

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 26, 2006

8:44 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

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
04/20/06	(S)	Heard & Held
04/20/06	(S)	MINUTE(JUD)
04/21/06	(S)	JUD AT 9:30 AM BUTROVICH 205
04/21/06	(S)	Heard & Held
04/21/06	(S)	MINUTE(JUD)
04/22/06	(S)	JUD AT 9:30 AM BUTROVICH 205
04/22/06	(S)	-- Continued from 04/20/06 --

04/25/06 (S) JUD AT 8:30 AM BUTROVICH 205
04/25/06 (S) Heard & Held
04/25/06 (S) MINUTE(JUD)

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

Jim Baldwin, Attorney
No address provided

POSITION STATEMENT: Answered questions regarding SB 316

Jomo Stewart
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 [8:44:35 AM](#). Present were Senators Hollis French, Gene Therriault, Gretchen Guess, Charlie Huggins, and Chair Ralph Seekins.

SB 316-COURT REVIEW OF STRANDED GAS DECISION

[8:45:00 AM](#)

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

LARRY OSTROVSKY, Chief Assistant Attorney General, Department of Law (DOL), introduced himself.

[8:46:03 AM](#)

SENATOR GRETCHEN GUESS stated her confusion on page 3, lines 6-7 was the intent behind the findings and determinations relied on by the Legislature. She asked whether these were the final findings and if the chapter should refer back to 430(a)(3), which states the commissioner's findings.

CHAIR SEEKINS stated his dilemma was that it appears that the commissioner goes through the entire process of developing a contract, gathers information, analyzes it and comes up with his

final findings. So now there are several findings; whether or not it complies with the law, whether or not it meets the best financial interest of the state.

MR. OSTROVSKY interjected those two would be incorporated into one finding.

CHAIR SEEKINS stated those two things have to be determined.

SENATOR GUESS countered that was implied but .430(a)(3) states what is to be determined is whether the proposed contract and amendments meet the requirements and purposes of the Chapter.

CHAIR SEEKINS agreed.

SENATOR GUESS said fiscal interest is not mentioned. It is implied but not specified.

CHAIR SEEKINS said .430(b) would indicate that the commissioner has to have a contract that is in the long-term fiscal interest of the state.

SENATOR GUESS asserted that is just the hurdle to submit the contract to the governor.

CHAIR SEEKINS referred to .400(a)(1-2) and said the commissioner has to make preliminary findings and a determination that the proposed contract terms are in the long-term fiscal interest of the state.

SENATOR HOLLIS FRENCH agreed.

CHAIR SEEKINS said along with that, as soon as the commissioner makes the preliminary finding under .310(f), the entire body of information other than the information that is required to be kept confidential becomes a public document.

[8:52:35 AM](#)

MR. OSTROVSKY said that is correct but the Stranded Gas Development Act (SGDA) says it becomes a public document subject to whatever privileges might exist under law.

CHAIR SEEKINS said at this point even the documents that might not agree with the commissioner's final findings are public documents under the Public Information Act.

[8:54:04 AM](#)

SENATOR FRENCH referred to the public documents and said it was important to keep in mind the difference between those and the "universe of information you can acquire through the discover process when challenging a finding."

CHAIR SEEKINS asked Mr. Ostrovsky the distinction between the two.

MR. OSTROVSKY said with respect to certain documents, for example attorney-client privilege, there would be no difference.

CHAIR SEEKINS asked about internal memorandums.

MR. OSTROVSKY said that would be part of the public documents.

CHAIR SEEKINS asked about a memorandum from the DOL to the commissioner.

MR. OSTROVSKY responded ordinarily that would not be discoverable.

[8:56:00 AM](#)

SENATOR FRENCH asked who would decide what is discoverable.

MR. OSTROVSKY responded, "A judge."

SENATOR FRENCH asked what, besides documents, could be discoverable.

MR. OSTROVSKY replied depositions and testimony.

SENATOR FRENCH recognized that testimony and depositions is something the committee has not explored but could be very informative.

MR. OSTROVSKY responded normally that type of discovery is not used in administrative challenges because the court looks to the record to see where the record supports the decision. The burden is on the agency to show that the record supports the decision.

CHAIR SEEKINS posed a hypothetical situation of two opposing models and asked whether both of the models would be made public documents.

MR. OSTROVSKY said he didn't see why not although there could be problems with confidentiality. In that case the court could fashion a protective order for the confidential data.

9:00:04 AM

CHAIR SEEKINS reference AS 40.25.110 and read the statute.

Sec. 40.25.110. Public records open to inspection and copying; fees.

(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 a certified copy of the public record.

(b) Except as otherwise provided in this section, the fee for copying public records may not exceed the standard unit cost of duplication established by the public agency.

(c) If the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks. The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. The requester shall pay the fee before the records are disclosed, and the public agency may require payment in advance of the search.

(d) A public agency may reduce or waive a fee when the public agency determines that the reduction or waiver is in the public interest. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated. A public agency may waive a fee of \$5 or less if the fee is less than the cost to the public agency to arrange for payment.

(e) Notwithstanding other provisions of this section to the contrary, the Bureau of Vital Statistics and the library archives in the Department of Education and Early Development may continue to charge the same fees that they were charging on September 25, 1990, for performing record searches, and may increase the fees as necessary to recover agency expenses on the same basis that was used by the agency immediately before September 25, 1990. Notwithstanding other provisions of this section to the contrary, the Department of Commerce, Community, and Economic Development may continue to charge the

same fees that the former Department of Commerce and Economic Development was charging on July 1, 1999, for performing record searches for matters related to banking, securities, and corporations, and may increase the fees as necessary to recover agency expenses on the same basis that was used by the former Department of Commerce and Economic Development immediately before July 1, 1999.

(f) Notwithstanding other provisions of this section to the contrary, the Board of Regents of the University of Alaska may establish reasonable fees for the inspection and copying of public records, including record searches.

(g) Notwithstanding other provisions of this section to the contrary, the board of directors of the Alaska Railroad Corporation may establish reasonable fees for the inspection and copying of public records, including record searches.

(h) Notwithstanding other provisions of this section to the contrary, the judicial branch may establish by court rule reasonable fees for the inspection and copying of public records, including record searches.

(i) Electronic information that is provided in printed form shall be made available without codes or symbols, unless accompanied by an explanation of the codes or symbols.

CHAIR SEEKINS said Senator French was, "getting more into interrogatories more than he is discoverable documents." He asked Senator French whether he meant to indicate interrogatories.

SENATOR FRENCH said he was talking about "strictly paper." The point is discovery is a broader inquiry than a public records inquiry.

CHAIR SEEKINS agreed. If all the public documents, models, analysis, and working paper were public documents; they are public as soon as the commissioner makes his preliminary findings, he reiterated.

MR. OSTROVSKY interrupted to say the universe of public documents is broader. Under the SGDA, the commissioner releases all the extra reports but there is a universe of documents that become public record.

SENATOR GUESS said she interprets (f) to be much narrower than "every public document" because anyone could say certain discussions or documents weren't relevant to the decision.

CHAIR SEEKINS opined if it weren't something that was relevant to the conversation, it wouldn't have been confidential.

MR. OSTROVSKY said normally all documents in state government are public records but some documents are covered by privilege. The Stranded Gas Development Act puts a layer of protection on certain documents for a limited period of time to allow negotiations to go forward. Those are the documents that reflect and incorporate state strategy. The commercial documents do not necessarily lose their confidentiality but the Act outlines that those documents are public records once a contract is negotiated.

9:06:07 AM

CHAIR SEEKINS asked whether language in the Act should clearly state that all of the documents are public.

MR. OSTROVSKY said there is a limited protection for a limited time. Once there is a proposed contract that disappears.

CHAIR SEEKINS noted once the findings become preliminary the public comment and legislative review period commences with a minimum of 30 days.

MR. OSTROVSKY said that is correct.

CHAIR SEEKINS continued during that 30 days, any person that wants to could get copies of the documents.

MR. OSTROVSKY informed the committee the commissioner is under the affirmative duty to release all of the documents under .410(2) and the Legislature is also able to see those.

CHAIR SEEKINS asked, "The Legislature is allowed to see the confidential documents that would not be public records?"

MR. OSTROVSKY said yes.

CHAIR SEEKINS assumed there was a responsibility on the part of the Legislature to keep the documents confidential.

MR. OSTROVSKY agreed.

CHAIR SEEKINS stated his concern that a person could challenge the preliminary findings based on discovering some documents that they believe should have been used in determining the contract but weren't.

[9:09:54 AM](#)

SENATOR FRENCH said the reason he asked Mr. Ostrovsky about the final findings was to let everybody know that was the trigger to which people could present a challenge.

CHAIR SEEKINS mentioned after the legislative review and public comment, the commissioner submits his final findings. Under current law, he has to determine whether the contract meets the requirements of the law and also determine that the contract is in the long-term fiscal interest of the state.

MR. OSTROVSKY reminded the committee that after the public comment period, the commissioner might need to renegotiate the contract. At that point in time it becomes a "final agency decision."

SENATOR GUESS asked the difference between "final findings and determinations" and "final agency decision."

MR. OSTROVSKY said none. The final agency decision is what a person would file an appeal from. Findings and determinations are final agency decisions.

[9:15:06 AM](#)

CHAIR SEEKINS reminded the committee that in 1998 the Legislature called "time out" and inserted themselves into the process. The Legislature now becomes the final body to determine whether or not it meets the requirements of the Chapter.

SENATOR GUESS said the law currently reads such that the Legislature gets the contract to review but not the final findings and determination.

CHAIR SEEKINS said he could not imagine that they wouldn't get the final findings.

[9:18:22 AM](#)

CHAIR SEEKINS asked what other information the Legislature is allowed to look at other than the commissioner's findings.

MR. OSTROVSKY said, "Whatever it chooses to look at." The Legislature often hires its own experts.

CHAIR SEEKINS said the information brought to us by the expert would constitute a recommendation.

MR. OSTROVSKY agreed.

CHAIR SEEKINS asked whether the findings of the commissioner would be any more than that.

MR. OSTROVSKY said essentially no.

9:20:15 AM

CHAIR SEEKINS said, "That's our dilemma."

SENATOR GUESS didn't see the dilemma. It's a decision, she staetd.

CHAIR SEEKINS said, "Our decision is not challengeable unless it's unconstitutional."

SENATOR GUESS said she thought the committee was more concerned about the timing issue.

CHAIR SEEKINS said, "You're right." He asked whether the law should be able to say, "the Legislature can't consider the contract because the findings and recommendations are going to be in litigation."

SENATOR GENE THERRIAULT said the commissioner's power and right to ignore the law is different than the Legislature's power to [indisc] the law.

9:23:37 AM

CHAIR SEEKINS referred to .430(a)(3) and read:

(3) make final findings and a determination as to whether the proposed contract and any proposed amendments prepared under (2) of this subsection meet the requirements and purposes of this chapter.

He said it wasn't certifying that they meet; it is as to "whether" they meet.

SENATOR GUESS noted that is a final agency decision.

9:27:11 AM

SENATOR GUESS asked Mr. Ostrovsky whether certification is a term of art in statute.

MR. OSTROVSKY said, "Not that I'm aware of."

JIM BALDWIN, Attorney, said there are instances where duties are [indisc] in terms of certification. It is usually associated with taking an oath.

CHAIR SEEKINS asked Mr. Baldwin whether the commissioner is required to certify that his findings are correct and complete.

MR. BALDWIN replied the commissioner would have to note whether or not changes would need to be made to the Act.

[9:30:12 AM](#)

SENATOR GUESS countered if the final findings aren't challengeable, (if the legislative approval of the contract is the final say), why have the Stranded Gas Act at all?

MR. BALDWIN said it is important to keep in mind the complete picture of the SGDA and what is worth challenging at the end of the day. A person will always have the constitutional right to challenge a contract.

SENATOR GUESS said everyone on the committee would take the constitutionality issue off the table. Nobody wants to slow the process down but the question is whether to take away the public's ability to challenge.

CHAIR SEEKINS asked Mr. Baldwin whether a law could be passed to specify a block of time for a right to challenge something on a constitutional basis.

MR. BALDWIN responded that would have the potential of being challenged. However, there are instances where the court has limited things for review, such as redistricting of the state where the court requires that constitutional issues be brought within 60 days.

[9:36:08 AM](#)

SENATOR FRENCH agreed with Mr. Baldwin. In the civil arena the courts can limit a person's constitutional challenges.

CHAIR SEEKINS commented the committee has come down to the final question of whether or not the challenge to the final agency decision could be moved to the final step of the process.

MR. OSTROVSKY reported the DOL believes that because the Legislature retained a role in the process, the agency decision under SGDA becomes but a component of the final contract. Hypothetically speaking, the Legislature's decision could be independent of the commissioner's.

[9:40:00 AM](#)

SENATOR FRENCH said if it is broader then there is no harm or imposition on the system to allow a full challenge to the commissioner's findings. He said the main concern of the committee is whether or not there could be a court case against their finding. The final findings and determination is a term of art that the courts are comfortable working with, but the final findings and determination of the Legislature is brand new, he said, and he expressed concern with how a judge would proceed on a legal challenge.

MR. OSTROVSKY replied the DOL would consider the final findings of the commissioner just a step in the process but not a final step. The challenge would be at the end of the process, he indicated.

SENATOR FRENCH said he was concerned about a "kink in the system." There is still an executive act function once the Legislature is finished and so in order to minimize the amount of challenges that can be brought, he wanted to make sure the committee establishes the correct place for a challenge.

[9:45:38 AM](#)

CHAIR SEEKINS agreed that the challenge should take place after the execution of the contract.

[9:50:57 AM](#)

SENATOR THERRIAULT added that nobody knows how long the Supreme Court would take to make a decision on the challenge. He asked whether the contract could go forward while the court decides.

MR. OSTROVSKY replied the court would remand the commissioner's findings.

CHAIR SEEKINS suggested the language, "any challenge to the findings and determination forwarded by the commissioner or the Legislature can not delay consideration of the contract."

SENATOR THERRIAULT added the contract would still be able to be forwarded to the Legislature to begin their process.

[9:53:49 AM](#)

SENATOR HUGGINS said the point is "is the threshold of constitutionality too high?"

SENATOR GUESS asked the reason for maintaining the Stranded Gas Development Act. If the contract is good to go, why bother going through the process of amending the Act, she asked.

MR. OSTROVSKY responded it was all part of the process. The SGDA requires the administration with something they normally aren't required to do when they present something to the Legislature. He said there is a purpose for it.

CHAIR SEEKINS called a brief recess at [10:06:00 AM](#).

[10:20:35 AM](#)

CHAIR SEEKINS called the committee back to order. He informed the committee that he was going to ask the drafter of the bill to clarify the language that any challenge can't delay consideration of the contract by the Legislature and that the contract is challengeable for only 120 days after execution of the contract.

SENATOR GUESS questioned when the challenge would happen. The current language doesn't allow for a challenge before the review of the Legislature.

CHAIR SEEKINS referred the committee to section .410(2) in the Act and said he wants that language to line up with Section 2 of the bill.

[10:26:30 AM](#)

JOMO STEWART, Fairbanks, testified in opposition to the bill. He said it is a bad bill and it would not serve the purpose the committee is seeking. The record shows that the Legislature was invited into the process by the Administration in 1998 yet was not required to participate. It chose to do so and that is not an "abomination" as it has been referred as several times in this committee. It is an established practice to have the Legislature involved in issues involving resource development.

[10:30:32 AM](#)

MR. STEWART continued it has been stated several times in committee that the Legislature has some kind of final power over the contract and that is not the case. The final decision of whether or not the contract is in the best interest of the state

and should be carried further is under the governor's authority. He encouraged the committee to bury the bill.

[10:37:32 AM](#)

SENATOR HUGGINS asked Mr. Ostrovsky to comment on the pending suit in reference to the gas pipeline.

MR. OSTROVSKY replied the Port Authority has filed an anti-trust action in federal court against British Petroleum and Exxon Mobil but did not elaborate.

CHAIR SEEKINS held the bill in committee.

There being no further business to come before the committee, he adjourned the meeting at [10:39:43 AM](#).