether or not the Legislature would be acting under the SGDA this year. The statute tends to surpass the present, she said. She supported Senator French's concerns regarding the public's access to the documents and reiterated Senator Therriault's suggestion that there is no recourse for the public to challenge that the contract goes against the law. There is nothing to help the public compel the Legislature to follow the law.

MR. OSTROVSKY commented it was his belief that the court could compel the Legislature to follow the law but the court could compel the DOR to follow the law. The Legislature has the power to amend the SGA. The check doesn't check the Legislature's power but it might check the DOR's power.

SENATOR GUESS asked would it then compel the contract to comply with the law.

MR. PORTER said that was an interesting scenario.

If you assume that oil certainty needs to be a part of the contract, the way it is currently written, if you allow the public to appeal to the court at the findings level before it gets to the Legislature, the Legislature never gets to make that decision because... let's assume that you have to amend the SGDA and you don't amend it until that final time. You end up in the situation where the public can always prevent the DOR from presenting the contract to the Legislature for review and analysis because they didn't follow every element of the current law if you know the Act needs to be amended.

[9:50:29 AM](#)

SENATOR GUESS asked Mr. Porter the intent of the bill:

Is the intent of this bill a "timing intent," which I actually agree with, let's make all the legal actions at one time. Or is the intent a timing and a "we also want to take off the table any challenges that the contract doesn't comply with the law." Which this bill does because it says you only can look at the constitutionality of the issue.

MR. PORTER replied the difficulty is that the Legislature sits as the lawmaker. It can ratify the contract and ignore or change the laws. The final finding means that the agency took an action that affects the economic interest of somebody. The final report that the commissioner is making is a recommendation to the governor and the Legislature, so there is no final finding upon which an economic issue has been changed until the Legislature makes a decision, he stated.

SENATOR GUESS countered the final finding is that the proposed contract and any amendments meet the requirements and the purpose of this Chapter. It's not a recommendation.

CHAIR SEEKINS interrupted to say that it was a precedent prior to the execution of the contract by the commissioner but now it has been relegated to a recommendation by a consultant to the Legislature. The Legislature, by inserting itself, now stands to have its decision to be challenged. And the challenge can only be made as to the constitutional fiscal interest to the state.

SENATOR GUESS asked the reason for the Stranded Gas Act.

[9:54:40 AM](#)

MR. PORTER responded the SGDA gave the DOR direction on how to negotiate the contract.

SENATOR THERRIault said the issue is the sticking point. He suggested there should be a way of removing the sticking point without extinguishing the entire process.

CHAIR SEEKINS said the way the Act was amended was clumsy but that he had some suggestions. He asked Mr. Ostrovsky whether somebody could bring a lawsuit before the contract was signed.

MR. OSTROVSKY said yes.

MR. PORTER added normally after the ratification, the governor has up to 60 days. The DOR would expect that the agency would notify the public that they have 30 days with which to file an

appeal with the court and usually they would stay the action until that 30 days is over.

[9:59:09 AM](#)

CHAIR SEEKINS said the bill has to be passed by both legislative bodies and signed by the governor so there is a period of time for public notification.

SENATOR FRENCH quipped the SGDA is looking better and better the way it stands. The process is orderly. The problem is that the administration has created a contract that conflicts with the Stranded Gas Act.

[10:02:43 AM](#)

SENATOR CHARLIE HUGGINS speculated that likely the party that would file a lawsuit would be some special interest group based on economic factor.

CHAIR SEEKINS asked Mr. Porter to explain the role of the Department of Natural Resources in the process.

MR. PORTER directed the committee to AS 43.82.430(2) and said the commissioners of both departments are relegated to work together to determine if any amendments are necessary based on public comments.

[10:06:00 AM](#) at ease [10:16:30 AM](#)

CHAIR SEEKINS called the committee back to order. He summarized the committee's main concern was that when the Legislature amended the SGDA in 1998 they eliminated the public's right to challenge whether or not the contract and proposed amendments met the requirements of the Chapter because the Legislature can change that.

MR. OSTROVSKY interjected the public would always be able to challenge a contract whether or not the contract meets the statute as it's ultimately enacted.

CHAIR SEEKINS said on the other hand the court would side with the Legislature.

MR. OSTROVSKY replied, "Likely, yes."

[10:19:48 AM](#)

CHAIR SEEKINS asserted the intent of the committee is to remove the point for someone to "high-center" the process. Conceptually

the committee wants to allow for someone to challenge the contract after the contract is executed. He asked how the committee should do that.

SENATOR FRENCH distributed his proposed amendment [entitled 24-LS1842\F.1] to committee members and explained the idea behind it. The idea is simply to postpone the challenge until you have something to challenge, which is a ratified contract.

[10:23:26 AM](#)

MR. PORTER responded the difficulty with the proposed amendment was that it "messes up the process and the relationship between the Legislature and the judiciary." He said it would allow the judiciary to jump in front of the Legislature after the Legislature had made a decision.

MR. OSTROVSKY added that there have been discussions regarding amendments of the Stranded Gas Development Act. The proposed amendment would prevent the governor from advancing a contract because it would be inconsistent with the Act as written.

[10:25:30 AM](#)

SENATOR FRENCH interrupted to ask him for an explanation of how the amendment would limit the ability of the governor to transmit a contract.

MR. OSTROVSKY said it depends on where the amendments to the SGDA end up.

SENATOR FRENCH referred to AS 43.82.430 and said once the contract is amended and signed, the contractors must agree to the changes and at the same time the commissioner would be making his final finding. That all happens before that big 200-page document comes out, he said. Everything has to have been done before that time. The Chairman is concerned about stopping the review of that contract while the court sorts through the 30,000 pages of background documents.

[10:28:40 AM](#)

MR. OSTROVSKY noted there was another issue of whether the commissioner's finding would be superseded by the legislative review that occurs after it.

SENATOR THERRIAULT countered that the court would have to consider the law earlier than the date of the appeal.

CHAIR SEEKINS said the problem was in the timing. The Legislature by authorizing the signature has in effect approved the contract regardless of what the Act says.

[10:34:18 AM](#)

LORI BACKES, Fairbanks, testified and objected to the amendment of the SGDA, which she claimed would effectively remove the right of the people to seek judicial review. The unnecessary delay in the contract is the governor's insistence that the Legislature pass a revision of oil taxes before he releases the contract. She stated that the governor broke the law in negotiating the contract.

[10:36:46 AM](#)

SENATOR THERRIAULT asked Ms. Backes whether she heard Senator French's proposed amendment that would delay the judicial review to the end of the process.

MS. BACKES responded that she had the amendment and did not have an objection except that it has become a reverse process. She claimed that moving it to the end of the process would be moot since the contract would already be enacted and the statute would have been amended to match the contract.

[10:40:02 AM](#)

BILL WALKER, General Counsel, Alaska Gasline Port Authority, testified in opposition to the bill and said he found SB 316 to be appalling. It allows the commissioner to compile whatever best interest finding that he sees fit and it does not have to match the law. That is reverse of the way the law is designed, he stated. He challenged the governor to release his amendments to the Stranded Gas Development Act immediately so they can be debated now. He expressed appreciate to the committee for their current debate and encouraged the committee to vote against the bill.

[10:43:54 AM](#)

CHAIR SEEKINS recessed the meeting until 9:30 AM tomorrow, April 21, 2006.