ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 11, 2007
5:39 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 104
"An Act relating to the Alaska Gasline Inducement Act; establishing the Alaska Gasline Inducement Act matching contribution fund; providing for an Alaska Gasline Inducement Act coordinator; making conforming amendments; and providing for an effective date."
HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 104
SHORT TITLE: NATURAL GAS PIPELINE PROJECT
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/05/07	(S)	READ THE FIRST TIME - REFERRALS
03/05/07	(S)	RES, JUD, FIN
03/14/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/14/07	(S)	Heard & Held
03/14/07	(S)	MINUTE(RES)
03/16/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/16/07	(S)	Heard & Held
03/16/07	(S)	MINUTE(RES)
03/19/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/19/07	(S)	Heard & Held
03/19/07	(S)	MINUTE(RES)
03/21/07	(S)	RES AT 3:30 PM SENATE FINANCE 532
03/21/07	(S)	Heard & Held
03/21/07	(S)	MINUTE(RES)

03/21/07	(S)	RES AT 5:30 PM SENATE FINANCE 532
03/21/07	(S)	Heard & Held
03/21/07	(S)	MINUTE(RES)
03/22/07	(S)	RES AT 4:15 PM FAHRENKAMP 203
03/22/07	(S)	Heard & Held
03/22/07	(S)	MINUTE(RES)
03/23/07	(S)	RES AT 1:30 PM BUTROVICH 205
03/23/07	(S)	Heard & Held
03/23/07	(S)	MINUTE(RES)
03/24/07	(S)	RES AT 1:00 PM SENATE FINANCE 532
03/24/07	(S)	Heard & Held
03/24/07	(S)	MINUTE(RES)
03/24/07	(S)	RES AT 3:00 PM SENATE FINANCE 532
03/24/07	(S)	Heard & Held
03/24/07	(S)	MINUTE(RES)
03/26/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/26/07	(S)	Heard & Held
03/26/07	(S)	MINUTE(RES)
03/27/07	(S)	RES AT 3:00 PM BUTROVICH 205
03/27/07	(S)	Heard & Held
03/27/07	(S)	MINUTE(RES)
03/28/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/28/07	(S)	Heard & Held
03/28/07	(S)	MINUTE(RES)
03/29/07	(S)	RES AT 5:00 PM BUTROVICH 205
03/29/07	(S)	Heard & Held
03/29/07	(S)	MINUTE(RES)
03/30/07	(S)	RES AT 1:30 PM BUTROVICH 205
03/30/07	(S)	Heard & Held
03/30/07	(S)	MINUTE(RES)
03/31/07	(S)	RES AT 12:00 AM BUTROVICH 205
03/31/07	(S)	Heard & Held
03/31/07	(S)	MINUTE(RES)
04/01/07	(S)	RES AT 11:00 AM BUTROVICH 205
04/01/07	(S)	Moved CSSB 104(RES) Out of Committee
04/01/07	(S)	MINUTE(RES)
04/02/07	(S)	RES RPT CS 6AM SAME TITLE
04/02/07	(S)	AM: HUGGINS, GREEN, STEVENS, STEDMAN, WIELECHOWSKI, WAGONER
04/02/07	(S)	RES AT 3:30 PM BUTROVICH 205
04/02/07	(S)	Moved Out of Committee 4/1/07
04/02/07	(S)	MINUTE(RES)
04/04/07	(S)	JUD AT 2:45 PM BELTZ 211
04/04/07	(S)	Heard & Held
04/04/07	(S)	MINUTE(JUD)
04/11/07	(S)	JUD AT 1:30 PM BUTROVICH 205
04/11/07	(S)	JUD AT 5:30 PM BUTROVICH 205

WITNESS REGISTER

Don Bullock, Attorney
Legislative Legal and Research Services Division
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Discussed constitutional issues related to AGIA - SB 104

Larry Ostrovsky, Chief Assistant Attorney General
Oil, Gas & Mining Section
Department of Law
Anchorage, AK
POSITION STATEMENT: Discussed constitutional issues related to AGIA – SB 104

Bonnie Harris, Senior Attorney General
Civil Division
Oil Gas and Mining Section
Department of Law
Anchorage, AK
POSITION STATEMENT: Explained expedited review in AGIA – SB 104

ACTION NARRATIVE

CHAIR HOLLIS FRENCH reconvened the Senate Judiciary Standing Committee meeting at 5:39:09 PM. Present at the call to order were Senator Wielechowski, Senator McGuire, and Chair French.

SB 104-NATURAL GAS PIPELINE PROJECT

CHAIR FRENCH announced the consideration of SB 104. He recapped previous testimony and asked Mr. Bullock to present his view of what general law is and is not and some instances where the supreme court has discussed it.

5:40:24 PM
DON BULLOCK, Attorney, Legislative Legal and Research Services Division, Legislative Affairs Agency, said he generally agrees with the Department of Law representative who described general law as the law of general application. That can be distinguished from a contract, which isn’t general law, because a contract only binds the party.

The Alaska Supreme Court considered exemptions granted by general law in Stanek v. Kenai Peninsula Borough. After discussing Article 9, Section 4, the court said:

> By requiring the equal assessment of property AS 29.45.110 implies an equal taxation goal. Accepting that equal taxation is a goal of section .110, this goal is necessarily subject to tax exemptions that are authorized by statute.

MR. BULLOCK said exemptions are narrowly construed and generally they are construed in favor of the government and against the taxpayer. He would expect a tax inducement to be similarly construed in favor of the state. When a tax inducement is given and it's contracted to the point of no change, it has a potential burden on other taxpayers that would otherwise be similarly situated. "If the state has fiscal needs they must come from somewhere and if you've taken some people…out of the mix, then other people would have to pick up the burden." Part of the Stanek case talked about equal assessment of the property, he stated.

CHAIR FRENCH asked him to give some examples of general law tax exemptions that are currently in statute.

MR. BULLOCK cited AS 43.65.010, which says that all new mining operations are exempt from the tax levied by the chapter for three and one-half years after production starts. It isn't a contract, he stated.

CHAIR FRENCH said it just says that the first three and one-half years of mining production is tax-free, but the operator who starts a new mine can't bank on that exemption continuing indefinitely. The legislature could change that tax exemption this year, he stated.

MR. BULLOCK added that laws are always subject to change; that's the legislature's job. For example, "Say the PPT had been locked into contract last year, and if it turns out that the first filing shows that there was a flaw in the mechanism for establishing the tax… How bad would the mistake have to be before you could go in and rewrite the contract so that you could change the tax because there was a fundamental problem?" Whole fiscal parts of the state constitution provide the legislature with maximum fiscal flexibility so it can respond to the duties of the state. Also, requirements in the U.S Constitution—such as complete auto transit—look at state taxes and apply a test as to whether it is excessive or not. It’s a standard that prevents the legislature from going hog-wild and imposing an unreasonable burden.

CHAIR FRENCH asked if a general law tax exemption could last for four or five years or if it’s more constitutional if it’s shorter.

MR. BULLOCK said he doesn’t believe timing makes a difference. As long as it’s by general law you could have it indefinitely. Last year PPT repealed the tax exemption that provided a lower tax rate for oil production for the first five-years of a new field that first went into production after June 30, 1981. The issue is whether it’s being contracted away and if it is, then the time doesn’t matter. He noted that the governor's original bill states that the exemption is expected to apply for ten years.

CHAIR FRENCH asked which page and line he is referencing.

MR. BULLOCK said he didn't have a copy of the original bill.

SENATOR THERRIAULT advised that it’s on page 19.

CHAIR FRENCH asked if he’s looking at the gas production tax exemption under AS 43.90.320, on page 19.

MR. BULLOCK explained that the CS provides for a contractual tax exemption. AS 43.90.300 identifies who qualifies for the resource inducement, and AS 43.90.320 talks about the certificate that the commissioner of revenue issues being in the form of a contract between the state and the inducement recipient.

CHAIR FRENCH clarified the talk is centered on AS 43.90.300, which is page 16, line 29 [CSSB 104(RES)].

MR. BULLOCK agreed; also, the royalty inducement is set out in AS 43.90.310, and the tax inducement is set out in AS 43.90.320. It says those are contractual, he stated.

CHAIR FRENCH asked if it’s his view that adding the line that incorporates the inducements into the contract pushes this from constitutional into unconstitutional.

MR. BULLOCK said that is his opinion. He continued to say:

> It’s a contract; it becomes subject to general law. If it was just subject to general law then it’s open to amendment or repeal by the legislature. If it’s a matter of contract, then it introduces the element of Article 1, Section 15 that prohibits the legislature from passing a bill that impairs the obligations of a contract.

CHAIR FRENCH referenced an analysis done several years ago by a then Department of Law employee, labeled DOL005967.

To the question:

> May the legislature pass a general law that empowers the executive to enter a contract setting the tax obligations of a participant in a particular industry for a definite period…?

The answer was:

> No, Article 9, Section 4 empowers the legislature to establish exemptions only by general law. Although the legislature may allow the executive to reflect those exemptions in a contract, that contract, like the general law upon which it is based, will be subject to an implied condition that future legislatures may amend or repeal it.

The reason was:

> The contract that prohibits future legislatures from amending or appealing tax exemptions is a surrender of the taxing power.

CHAIR FRENCH asked Mr. Bullock if he had come across that analysis before while working on this subject.

MR. BULLOCK said he believes he read it somewhere, but he can’t be sure.

CHAIR FRENCH asked if his analysis today comports with the analysis from 1998.

MR. BULLOCK said with the exception of the sentence, “Although the legislature may allow the executive to reflect those exemptions in a contract…” He explained that if you strictly construe the exemption provision, it says it should be read narrowly. It says the general law, not a law authorizing the executive to contract or suspend it.

CHAIR FRENCH said to be clear, you wouldn't go as far as the person who wrote the opinion. That person would have allowed you to put the provisions into a contract, subject to the implied condition that the contract could be changed in the future.

MR. BULLOCK said he'd hesitate to go that far because it places it more in jeopardy. Using legislative office leases as an example, he explained that there's always a provision in those leases that they are subject to appropriation by the legislature. So if you did go to a contract and it was a clear condition that it's subject to change by the legislature, it would take the stability out of the contract, he stated.

5:51:43 PM
SENATOR McGUIRE asked how exchanges are handled between the parties regarding the different conditions that are put into oil and gas leases. She asked if he had discussed that yet and if he could use that as an analogy.

MR. BULLOCK said an analogy would apply only to the extent that it distinguishes the royalty situation from the tax situation. He then explained that the state has interests in its natural resources as both the owner and as the sovereign. Although the production tax is measured by the value of the oil or gas that's produced, the activity that's taxed is producing oil or gas. Bringing it to the point of production is when the state gets its royalty share either in-kind or in-value, and then the activity of producing the oil or gas is subject to tax in the state's role as sovereign. The royalties are contracts that can be renegotiated and changed and that's what happened on the Northstar. "I think it had to do with net profit share leasing," he stated.

MR. BULLOCK noted that the current committee substitute makes changes in the royalty regulations. It allows the applicant to use what might be more publicly available information to determine the value of the gas, and also to minimize the retroactive changes in the value of the gas when determining the value to the state. That does provide stability, but the CS also says that the people that are subject to the royalty can renegotiate their leases based on the new regulations. If they do, that becomes a new contract, he stated.

MR. BULLOCK reiterated that royalties involve contracts. The guidance in AS 38.01.180, which sets up for oil and gas leases, discusses contracts and other provisions in that title about what is to be included. Taxes are different, he said. The limitation of giving a royalty inducement as opposed to a tax credit relates to the fact that the state only owns the oil and gas that's on state land. If production from federal land is anticipated, then a royalty inducement wouldn't give the same benefit as some other inducement that covers general production—the act of producing oil and gas.

5:54:36 PM
CHAIR FRENCH asked if the state had ever gone back on a deal after granting a tax exemption to a resource developer.

MR. BULLOCK said not that he's aware of, but the severance tax that had the 5-year tax break was repealed. "It's possible that a field was benefiting from that that may have had the benefit change when PPT was enacted."

CHAIR FRENCH said he be interested in knowing if he comes across any examples.

SENATOR WIELECHOWSKI said Article 9, Section 4 of the constitution talks about tax exemptions for properties used for religious, charitable, cemeteries, and educational purposes. He noted that it also says that, "Other exemptions of like or different kind may be granted by general law." and asked if there is an argument that this is a different kind of exemption under the constitution.

5:55:52 PM Senator Huggins joined the committee.

MR. BULLOCK said that's true, but there's the issue of the subject of the exemption and how it's created. Certainly the language is open, but it's not so much what the exemption applies to as how it's created. Article 9, Section 4 says it may be granted by general law.

SENATOR WIELECHOWSKI said Section 1 is very definite when it says "shall not be suspended or contracted away" but then it says that it can be exempted by general law of a different kind. "That seems to me to be wide open," he said and asked if there's any interpretation of what "different kind" means.

MR. BULLOCK said "or different kind" is very broad language so it's a policy decision as to what you want to exempt. For example you could probably exempt a portion of gas that goes into the committed capacity that's acquired during the initial open season if you did it by general law, he said. "I don't believe if you provided that exemption by contract that it would apply." When you make that kind of exemption you look at the benefits to the state in return for the tax that it's giving up.

SENATOR WIELECHOWSKI asked if the Alaska Supreme Court would analyze "or different kind" as a rational basis test or a compelling strict scrutiny test.

MR. BULLOCK said he isn't sure, but he believes that adding "or different kind" broadened the policy-making authority of the legislature to identify suitable means for exemptions—suitable subjects. But, if you do that it also tells you how to do it, he said.

5:58:59 PM
CHAIR FRENCH added that it's by general law. Noting that the section is about property tax exemptions, he said you have to cope with the fact that it says "different," but it does have to be done by general law.

MR. BULLOCK said under the same principle of interpretation, the court could say it would only be a property exemption for something other than what's listed.

SENATOR WIELECHOWSKI asked if there's any analysis on what the constitution founders were thinking when they included that clause.

MR. BULLOCK explained that Representative Nerland, who was a delegate on the committee that developed Article 9, said the language allowing additional exemptions to be granted by general law was included to allow the state to offer incentives in the form of exemptions. He reiterated that the issue isn't the exemption, the limitation is how the exemption is granted.

6:00:19 PM
CHAIR FRENCH informed members that under tab 11 in the AGIA binder there is a thorough analysis of the Alaska Constitutional Convention minutes. It was prepared by BP and is a detailed examination of about every instance of the founding fathers talking about exemptions that can and can not be granted.

MR. BULLOCK read the following from Representative Leslie Nerland's comments on Article 9:

> Section 1 of this proposal has been altered slightly from the usual wording of a number of state constitutions and also the model state constitution that…generally reads that the power of taxation shall never be surrendered, suspended, or contracted away. The committee felt that definitely the power of taxation should never be surrendered so we inserted a semicolon, but we did feel that there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to encourage new industry to come in, and that is the reason for the particular wording that is later provided for under Section 4.

CHAIR FRENCH noted that the emphasis was on new industry.

SENATOR WIELECHOWSKI added that the committee commentary included the following: "The legislature is authorized to make further tax exemptions to encourage, among other purposes, new industry."

MR. BULLOCK said the constitutional language actually says "like or different kind" which is quite broad.

CHAIR FRENCH added that under tab 2 there's an opinion piece by Vic Fisher and Jack Coghill opining that the Stranded Gas Development Act contract was far longer and broader than anything they had in mind when they were writing the constitution.

6:02:42 PM
SENATOR McGUIRE said she'd like to hear an analysis of how that particular constitutional provision balances the inability of one legislature to bind another.

MR. BULLOCK said if it's by general law the legislature can amend it by general law, but if it's by contract there is the issue of whether the legislature can pass a law that affects the terms of that contract. "This is a provision that gives the legislature flexibility, and to make the choice of what should be exempted," he stated.

CHAIR FRENCH asked if the provision is a general law provision.

MR. BULLOCK said yes, in Article 9, Section 4.

SENATOR McGUIRE said she thought she was hearing that the general law provision supersedes to give the legislature the flexibility to offer stability and certainty in certain areas.

MR. BULLOCK explained that Representative Nerland was talking about other constitutions that said that the power of taxation shall never be suspended or contracted away, but "except as provided in this article" was added here. He continued to say:

> The only other provision in the article that speaks to an exception to contracting away…only speaks to suspension because an exemption would be in effect for the period in which the law was in effect that granted the exemption, and when the law goes away the suspension goes away.

6:05:50 PM
CHAIR FRENCH said he can hear Mr. Ostrovsky thinking and he would say you've got to give effect to every word in the constitution. How can you avoid that word "contract?" he asked.

MR. BULLOCK responded you have never surrender, never suspend, never contract, and except as provided. If you look at what's provided as alternatives to those three in Article 9, Section 4, the only one is exemptions that are granted by general law. If it's a contract, is it a general law? You don't enact contracts, you enact laws and if it's narrowly construed, the exception must be created by the law.

SENATOR WIELECHOWSKI said with due respect to the framers there seems to be a contradiction in the law. He wonders if delegate Nerland's statement "that the provision that allows for some exemption or inducement to industries or similar things" was somewhat prophetic.

SENATOR THERRIAULT questioned whether the court might view this on a sliding scale. When there's tension between sections of the constitution the court generally looks for the reasoning and justification. The constitution also says that it's the legislature's job to provide for utilization of the resources. As part of the future litigation on this issue will the court say the legislature and the executive must get the resources out for utilization, and to make it economically viable to take place this certainty had to be given for a period of time. He questioned whether the court would look at the tension between the two sections and ask how much they had to give, for how long, and what numbers they ran to show that they had to give it. Is that what we're setting up here?

MR. BULLOCK said in addition to the tax the bill has an option that has to do with contract, which the state has the power to offer as an inducement. The state does have the power to renegotiate contracts. He opined that the court would have trouble getting around anything to do with tax because that affects all the taxpayers. That includes the oil and gas taxpayers that may not be receiving the inducement and also any person, including individuals, that is subject to pick up the slack if an inducement is given one place that shorts revenue someplace else. The clarity of the exemption provision would require the court to stretch to allow something that's contrary even though it may be a good reason. In the past the constitution has stopped a lot of good ideas such as local hire and giving the PFD based on durational residency requirements. "If it's truly a good idea then maybe the constitution should be amended to allow contracts. If…it provides the justifiable benefit to the state and if it's done by law, you can make the policy as to what types of contracts would be in the overall best interest," he stated.

6:10:46 PM

SENATOR WIELECHOWSKI asked if it would help with the exemption portion of Section 4 if the legislature were to award the contract through a general law instead of approving or disapproving the commissioners' decision.

MR. BULLOCK said it would, but you'd run into the separation of powers issues under Article 2, Section 1, which identifies the power of the legislature, and Article 3, Section 1, which defines the powers of the executive.

SENATOR WIELECHOWSKI asked if he is saying that under the constitution the legislature could not award a contract.

MR. BULLOCK explained that the legislature can award contracts that affect the legislature, but this contract would affect the state.

SENATOR WIELECHOWSKI asked which section he's referring to.

MR. BULLOCK said the separation of powers doctrine is attributed to Article 2, Section 1 and Article 3, Section 1.

SENATOR THERRIAULT asked about the genesis of the contractual language.

MR. BULLOCK said it was suggested by the administration.

SENATOR WIELECHOWSKI said more thought should be given to making AGIA into a general law somehow.

MR. BULLOCK said AGIA would be a general law.

SENATOR WIELECHOWSKI said if it's a general law and the 10-year exemption is included, how does the legislature violate the separation of powers.

MR. BULLOCK said if you create a contract then it's contracting away regardless of whether the executive or legislature does it.

6:14:31 PM
CHAIR FRENCH, noting that the state has done this in the past, asked him to explain what happened in the 1968 Industrial Incentive Act.

MR. BULLOCK explained that it provided tax credits in the form of a contract. That was never challenged, but three supreme court appeals were based on those credits. Two dealt with how the tax return as a whole would reflect the credit if part of a member of an affiliated group qualified for the credit. That includes the multi-state multi-national aspects of the business and those appeals had to due with Union Oil and the Collier fertilizer plant in Kenai. The third case was an equal protection argument in which K&L Distributors said that an incentive that was given to a brewery was unconstitutional. They argued that as a distributor of similar malt beverages, they should have a similar opportunity for the credit. "So the constitutional issues in Article 9, Section 1 and 4…have never been presented to the court," he stated.

SENATOR HUGGINS asked for a 30 second burst on the potential to exempt the volume of gas based on the open season concept.

MR. BULLOCK said it would be by general law and the exemption would be for a percentage of the gas that is going to be shipped through the committed capacity from the first binding open season. By general law you'd be making policy decisions as to how much and how long so if you made a mistake you would be free to respond to make changes.

CHAIR FRENCH added it would be like a senior citizen property tax exemption. You could grant a tax exemption on the first $250,000 value of a senior's home, but if the tax rolls suffer immeasurable then you make adjustment to hit the sweet spot. He continued to say what you're suggesting is that you could take the 4 bcf/day volume of the pipe and give a tax exemption on one quarter of the volume for the life of the project. Everyone realizes that the legislature could tweak that up or down, he said. Is that along the lines of what you're suggesting?

MR. BULLOCK said that's right, and the property tax exemption is a good example because of the effect on municipalities that had to honor the exemption and the extent to which the state was able to provide money to the municipalities to offset some of the revenue hit. He added that he's noticed that the legislature isn't always of the same mind so there will be policy discussions.

MR. BULLOCK continued to explain that when special funds are created and even though the legislature has identified a purpose for the money, it is nothing more than a statement of the policy at the time that the provision was enacted. The 10-year provision is like that, he said.

6:20:00 PM
SENATOR WIELECHOWSKI asked who would have standing to challenge this if the bill was not changed.

MR. BULLOCK said anybody in the state could challenge it under the constitutional provision. "If they win we'd be paying their attorney's fees."

SENATOR WIELECHOWSKI asked what would happen if the provision in .320 was struck down and there was a lower rate for the person that came to the initial open season.

MR. BULLOCK replied the court would address it and strike the part of the provision that was unconstitutional. "They would take away the inducement that was offered by contract," he said.

CHAIR FRENCH asked if the court would deem the question ripe for review: upon passage of AGIA; upon the first gas flowing subject to the exemption; or after the legislature had raised taxes contrary to the spirit and letter of the exemption.

MR. BULLOCK said it's not clear because the declaratory judgment act in AS 22.10.020(g) says there must be an actual controversy.

The court might say the controversy doesn’t arise under the tax until there’s been an increase in the tax and the effect of the inducement actually happens. Before that time the court would be speculating as to whether the inducement would ever kick-in. One case he read that dealt with tax credits said the legislature could say this is a final administrative opinion that isn’t subject to appeal, but the court could say that although the laws the legislature passes are presumed to be constitutional, it doesn't take away constitutional rights. So if we said that the award of the contract for the license is a final decision that can’t be appealed and there’s a due process issue, the applicant would still have a ticket to court to argue the constitutional issue. Some states allow more liberal declaratory judgments, but ours amounts to summary judgment, he stated.

6:23:38 PM
SENATOR McGUIRE recapped that there’s a severability clause in the bill and there’s a set of inducements with a set of penalties that have treble damages. If the court finds the 10-year freeze unconstitutional but it’s severable, and it isn’t ripe until after there’s a licensee, what are the licensee’s rights at that time and what are the state’s obligations, he asked.

MR. BULLOCK said it’s speculative, but it comes down to how critical the inducement is to somebody making a commitment, which in turn lets the project go forward, he stated.

SENATOR THERRIAULT asked if the administration would be available to respond to questions since that’s where the change came from.

CHAIR FRENCH said his intention is to hear from Mr. Ostrovsky next.

6:26:26 PM
LARRY OSTROVSKY, Assistant Attorney General, Oil, Gas and Mining Section, Department of Law, stated that despite his great respect for Mr. Bullock, he does not believe a court would be persuaded by his analysis. To begin with he writes-out the meaning of “contract” from the constitution, he said. The analysis that Senator French did last year talked about the history of the no surrender clause when states entered into tax contracts with railroads, banks and other entities in the late 1800s and early 1900s. A series of those cases went to the U.S. Supreme Court and the states were held to be bound by those contracts under the U.S. Constitution. When the National

Municipal League came up with its model, it had provisions about not surrendering, suspending or contracting away the power to tax. During the Constitutional Convention the delegates received the following advice from the Public Advisory Service:

> It is a settled principle of public law that one legislature can not bind another and that the government of a state can not contract away its police powers. The power to tax is not considered inalienable, however. In granting exceptions one legislature may bind another and thereby lose for the state, its power to tax. The exemption may, under certain conditions, result in a contract relationship that legislatures may not abrogate without violating the federal constitutional guarantee.

MR. OSTROVSKY said the explanation was that the model contract should be adopted so as not to fall into the trap of contracting away because that might bind the state under the U.S. Constitution. Under the Stranded Gas Act producers and others want a contract because they believe they can invoke the U.S. Constitution, but the framers rejected the model act and put in Article 9, Section 1, which says:

> Article 9 – Finance and Taxation
> § 1. Taxing Power
> The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Implicit in that sentence is some power that allows for contracting away, he stated. In that sentence there are exceptions of like or different kinds that are granted by general law.

CHAIR FRENCH asked if there is power in Article 9 to surrender the power of taxation as well.

MR. OSTROVSKY said no; he opined that the legislature can't surrender the power, but it can suspend or contract away. Look at Section 4 and ask what general law means. If it means a law that the legislature can enact and then change the next day, then it’s not a binding contractual commitment and certainly not the kind that the Public Advisory Service talked about. He believes general law to mean a general law as opposed to special legislation. “If you look in the constitution, they draw that distinction.," he said. It says the legislature shall pass no local or special act if a general act can be made applicable. A special act applies to a particular party and a general act is of general applicability. S to give meaning to the term "contract" the provision says that the legislature can contract away, but it has to be through an act that's generally available. In other words it can't contract away with Joe's Auto Body but it can make a provision that's available to everybody under certain circumstances of general law. That's the only way to give meaning to that term, he stated.

6:32:27 PM
MR. OSTROVSKY took issue with Mr. Bullock's statement that the constitution has to be read so as to give flexibility to the legislature because if you read "contract" in there it's just the opposite. When the legislature was considering this, it was considering the provision that said it couldn't suspend, surrender or contract away. But the legislature wanted the flexibility to encourage new business and investment and to be able to give assuredness of a contractual commitment on taxes.

MR. OSTROVSKY highlighted the Industrial Incentive Act in 1968 that was the subject of an Atlantic Richfield case. That case had some dicta—language that explains the courts thinking—that had to do with the unitary tax and the argument that this impacted some fixed right that Atlantic Richfield had by contract. The court said that no lease provision has been impaired. By entering into the leases the state could not and did not contract away its power as a sovereign to tax income earned in the state. People have interpreted that to mean that the state did not and could not contract away its power, he stated. But the Alaska Supreme Court cited another court, which said that "Contractual arrangements remain subject to subsequent legislation by the presiding sovereign even where the contracted issue requires payment of a royalty for a license or franchise issued by the governmental entity. The government's power to tax remains, unless 'it has been specifically surrendered in terms which admit of no other reasonable interpretation.'"

MR. OSTROVSKY said the court was referring to the "unmistakeability doctrine." He explained that when the U.S. Supreme Court looked at these cases it was very protective of state's rights, and it said that states could enter into tax contracts, but they wouldn't be held to those contracts unless it was unmistakable that the state intended to do that. That's precisely what the Alaska Supreme Court was saying in this case, he said. It wasn't buying the tax contract argument because by entering into oil and gas leases, the state didn't unmistakably agree to a tax contract. Although the issue wasn't deal with squarely, it's obvious that the issue wasn't so facially unconstitutional or deficient that the court su esponte—on its own—found a problem with the statute, he said. It simply wrote a footnote recognizing a problem. Again, he said he disagrees with Mr. Bullock. The court would look at the constitutional language and at previous statutes and read it as giving the legislature flexibility to induce investment and bring new industry into the state.

SENATOR WIELECHOWSKI asked if there's a limit. Could we do it for 45 years?

6:37:21 PM
MR. OSTROVSKY surmised that the court would give deference to the administrative and the legislative records and it's likely it would want to see a close nexus between a period of fiscal certainty and the nature of the project.

SENATOR McGUIRE asked where the right of the people of Alaska to be represented comes in. When the constitution was drafted it was explicit in setting legislative terms and the concept was that the House is closest to the people. She opined that that is the premise behind the idea of one legislature not being able to bind another. It's the people's ability to reflect a desired change through their elected officials. From a practical point, I need to be able to explain to the people that I represent why I'm locking up the ability for my successor to make a decision that is different than the one that I'm making today.

MR. OSTROVSKY explained that the courts have articulated limits to this doctrine. The U.S. Supreme Court has said that even though some states have the ability to contract away, a state could not contract away its ability to tax to the point that it impacted essential elements of sovereignty.

SENATOR McGUIRE said this state relies on oil revenues for about 90 percent of its revenue and she questioned whether you couldn't argue that it's essential core services that are affected.

MR. OSTROVSKY said that's one reason that AGIA is narrower in holding parties harmless to tax changes. It affects production tax; it doesn't affect royalties, corporate income tax, or property tax. The court isn't going to look at 90 percent of the state's revenue, it's going to look at one taxing element, he stated. Although he didn't know what percentage of state revenues would be gas production tax, he did know it would be much less than 90 percent.

6:42:13 PM
SENATOR THERRIAULT questioned why the contractual language was not in the original draft of AGIA.

MR. OSTROVSKY confessed he wasn't sure how the contractual language got there, but the Department of Law (DOL) thought it would be a good idea if it mimicked the language in the Industrial Incentive Acts to make sure it was a contractual commitment.

SENATOR THERRIAULT asked if the original intent was that it be done contractually.

MR. OSTROVSKY replied through the certificate issued by DOL but this language came in later on and it reflects the intention and in DOL's view made it closer to the previous acts.

SENATOR THERRIAULT asked if he was involved in suggesting the language.

MR. OSTROVSKY said DOL was consulted and made suggestions.

6:43:52 PM
SENATOR McGUIRE asked how it would play out if, after the licensee has a license, the supreme court decided that the issue is ripe and it found that the lock-in is unconstitutional.

MR. OSTROVSKY said he has confidence in the free market. It'll be a decision between private parties—a pipeline company and a shipper.

6:45:38 PM
CHAIR FRENCH said the committee would set the issue of constitutionality aside for awhile. He noted that Section 43.90.410 on page 20 calls for expedited agency review, and said some discussion on that would provide a segue to the next item on the list, which is expedited judicial review.

6:47:18 PM
BONNIE HARRIS, Senior Attorney General, Civil Division, Oil Gas and Mining Section, Department of Law, explained that the intent of the section on expedited review and action by state agencies is to deal with state permitting and rights-of-way. It makes it

clear that the state shall take action to expedite the review and it shall not take any action that is not required by regulation or statute if it would slow issuance of the permits.

SENATOR WIELECHOWSKI expressed concern that subsection (b) gives tremendous authority to the coordinator. One person basically has veto power over any agency decision.

MS. HARRIS agreed that it does gives power to the coordinator, but it's limited to what's in statute with regard to rights-of-way or permits. The amount of discretion the coordinator has would be within your purview, she said.

CHAIR FRENCH asked who settles disputes between a state agency and the coordinator.

MR. OSTROVSKY said he would expect a dispute to go to the governor, but statute does vest certain authorities with the coordinator.

CHAIR FRENCH asked if the coordinator could essentially override a decision or request by a commissioner.

MR. OSTROVSKY reminded the committee that the lore is what is required by law. The coordinator comes in if the commissioners demand something that's not required by law. It's the pure policy calls, he said.

CHAIR FRENCH asked for an example.

MR. OSTROVSKY said he isn't sure he has an example, but it's designed as a prophylactic to prevent someone from putting requirements on a permit that aren't required by law, but that the agency would like to have. But it could also be an applicant who challenges the permit saying they were required to do things that aren't required by law. In such an instance the coordinator would be able to expedite things and free the applicant from having to go to court.

6:52:41 PM
SENATOR WIELECHOWSKI cited examples of potential rights-of-way or permit conflicts between various user groups, the commissioners and the pipeline coordinator and emphasized that the AGIA coordinator has a tremendous amount of power. We may want to think about that, he said.

SENATOR THERRIAULT mentioned “homeless stipulations” and described a hypothetical situation in which the Department of Natural Resources (DNR) is required to confer with the Department of Fish and Game (ADF&G) before issuing a permit. He explained that in the past the requirement to confer was used as a lever by the second agency to get the first agency to stipulate to some possibly unrelated action. It’s the sort of situation where the second commissioner has no statutory authority but refuses to play unless his demands are granted, he said.

SENATOR HUGGINS described a scenario in which the licensee had difficulty and Warren Buffet came in and slapped down his checkbook to commit to build the pipeline. Who is Mr. Buffet’s pipeline coordinator and is there an existing statutory provision that would accommodate such a situation, he asked.

MR. OSTROVSKY replied this pipeline coordinator is for the AGIA project, but there’s nothing to prevent agencies from creating other coordinator positions. They wouldn’t necessarily have these particular powers, but project applicants like coordinators because they navigate bureaucratic roadblocks.

SENATOR HUGGINS asked if the current language allows a subsequent coordinator to perform these same functions.

MR. OSTROVSKY explained that the coordinator is given particular authorities by law pertaining to the AGIA project in particular; those authorities don’t extend to another project.

6:57:16 PM
SENATOR WIELECHOWSKI suggested the committee consider adding a safety valve that says that the AGIA coordinator’s decision may be reviewed and overruled by the legislature or someone.

CHAIR FRENCH asked if the inducement coordinator serves at the pleasure of the governor.

MS. HARRIS recalled that the coordinator is appointed by the governor and serves a term.

CHAIR FRENCH added that he/she is also confirmed by the legislature.

SENATOR WIELECHOWSKI said section .400 says “terminates one year after commencement of commercial operation of the project” which implies that they can’t be removed.

CHAIR FRENCH said so the short answer is no.

SENATOR HUGGINS pointed out that it's the position and not the person.

CHAIR FRENCH said it's a good time to take a break because it could be analyzed both ways. He outlined the schedule for the next meeting, which would include expedited judicial review and the legislative role in approving or disapproving a license. He thanked everyone for their help in the discussion of the constitutional issues.

SENATOR THERRIAULT noted that Senators Murkowski and Stevens introduced legislation in Congress today that had a clarifying provision for expedited court review in the federal system. That might be something to look at, he stated.

There being no further business to come before the committee, Chair French adjourned the meeting at 6:59:56 PM.