

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

March 14, 2007

1:08 p.m.

**MEMBERS PRESENT**

Representative Jay Ramras, Chair  
Representative Nancy Dahlstrom, Vice Chair  
Representative John Coghill  
Representative Bob Lynn  
Representative Ralph Samuels  
Representative Max Gruenberg  
Representative Lindsey Holmes

**MEMBERS ABSENT**

All members present

**OTHER LEGISLATORS PRESENT**

Representative Bill Stoltze

**COMMITTEE CALENDAR**

CONFIRMATION HEARING(S)

Attorney General [Continued from 3/2/07]

Talis Colberg - Palmer

- CONFIRMATION(S) ADVANCED

HOUSE BILL NO. 175

"An Act relating to the prohibition of the exercise of the power of eminent domain against a recreational structure for the purposes of developing a recreational facility or project."

- HEARD AND HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HB 175

SHORT TITLE: EMINENT DOMAIN; RECREATIONAL STRUCTURES

SPONSOR(S): REPRESENTATIVE(S) JOHNSON

03/05/07            (H)            READ THE FIRST TIME - REFERRALS

03/05/07 (H) JUD, FIN  
03/14/07 (H) JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

TALIS COLBERG, Appointee  
Attorney General  
Palmer, Alaska

POSITION STATEMENT: Testified as appointee to the position of Attorney General.

REPRESENTATIVE CRAIG JOHNSON  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 175.

DAVE FEEKIN  
Alaska Association of Realtors (AAR)  
Kenai, Alaska

POSITION STATEMENT: During discussion of HB 175, provided comments and asked the committee to support the bill and report it from committee.

DICK MYLIUS, Acting Director  
Central Office  
Division of Mining, Land and Water  
Department of Natural Resources (DNR)  
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 175.

**ACTION NARRATIVE**

**CHAIR JAY RAMRAS** called the House Judiciary Standing Committee meeting to order at [1:08:05 PM](#). Representatives Coghill, Samuels, Lynn, Holmes, Dahlstrom, and Ramras were present at the call to order. Representative Gruenberg arrived as the meeting was in progress. Representative Stoltze was also in attendance.

CONFIRMATION HEARING(S)  
Attorney General

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CHAIR RAMRAS announced that the first order of business would be the consideration of the appointment of Talis Colberg to the position of Attorney General.

REPRESENTATIVE COGHILL asked Mr. Colberg whether he would be willing to draft a letter to the federal government asking it to address the issue of tribal status in Alaska.

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TALIS COLBERG, Appointee, Attorney General, indicated that he would draft such a letter but only if the governor asks him to do so, because that is her decision to make, not his.

REPRESENTATIVE SAMUELS asked Mr. Colberg what his legal advice to the governor would be should she decide to pursue that issue.

MR. COLBERG said he would endeavor to provide the governor with the best legal advice available that would support her policy choices to the extent that they are consistent with the law. In response to a comment, he opined that it is not inconsistent to provide legal advice to the governor and to the legislature on individual issues but still give deference to the person who appointed him.

REPRESENTATIVE SAMUELS asked whether he should assume that any legal advice he receives from the Department of Law (DOL) will simply coincide with the governor's policies.

MR. COLBERG opined that it would be wrong to assume that the attorney general will always say only what the governor wants to hear, and suggested that his advice to the governor concerning a university regent demonstrates that point.

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REPRESENTATIVE SAMUELS offered his understanding that in that situation, the governor had not publicly expressed a desire one way or the other, and surmised that if the governor does express an opinion publicly about a matter, then legislators would need to get separate counsel on that issue if they don't agree with her, because Mr. Colberg would simply be promoting the governor's viewpoint.

MR. COLBERG clarified that in the aforementioned situation, the governor only asked for his advice after she had already asked for the regent's resignation. In response to a question, he indicated that he still wishes to address the issues that arise between the Native and non-Native populations in Alaska.

CHAIR RAMRAS suggested that Mr. Colberg will bring a fresh perspective to the job. He then asked Mr. Colberg to speak about some of the disharmony that exists in both the Fairbanks and Anchorage district attorney offices - because he has been told that it stems from a morale problem rather than a compensation problem - what Mr. Colberg perceives as being some of the personnel issues, and what Mr. Colberg intends to do to resolve them.

The committee took an at-ease from 1:31 p.m. to 1:33 p.m.

MR. COLBERG said that Richard Svobodny - Chief Assistant Attorney General, Criminal Division - would be looking into those issues for him. Mr. Colberg mentioned that Mr. Svobodny is currently in the Kenai office looking into why there is a disproportionate prosecution failure rate compared to the offices in rest of the state. Mr. Colberg said he is comfortable with Mr. Svobodny's efforts to constructively address members' concerns about the Anchorage and Fairbanks offices.

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REPRESENTATIVE SAMUELS pointed out that in addition to having sufficient legal expertise, an attorney general must have the ability to manage the 280 attorneys currently working for the DOL. He said that how the personnel issues pertaining to the two most recent previous directors of the Criminal Division have been handled gives him pause [and raises questions regarding] Mr. Colberg's management skills, particularly given that managing the personnel at the DOL is the bigger part of the job of attorney general. Representative Samuels sought assurance that Mr. Colberg's management skills are up to the task.

REPRESENTATIVE DAHLSTROM suggested that it is unreasonable to expect a candidate for confirmation to not take any action in his/her prospective role before being confirmed. She cautioned that many of the facts regarding the aforementioned situations are not yet known by either legislators or the public, and that for Mr. Colberg to disclose more information about those situations could breach confidentiality and the law.

REPRESENTATIVE COGHILL suggested that the committee merely wants to have a discussion regarding Mr. Colberg's management style.

REPRESENTATIVE SAMUELS concurred, reiterating his view that an attorney general's management skills are more important than his/her legal skills.

MR. COLBERG concurred, recounted his experience while serving on the Matanuska-Susitna (Mat-Su) Borough assembly, acknowledged that most of his management experience relates to offices with a small number of personnel, and assured the committee that he doesn't expect to have to hire a new director of the Criminal Division every few months.

REPRESENTATIVE LYNN observed that without knowing more about the situations that were presented to Mr. Colberg, it will be difficult for the committee to evaluate his actions.

CHAIR RAMRAS offered his understanding that the district attorney office in Fairbanks has lost many high-profile cases, including cases involving rape and murder, and yet the office appears to be pursuing many charges of misconduct involving a controlled substance in the sixth degree. He asked, therefore, whether Mr. Colberg feels that a reallocation of prosecutorial resources at the Fairbanks office would be in order. Chair Ramras also asked Mr. Colberg how he intends to address the issue of low morale in that office.

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MR. COLBERG offered his recollection that the district attorney office in Fairbanks has only lost one high-profile sexual assault case - two years ago - and that the aforementioned misconduct charges were not occurring independently but rather in tandem with other charges such as DUI. He suggested, therefore, that any morale problem which exists in that office has no correlation to the allocation of prosecutorial resources. He mentioned that he has been presented with information suggesting that any morale problems that exist in the various district attorney offices existed before the new administration took office, and reiterated that Mr. Svobodny will be addressing those problems. Mr. Colberg, on the question of prosecutorial resource allocation, surmised that the information he has received differs greatly from that which Chair Ramras has received, and offered his belief that resources are not currently being allocated in favor of the aforementioned misconduct charges.

CHAIR RAMRAS asked Mr. Colberg whether he is satisfied with the prosecutorial resource allocation in the Fairbanks office, and

again asked Mr. Colberg what he intends to do about the low-morale situation to ensure that the district attorney offices do a better job of protecting the public.

MR. COLBERG said he will be relying on Mr. Svobodny's recommendations. He offered his understanding that at one office, the actual physical location of the building is contributing to low morale. In response to a question, Mr. Colberg said he has asked Mr. Svobodny to look into all the issues arising at the state's various district attorney offices.

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REPRESENTATIVE SAMUELS asked whether there is a specific policy in place at the DOL wherein [legislators'] requests for information must be forwarded up the chain of command before being fulfilled.

MR. COLBERG said he has not established such a policy himself, but acknowledged that perhaps at one point there might have been a policy in place wherein DOL employees were supposed to document legislative contacts. Furthermore, perhaps some people simply feel that they should inform their supervisor when a legislator contacts them.

REPRESENTATIVE HOLMES said she has recently come across individuals at the DOL who believe that there is a policy in place such as Representative Samuels described. She recommended, therefore, that Mr. Colberg make efforts to inform all of his staff that they are free to disseminate information to legislators when they request it.

CHAIR RAMRAS, notwithstanding Mr. Colberg's comments that he intends to rely on Mr. Svobodny's recommendations, opined that there is no substitute for a hands-on approach to managing a department.

MR. COLBERG agreed to issue a statement to his staff regarding how he would like them to deal with legislative requests for information.

CHAIR RAMRAS asked Mr. Colberg to comment on the issues raised as a result of the passage of certain ballot measures.

MR. COLBERG indicated that the DOL is establishing a new position that will deal with the legal issues which could arise from the "cruise ship initiative," and said he expects that

[that initiative] will engender litigation. In response to a question, he indicated that he is not sure whether the same legal arguments could be raised regarding Washington's container tax as might be raised regarding the cruise ship initiative, should litigation result from either or both. In response to a further question, he said that the DOL's position would be to defend, to the best of its ability, what the voters passed.

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REPRESENTATIVE SAMUELS referred to an upcoming ballot measure pertaining to establishing a gaming commission, and asked Mr. Colberg whether he thinks gambling would be good for Alaska.

MR. COLBERG opined that gambling can be very corrosive to society. In response to further questions, he indicated that [the state] is currently involved in litigation regarding the interpretation of the aforementioned ballot measure, and explained that the National Indian Gaming Commission (NIGC) requires that the federal ordinances allowing for Indian gambling must stipulate that the tribe comply with its state's laws on gambling.

CHAIR RAMRAS, referring to the State v. Amerada Hess, et al. settlement money, asked Mr. Colberg what proactive approach he will take regarding any funds engendered by the "cruise ship head tax" and any ensuing litigation.

MR. COLBERG said he is not aware of any action pending on that particular tax.

CHAIR RAMRAS suggested to Mr. Colberg that he provide counsel to the legislature regarding that issue.

REPRESENTATIVE GRUENBERG asked Mr. Colberg to explain the status of possible litigation against the actuaries responsible for the Public Employees' Retirement System and Teachers' Retirement System (PERS/TRS) funds.

MR. COLBERG said the DOL has made a request for an appropriation of \$12 million to pursue that litigation, and that the case is on hold pending funding. He added that the DOL feels that there is a good cause of action and recommends going forward with it. In response to a further question, he said that moneys appropriated thus far for that purpose have already been spent.

REPRESENTATIVE GRUENBERG indicated that he would want the State to not let the statute of limitations run out on that case.

MR. COLBERG, in response to a question regarding the McDowell v. State case, said, "I think the majority was right."

CHAIR RAMRAS asked Mr. Colberg whether he believes that the "advocacy section" that weighs in on the regulatory filing in front of the Regulatory Commission of Alaska (RCA) should [continue to] be located within the Office of the Attorney General.

MR. COLBERG said yes. He opined that from an institutional perspective, it is a bad concept for agencies to develop their own separate legal departments, because doing so could create consistency problems.

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CHAIR RAMRAS referred to Mr. Colberg's 3/13/07 letter regarding the Alaska Gasline Inducement Act (AGIA), and asked Mr. Colberg to elaborate.

MR. COLBERG said:

There's been a lot written on that. You have not only about a 31-page opinion from [former] Attorney General Marquez talking about that that's, in his view, citing many of the same cases, older even, that there are reasons to argue that fiscal certainty could be justified for 30-45 years, you have at the other end Senator French wrote a very long opinion saying that nothing over 2 years, beyond the term of any legislature, could be found legitimate. And then ultimately, almost all of the opinions agree that there's no certainty about the fiscal certainty short of a court decision.

Now, what it gets into is, always, an interpretation of Article IX, Section 1, in tandem with Article IX, Section 4, [of the Alaska State Constitution]. And Alaska, like about almost 30 states, has this "do not surrender your taxing authority" coming out of an old, old, old Georgia case, which is perhaps more than 150 years old, where states anticipating issues arising from a surrender by one legislature of powers creating serious problems down the line.

In the limited case law that's available in Alaska that gives hints about it and from the minutes of the [Alaska] Constitutional Convention, Delegate Nerland specifically talked about inducements, and for industry, and he used the word "inducements" in there, and the concept is that here, this is a 10-year period that is triggered by the initiation of giving something. It's not something that we're promising in advance of any commitment; it's in response to a commitment and investment made - it's for a limited duration.

MR. COLBERG continued:

And can it be challenged? Of course. And who is going to decide? The precedent is pretty slim all the way around. But we think it's much more defensible to make, under the terms described, in the AGIA, a 10-year concept that's not promised before anything's done, but after there's been a commitment and an investment that can be justified and defensible in court. And ... even [former Attorney General Marquez's] opinion can be defended, we just think it's too much of a stretch.

And so the opposite end is Senator French saying nothing over 2 years will prevail, and he laid out a very thorough set of arguments. But there is a qualifier in Article IX, Section 1, that leaves open the door for some exceptions, and if it had no purpose - and every word has a purpose in that type of thing is the presumption - there'd be no reason for that, and we think this ... fits into the gist of the comments made when it was created as to what's an appropriate use for that terminology.

MR. COLBERG, in response to a question regarding [Indian] gaming, offered his understanding that Kake and Klawock [are only requesting permission from the NIGC to offer] bingo and pull-tabs, both of which are currently allowed under state law.

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REPRESENTATIVE DAHLSTROM made a motion to advance from committee the nomination of Talis Colberg to the position of Attorney

General. There being no objection, the confirmation was advanced from the House Judiciary Standing Committee.

The committee took an at-ease from 2:32 p.m. to 2:38 p.m.

HB 175 - EMINENT DOMAIN; RECREATIONAL STRUCTURES

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CHAIR RAMRAS announced that the final order of business would be HOUSE BILL NO. 175, "An Act relating to the prohibition of the exercise of the power of eminent domain against a recreational structure for the purposes of developing a recreational facility or project."

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REPRESENTATIVE CRAIG JOHNSON, Alaska State Legislature, sponsor, relayed that legislation last year set limitations on the exercise of eminent domain and elevated someone's personal residence such that eminent domain could not be exercised for the purpose of developing a recreational facility or project unless the homeowner consented to the taking of his/her residence. House Bill 175 would extend that limitation to a person's recreational structure, and establishes a limit regarding the amount of land that would be protected to a radius 250 linear feet around the recreational structure itself - the same amount of land that would apply in situations involving a residence; HB 175 would not interfere with a government entity's exercise of eminent domain for other legitimate purposes. He relayed that although last year's legislation struck a fine balance between all interested parties, recreational structures were not included, and so he is now bringing this issue forward because he believes that private ownership constitutes the greatest use of Alaska's land. He mentioned that HB 175 would not apply to recreational structures owned by partnerships or businesses.

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DAVE FEEKIN, Alaska Association of Realtors (AAR), spoke about last year's legislation, relayed that the property rights of "second home" owners is of key importance, and opined that HB 175 protects the values of those properties. Realtors have heard from many Alaskans about the importance of recognizing and protecting a key element for many families and their Alaskan lifestyles - the ownership and enjoyment of recreational

properties and cabins. He concluded by asking the committee to support HB 175 and move the bill from committee.

CHAIR RAMRAS, after ascertaining that no one else wished to testify, closed public testimony on HB 175.

REPRESENTATIVE JOHNSON, in response to a question, said, "It is standard practice to have access to your land ...; I believe that that right-of-way does exist, and [the government] ... couldn't condemn the area to prohibit you from having access to your property ...."

REPRESENTATIVE GRUENBERG questioned whether the term, "recreational structure" could be construed to mean a structure that was constructed for just one season, and asked whether the bill ought to require some form of permanency with regard to recreational structures.

REPRESENTATIVE JOHNSON said it is not the intention of HB 175 to allow someone with recreational property to merely put up a tent and move it from place to place in order to protect all of the property; HB 175 is intended to protect the owner of a permanent recreational structure. He indicated that he doesn't have an objection to clarifying that point.

REPRESENTATIVE GRUENBERG indicated a willingness to offer a conceptual amendment that would alter Section 3 such that the concept of permanence would be incorporated into the definition of "recreational structure".

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DICK MYLIUS, Acting Director, Central Office, Division of Mining, Land and Water, Department of Natural Resources (DNR), in response to a question, said that the department doesn't have any objection to [the bill or the aforementioned proposed change], and that the department has never exercised eminent domain in order to acquire recreational properties or access to recreational opportunities without the consent of the property owner. He opined that it would be good to better define the term, "recreational structure", particularly given that both tent camps and million-dollar structures are all considered to be recreational structures. In response to a further question, Mr. Mylius provided comments regarding a particular university land transfer.

REPRESENTATIVE JOHNSON, in response to a question, reiterated that the bill is intended to only protect the land that is within 250 linear feet of the structure, whether that structure is someone's personal residence or recreational structure. In response to a comment and question, he indicated that he would be amenable to an amendment that would clarify that point. In response to a further question, he said he intends for the protections afforded by the bill to apply only to a landowner who holds legal title to the recreational structure.

REPRESENTATIVE DAHLSTROM surmised that several members believe that the issue of how much land is going to be protected still needs to be clarified in the bill.

REPRESENTATIVE GRUENBERG suggested that the issues raised by the committee be addressed via a committee substitute.

[HB 175 was held over.]

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:58 p.m.