

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

March 28, 2012

1:45 p.m.

**MEMBERS PRESENT**

Senator Hollis French, Chair  
Senator Bill Wielechowski, Vice Chair  
Senator Joe Paskvan  
Senator John Coghill

**MEMBERS ABSENT**

Senator Lesil McGuire

**OTHER LEGISLATORS PRESENT**

Representative Mike Hawker

**COMMITTEE CALENDAR**

**BOARD AND COMMISSION CONFIRMATIONS**

Police Standards Council

BRAD REICH - Kiana  
JAMIE SUNDERLAND - Unalaska

- CONFIRMATIONS ADVANCED

Judicial Council

Kenneth Kreitzer - Juneau

- CONFIRMATION ADVANCED

**COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 215(JUD) AM**

"An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor."

- HEARD AND HELD

**COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 6(JUD) AM**

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good

cause; and establishing a procedure for the removal or suspension of a regent."

- HEARD AND HELD

SENATE BILL NO. 168

"An Act relating to geographic cost-of-living salary adjustments for justices of the supreme court and judges of the superior and district courts; and providing for an effective date."

- MOVED CSSB 168(JUD) OUT OF COMMITTEE

SENATE BILL NO. 198

"An Act establishing procedures relating to issuance, suspension, or revocation of certification of police officers by the police standards council; making certain court service officers subject to certification by the police standards council; making confidential certain information that personally identifies a police officer; relating to requesting or requiring police officers to submit to lie detector tests; repealing a provision exempting certain police officers from a prohibition against requiring certain employees to submit to lie detector tests; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

#### PREVIOUS COMMITTEE ACTION

BILL: HB 215

SHORT TITLE: PIPELINE PROJECT: JUDICIAL REVIEW/ROW

SPONSOR(S): REPRESENTATIVE(S) CHENAULT

03/29/11	(H)	READ THE FIRST TIME - REFERRALS
03/29/11	(H)	JUD
04/06/11	(H)	JUD AT 1:00 PM CAPITOL 120
04/06/11	(H)	Heard & Held
04/06/11	(H)	MINUTE(JUD)
04/08/11	(H)	JUD AT 1:00 PM CAPITOL 120
04/08/11	(H)	-- Rescheduled to 4/9/11 @ 12:30 pm --
04/09/11	(H)	JUD RPT CS(JUD) NT 5DP 2NR
04/09/11	(H)	DP: LYNN, KELLER, THOMPSON, PRUITT, GATTO
04/09/11	(H)	NR: GRUENBERG, HOLMES
04/09/11	(H)	JUD AT 12:30 AM CAPITOL 120
04/09/11	(H)	-- Rescheduled from 4/8/11 --
04/11/11	(H)	TRANSMITTED TO (S)
04/11/11	(H)	VERSION: CSHB 215(JUD) AM

04/12/11 (S) READ THE FIRST TIME - REFERRALS  
04/12/11 (S) JUD, FIN  
03/05/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
03/05/12 (S) Heard & Held  
03/05/12 (S) MINUTE(JUD)  
03/28/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 6

SHORT TITLE: REMOVING A REGENT

SPONSOR(s): REPRESENTATIVE(s) GRUENBERG

01/18/11 (H) PREFILE RELEASED 1/7/11  
01/18/11 (H) READ THE FIRST TIME - REFERRALS  
01/18/11 (H) EDC, JUD  
02/11/11 (H) EDC AT 8:00 AM CAPITOL 106  
02/11/11 (H) Heard & Held  
02/11/11 (H) MINUTE(EDC)  
02/21/11 (H) EDC AT 8:00 AM CAPITOL 106  
02/21/11 (H) Moved CSHB 6(EDC) Out of Committee  
02/21/11 (H) MINUTE(EDC)  
02/23/11 (H) EDC RPT CS(EDC) 5DP  
02/23/11 (H) DP: P.WILSON, SEATON, KAWASAKI, FEIGE,  
DICK  
03/21/11 (H) JUD AT 1:00 PM CAPITOL 120  
03/21/11 (H) Heard & Held  
03/21/11 (H) MINUTE(JUD)  
03/23/11 (H) JUD AT 1:00 PM CAPITOL 120  
03/23/11 (H) Scheduled But Not Heard  
04/04/11 (H) JUD AT 1:00 PM CAPITOL 120  
04/04/11 (H) Moved CSHB 6(JUD) Out of Committee  
04/04/11 (H) MINUTE(JUD)  
04/05/11 (H) JUD RPT CS(JUD) 3DP 1NR 1AM  
04/05/11 (H) DP: GRUENBERG, HOLMES, THOMPSON  
04/05/11 (H) NR: PRUITT  
04/05/11 (H) AM: KELLER  
04/11/11 (H) TRANSMITTED TO (S)  
04/11/11 (H) VERSION: CSHB 6(JUD) AM  
04/12/11 (S) READ THE FIRST TIME - REFERRALS  
04/12/11 (S) JUD  
03/05/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
03/05/12 (S) Heard & Held  
03/05/12 (S) MINUTE(JUD)  
03/21/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
03/21/12 (S) Scheduled But Not Heard  
03/28/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 168

SHORT TITLE: GEOGRAPHIC COLA FOR JUDGES  
SPONSOR(s): RULES BY REQUEST

01/18/12	(S)	READ THE FIRST TIME - REFERRALS
01/18/12	(S)	JUD, FIN
01/30/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
01/30/12	(S)	Heard & Held
01/30/12	(S)	MINUTE(JUD)
03/26/12	(S)	JUD AT 2:00 PM BELTZ 105 (TSBldg)
03/26/12	(S)	Heard & Held
03/26/12	(S)	MINUTE(JUD)
03/28/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

#### **WITNESS REGISTER**

BRAD REICH, Appointee  
Alaska Police Standards Council  
Kiana, AK

**POSITION STATEMENT:** Testified as appointee to the Alaska Police Standards Council.

JAMIE SUNDERLAND, Appointee  
Alaska Police Standards Council  
Unalaska, AK

**POSITION STATEMENT:** Testified as appointee to the Alaska Police Standards Council.

KENNETH KREITZER, Appointee  
Judicial Council  
Juneau, AK

**POSITION STATEMENT:** Testified as appointee to the Judicial Council.

TED MADSEN, Staff  
Representative Max Gruenberg  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Described the proposed changes to HB 6, version O.A, on behalf of the sponsor.

REPRESENTATIVE MIKE CHENAULT  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Sponsor of HB 215.

TOM WRIGHT, Staff  
Representative Mike Chenault

Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Reviewed HB 215 on behalf of the sponsor.

KEN VASSAR, General Counsel  
Alaska Gasline Development Corporation (AGDC)  
Anchorage, AK

**POSITION STATEMENT:** Provided supporting testimony on HB 215.

JOE DUBLER, Vice President and Chief Financial Officer  
Alaska Gasline Development Corporation (AGDC)  
Anchorage, AK

**POSITION STATEMENT:** Provided supporting testimony on HB 215.

DAVE HAUGEN, Project Manager  
Alaska Gasline Development Corporation (AGDC)  
Anchorage, AK

**POSITION STATEMENT:** Provided supporting testimony on HB 215.

TINA GROVIER, Attorney  
Birch Horton Bittner and Cherot  
Anchorage, AK

**POSITION STATEMENT:** Provided information related to HB 215.

JOHN HUTCHINS, Assistant Attorney General  
Civil Division  
Department of Law (DOL)  
Juneau, AK

**POSITION STATEMENT:** Provided information and answered questions related to HB 215.

RUTH HAMILTON HEESE, Assistant Attorney General  
Civil Division  
Department of Law (DOL)  
Anchorage, AK

**POSITION STATEMENT:** Explained the reason for AS 38.35.200(d) in HB 215 and suggested clarifying language.

#### **ACTION NARRATIVE**

[1:45:29 PM](#)

**CHAIR HOLLIS FRENCH** called the Senate Judiciary Standing Committee meeting to order at 1:45 p.m. Present at the call to order were Senators Wielechowski, Coghill, Paskvan, and Chair French.

#### **CONFIRMATION HEARING(S) Alaska Police Standards Council**

[1:45:45 PM](#)

CHAIR FRENCH announced the first order of business would be the confirmation hearing of Brad Reich to the Alaska Police Standards Council. He asked Mr. Reich to tell the committee why he was interested in serving on the council.

[1:46:01 PM](#)

BRAD REICH, Appointee, Alaska Police Standards Council (APSC), said he was interested in serving on the APSC to promote public safety. Currently, he was the Mayor of Kiana, a member of the regional school board, a member of the Alaska Association of School Boards, and a member of the Kiana Liquor Board.

CHAIR FRENCH asked how long he had served as mayor.

MR. REICH replied this was his third term.

CHAIR FRENCH noted that he was serving on the Northwest Arctic Borough Public Safety Commission (NABPSC), and asked what it does.

MR. REICH said NABPSC primarily oversees the borough VPSO program and develops five-year public safety plans. The council is also working to get VPOs in the villages.

[1:48:38 PM](#)

CHAIR FRENCH asked if he had any bias that would make it difficult to sit in judgment of police officers accused of wrongdoing.

MR. REICH said no.

CHAIR FRENCH thanked Mr. Reich for his willingness to serve.

CHAIR FRENCH announced that the next order of business would be the confirmation hearing of Jamie Sunderland to the Alaska Police Standards Council. He asked Mr. Sunderland to tell the committee about his interest in serving on the council.

[1:49:35 PM](#)

JAMIE SUNDERLAND, Appointee, Alaska Police Standards Council, said he had worked for the Unalaska Police Department for 16.5 years, and had served as the chief for the last 4.5 years. He relayed that he served in the military for 10 years and held a master's degree in business administration. He said he had attended council meetings in the past and believed he would be a

valuable asset in holding officers accountable for their actions.

CHAIR FRENCH reviewed Chief Sunderland's credentials including 10 years in military intelligence, graduation from the FBI National Academy, and the ability to speak Russian.

CHIEF SUNDERLAND added that he also serves on the Alaska Emergency Response Commission.

CHAIR FRENCH thanked Chief Sunderland for stepping forward to serve.

### Judicial Council

CHAIR FRENCH announced the next order of business would be the confirmation hearing of Kenneth Kreitzer to the Judicial Council. He asked Mr. Kreitzer to tell the committee why he was interested in serving on the Judicial Council.

[1:52:34 PM](#)

KENNETH KREITZER, Appointee, Judicial Council, said that when he retired from public safety after 25 years he was looking for something to do that would be both engaging and important. He served on the Citizen's Advisory Commission on Federal Areas (CACFA) for three years and became interested in serving on the Judicial Council when he became aware of how important it was to the people of Alaska.

CHAIR FRENCH offered his belief that the Judicial Council was one of the more important councils to which the Legislature makes appointments. It has a great deal of influence on who becomes an Alaska judge. He asked Mr. Kreitzer if he had attended any council meetings.

MR. KREITZER replied he had attended at least four meetings since the governor appointed him on August 1. During those meetings, the council considered applicants for three district court seats and three superior court seats. He said he found the work both engaging and interesting.

CHAIR FRENCH asked what would be the most difficult issues a Judicial Council member would face.

MR. KREITZER responded that it is not an easy task to pick the "best of the best."

CHAIR FRENCH asked when the council would select a new supreme court justice.

MR. KREITZER responded that it would happen in June.

CHAIR FRENCH asked if the council had received a list of names from the Bar poll.

MR. KREITZER confirmed that the council would interview the candidates from the Bar poll and that the current list had 12 names.

[1:55:10 PM](#)

SENATOR WIELECHOWSKI asked if he believed that the way Alaska appoints its judges was appropriate.

MR. KREITZER answered yes; there was real beauty to the system. The council selects strictly by merit and the governor can select from those candidates anyway he or she likes. Initially, Alaska was one of two states that had an appointment system, and now 33 states have similar systems.

SENATOR WIELECHOWSKI said some people want to change the process because they think the governor should have free reign in the selection. He asked Mr. Kreitzer if he had an opinion one way or another about how Alaska selects its judges.

MR. KREITZER said he liked the current system, but was open to suggestions.

SENATOR WIELECHOWSKI asked if he had ever advocated to change the process for selecting judges or had plans to advocate changing the process.

MR. KREITZER answered no, and reiterated that he liked the system and the way the council vets the candidates.

SENATOR WIELECHOWSKI asked how he would define "activist judge" and if he would reject someone he deemed to be an activist judge.

MR. KREITZER responded that he would consider a person to be an activist if he or she went outside the rule of law, went outside of common sense, tried to push their personal beliefs, or had trouble being impartial. "They probably wouldn't get my vote and I can't imagine them getting anybody else's vote on the council," he said.

SENATOR WIELECHOWSKI asked if he could cite specific examples of judicial activism that would cause him to reject an applicant for being a judge.

MR. KREITZER said he hadn't thought about it.

[1:58:22 PM](#)

CHAIR FRENCH noted that Mr. Kreitzer earned a Bachelor of Arts degree from Wright State University and had an Alaskan resume that included city council member, fisheries deckhand, correctional officer, airport safety officer, drilling fluids engineer, professional firefighter, legislative aide, city treasurer, EMT technician, and PSEA board member. He asked Mr. Kreitzer if he had formulated a response to Senator Wielechowski's question about judicial activism.

MR. KREITZER mentioned abortion and said that personal opinions should not enter in.

SENATOR WIELECHOWSKI asked if he would agree or disagree with those who say that Roe v. Wade was an activist decision.

MR. KREITZER responded that the questions were putting him on the spot.

SENATOR WIELECHOWSKI said that was not his intention.

[1:59:44 PM](#)

SENATOR COGHILL pointed out that, at one time or another, every member of the committee had disagreed with a judge's position. He questioned the relevance of the abortion issue if somebody was willing to be impartial.

SENATOR WIELECHOWSKI said politics aren't relevant, but he wanted to understand Mr. Kreitzer's position on judicial activism since he said he would not vote for an applicant who might be an activist judge. He asked Mr. Kreitzer if he considers either the Citizens United decision or the Roe v. Wade decision as examples of judicial activism.

[2:01:11 PM](#)

MR. KREITZER responded that an applicant's point of view or belief system does not enter into the equation unless he or she has been vocal and editorialized on a topic. If something like that came out in a person's interview, the council would talk about it and come to a consensus about whether the applicant

would be loyal to the rule of law. He reiterated that the role of the council is to look at merit and loyalty to the rule of law. He opined that it was inappropriate for the council to discuss personal opinions.

[2:02:33 PM](#)

CHAIR FRENCH asked, in any of the meetings he sat on, if he disagreed with any of the names the council forwarded to the governor.

MR. KREITZER replied not all of the applicants were his favorite, but he was happy with whomever the governor chose.

CHAIR FRENCH asked if there were applicants who he though should have gone on to the governor, but the council elected not pass along their names.

MR. KREITZER answered yes, one or two.

CHAIR FRENCH asked if he was alone in that belief.

MR. KREITZER replied he had never been the lone belief.

CHAIR FRENCH thanked Mr. Kreitzer.

[2:03:44 PM](#)

SENATOR WIELECHOWSKI moved to forward the names Brad Reich, Jamie Sunderland and Kenneth Kreitzer to the full body for a vote in joint session.

CHAIR FRENCH announced that without objection the names would be forwarded to the full body for consideration.

### **HB 6-REMOVING A REGENT**

[2:04:15 PM](#)

CHAIR FRENCH announced the consideration of HB 6 and asked for a motion to adopt the proposed committee substitute (CS), version G.

[2:04:41 PM](#)

SENATOR PASKVAN moved to adopt Senate CS for CSHB 6, labeled 27-LS0027\G, as the working document.

CHAIR FRENCH announced that without objection, version G was before the committee.

[2:05:06 PM](#)

TED MADSEN, Staff to Representative Max Gruenberg, explained that the Board of Regents suggested the following changes to CSHB 6(JUD)am:

Section 1 - Subsection (a) paragraph (3) states that it is not clear whether the Board of Regents has the constitutional authority to suspend or remove a regent. Section 1 also has one grammatical change.

Section 2 - subsection (a) paragraph (4) makes the suspension procedure, in the case of a complaint of malfeasance or nonfeasance in office, more rigorous. Three things are required: 1) a sworn complaint, 2) the governor must investigate the complaint, and 3) find "probable cause" to proceed further and suspend the regent. New language in this subsection will prohibit proceedings based on political differences or the discretionary performance of a lawful act or a prescribed duty. For example, a student would not be able to lodge a complaint and have a regent suspended because he or she disagreed with a tuition increase.

[2:07:01 PM](#)

CHAIR FRENCH asked if this was in response to a March 9 letter that, in his view, made good points.

MR. MADSEN said yes, and the sponsor worked closely with the legislative liaison to try to accommodate the concerns.

Section 2 - subsection (a) paragraph (5) requires a formal allegation or charge by a licensing board to proceed through a suspension proceeding. This makes the procedure more rigorous.

Section 2 - subsection (d) requires the Office of Administrative Hearings to conduct the hearings and the administrative law judge issues the decision. This is a way to insulate the Board of Regents from political directions from the governor.

Section 2 - subsection (g) paragraph (5) clarifies that a violation of a professional or occupational licensing statute or regulation that results in the revocation or suspension of a professional or occupational license that is related to the regent's ability to serve, will be grounds for suspension or removal of a regent.

Section 3 is a new section. It includes removal and suspension of a regent in the list of hearings conducted by the Office of Administrative Hearings.

[2:09:10 PM](#)

CHAIR FRENCH reviewed the process when a regent commits wrongdoing: someone files a complaint, the governor finds there is probable cause, and the trial takes place in front of an administrative law judge.

MR. MADSEN clarified that the trial takes place in front of the Office of Administrative Hearings.

SENATOR COGHILL referred to page 4, lines 16-19, and asked if there was any discretion with regard to violating a licensing statute or regulation. He mentioned paying a late fee on a license as opposed to blatantly violating a licensing practice.

MR. MADSEN replied it would have to relate to a regent's fitness to serve as a regent. He opined that late payment of a fee would not rise to that occasion.

SENATOR COGHILL asked how serious the violation would have to be for a regent to be unfit to serve.

MR. MADSEN offered his understanding that if the regent was a lawyer, for example, the violation would have to be something like a breach of trust or a crime of dishonesty that would result in the person losing their license to practice law.

SENATOR COGHILL asked for an explanation of the applicability section because it would apply to conduct that occurred before the effective date.

MR. MADSEN said the applicability section seeks to capture wrongdoing that was under investigation before the effective date of the Act.

SENATOR COGHILL asked if a regent had ever been dismissed.

MR. MADSEN said no. Several years ago, Mr. Hayes stepped down but he was not dismissed.

SENATOR COGHILL said he always wonders about a fishing expedition when a bill applies to conduct that occurred on or before the effective date.

[2:13:50 PM](#)

CHAIR FRENCH agreed that caution was warranted when administering a penalty for conduct that occurred before the penalty phase was laid out.

SENATOR COGHILL said he'd like to know if there was a better way to word the applicability section.

CHAIR FRENCH said he would hold HB 6 in committee to provide time to discuss the matter with Legislative Legal and the Department of Law (DOL).

### **SB 168-GEOGRAPHIC COLA FOR JUDGES**

[2:15:14 PM](#)

CHAIR FRENCH announced the consideration of SB 168. He stated that he held the bill in committee to ensure that the members were comfortable with the changes. He noted that the Finance Committee was the next committee of referral.

[2:15:39 PM](#)

SENATOR WIELECHOWSKI moved to report CS for SB 168, version M, from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection, CSSB 168(JUD) moved from the Senate Judiciary Standing Committee.

At ease from 2:15 p.m. to 2:17 p.m.

### **HB 215-PIPELINE PROJECT: JUDICIAL REVIEW/ROW**

[2:17:15 PM](#)

CHAIR FRENCH announced the consideration of HB 215. He noted that the committee received a brief overview of the bill at the previous hearing and that the Senate committee substitute (CS), version X, was before the committee. He recognized that Speaker Chenault and Representative Hawker were present.

[2:17:53 PM](#)

REPRESENTATIVE MIKE CHENAULT, sponsor of HB 215, said his staff would refresh the committee on the provisions in the bill.

[2:18:28 PM](#)

TOM WRIGHT, staff to Representative Mike Chenault, reviewed the bill speaking to the following sponsor statement: [Original punctuation provided.]

The objective of House Bill 215 is to prohibit the filing of lawsuits that have the potential to delay construction of in-state gaslines. The provisions under House Bill 215 modify current statute and the provisions only apply to state land rights-of-way. Claims may be filed only by an applicant, a competing applicant or a person who has a direct financial interest affected by the lease of a right-of-way. The requests for judicial review must be filed within 60 days of the publication of notice for a right-of-way lease application. Judicial review may only be granted for claims challenging the validity of the statute or challenging a denial of rights under the state constitution. Any claim will be barred unless it is filed within the 60 day time frame. [That means from the effective date of this bill since most of the right-of-way leases on state land have been granted or are in the process of being granted.] The Department of Environmental Conservation, under the Clean Water and Clean Air Acts, is exempted from the provisions pertaining to judicial review.

All claims are to be filed in Alaska Superior Court which will have exclusive jurisdiction to determine the proceeding. The court will not have the jurisdiction to grant any injunctive relief with the exception of an issuance of a final judgment.

This legislation is modeled after the Trans-Alaska Pipeline legislation, 43 USC, Chapter 34, that was adopted by Congress in 1973 (43 USC, Chapter 43, Sec. 1652 (d).) Similar legislation to House Bill 215 was passed by the Alaska State Legislature in 1973, Senate Bill 3, related to the TAPS line.

The bill also allows the Alaska Gasline Development Authority (AGDC) to move from a common carrier requirement to a contract carrier option. This change is necessary to pursue a successful open season and project financing for an in-state gasline.

CHAIR FRENCH recognized that Ken Vassar with AGDC, Ann Brown with the Department of Natural Resources (DNR), Daryl Kleppin, Tina Grovier, Joe Dubler, and Dan Fauske were available to testify and/or answer questions.

CHAIR FRENCH referred to the October 5, 2011 memorandum from legislative counsel, Donald Bullock Jr., and asked for an explanation of "direct financial interest."

MR. WRIGHT deferred the question to an attorney.

[2:22:33 PM](#)

KEN VASSAR, General Counsel, Alaska Gasline Development Corporation (AGDC), said that someone with a "direct financial interest" would primarily be a competing applicant.

CHAIR FRENCH asked if AGDC would be the applicant.

MR VASSAR explained that Alaska Housing Finance Corporation (AHFC) previously leased the right-of-way and part of this legislative effort was to transfer the lease to AGDC.

CHAIR FRENCH asked how much of the right-of-way AHFC had under lease.

MR VASSAR said all of the right-of-way was currently under lease to AHFC.

CHAIR FRENCH asked if it was a continuous right-of-way from the North Slope to Anchorage.

MR VASSAR said that AHFC had all of the rights-of-way that DNR had authority to lease, but that other owners along the route were not part of the AHFC lease.

CHAIR FRENCH asked if anyone had a map that showed which parts of the right-of-way were under lease to AHFC.

[2:24:52 PM](#)

MR. WRIGHT said he wasn't aware of a map, but his understanding was that AHFC had over 300 miles of right-of-way and that an application had been submitted to the federal government for federal rights-of-way. He noted that Mr. Dubler might have additional information.

CHAIR FRENCH asked how much of the pipeline route was federal right-of-way and how much was state right-of-way.

[2:25:35 PM](#)

JOE DUBLER, Vice President and Chief Financial Officer, Alaska Gasline Development Corporation (AGDC), said there are 437 miles of state right-of-way, and once AGDC obtains the federal right-

of-way the combination will represent over 90 percent of the rights-of-way. He suggested that Dave Haugen, the AGDC project manager, might know the exact number of miles of federal right-of-way.

CHAIR FRENCH asked Mr. Haugen how many miles of the proposed pipeline was federal right-of-way.

[2:26:06 PM](#)

DAVE HAUGEN, Project Manager, Alaska Gasline Development Corporation (AGDC), said he would follow up with the exact number, but it was over 200 miles.

CHAIR FRENCH asked if the proposed Act would affect the federal rights-of-way in any way.

MR. WRIGHT confirmed that the answer was no.

CHAIR FRENCH asked if the pipeline would have to cross land that was neither state nor federal.

MR. DUBLER said yes; AGDC would have to negotiate rights-of-way to cross a variety of lands including Native allotments, private lands, and mental health trust lands.

CHAIR FRENCH asked if AHFC or AGDC currently held any rights-of-way on private land.

MR. DUBLER answered no.

CHAIR FRENCH asked where most of the private lands were located.

MR. DUBLER said the bulk is in the Anchorage, Big Lake area but some is near Fairbanks and Cantwell. He offered to follow up with a map to show the different rights-of-way.

[2:28:06 PM](#)

CHAIR FRENCH asked if HB 215 gives AGDC the right to negotiate those rights-of-way and try to collect them in one corridor.

MR. DUBLER said no; the bill applies only to state rights-of-way.

CHAIR FRENCH asked what would happen in the event of a recalcitrant private landowner along the proposed pipeline route.

MR. DUBLER responded that AGDC is asking for the right of eminent domain, so the property would be condemned and taken for purposes of the gas pipeline. He confirmed that the landowner would receive fair market value for the condemned property.

[2:29:06 PM](#)

MR. WRIGHT highlighted that there was already statutory authority for gas pipelines to invoke the right of eminent domain.

CHAIR FRENCH commented that it is a utilitarian government authority for the greater good. He asked which landowners would be most affected by the proposed pipeline.

MR. DUBLER said it would be private landowners in the Big Lake and Willow areas and AGDC expected to begin negotiations soon with these landowners to obtain rights-of-way.

CHAIR FRENCH asked if, once AGDC connected to the distribution network in Big Lake, there would be sufficient capacity to move up to 500 million mcf of gas without constructing more pipelines.

MR. DUBLER said that was correct; the plan was to enter the Enstar pipeline system at Beluga, so the pipeline won't enter the Municipality of Anchorage.

[2:31:31 PM](#)

CHAIR FRENCH asked Ms. Grovier who might have a direct financial interest.

[2:31:43 PM](#)

TINA GROVIER, Attorney, Birch Horton Bittner and Cherot, said the language came from existing statute, and it might be an adjacent landowner or a non-applicant who wants their comments on a proceeding to rise to the level of direct financial interest in order to have standing."

CHAIR FRENCH asked if a competitor might bring a challenge because they, too, want to build a pipeline.

MS. GROVIER agreed that was one possibility.

CHAIR FRENCH posed a hypothetical situation of a competitor whose land the proposed pipeline would cross.

MS. GROVIER qualified that it would be an adjacent landowner.

CHAIR FRENCH asked if an Anchorage consumer could challenge the pipeline.

MS. GROVIER clarified that the bill reflects the same framework as existing statute, with slight reordering.

CHAIR FRENCH recalled the same debate with AGIA; the Legislature made sure that any challenges would be brought sooner rather than later so that a project wouldn't get derailed in the later stages by a lawsuit. He asked if AGIA adopted a 60-day or 90-day timeline

MS. GROVIER said she couldn't speak to AGIA, but AS 38.35.200 has a 60-day timeline for someone to raise a challenge.

CHAIR FRENCH reviewed Sec. 5 starting on page 6 and agreed with Ms. Grovier that it was all new language.

MR. VASSAR said that under the current statutory language AGDC wouldn't have the background to know whether somebody was intended to be included, and if it came to a court challenge it would be difficult to identify who would be able to carry the burden of demonstrating a direct financial interest. It might be, but wouldn't have to be, a person who wants to lease the land for some other type of project and the AGDC project in some way gets in the way of their ability to lease the land.

CHAIR FRENCH asked if the 60-day timeframe on page 6, lines [23 and 25] refer to a challenge to the constitutionality of this provision.

MR. WRIGHT said yes.

MS. GROVIER agreed and added that that idea came from the Trans-Alaska Pipeline Authorization Act (TAPPA) legislation as opposed to the direct financial interest language in AS 38.35.200(a).

CHAIR FRENCH highlighted that Sec. 38.35.200 had been law since 1973.

[2:38:52 PM](#)

SENATOR WIELECHOWSKI offered his understanding that someone could challenge the constitutionality of a statute at any time. He asked if he was incorrect.

CHAIR FRENCH recalled that it was done in AGIA.

[2:39:34 PM](#)

MR. WRIGHT read the judicial review from AGIA as follows:

A person may not bring a judicial action challenging the constitutionality of this chapter or the constitutionality of a license issued under this chapter unless the action is commenced in a court of the state of competent jurisdiction within 90 days after the date that a license is issued.

SENATOR WIELECHOWSKI asked if there was case law on that.

MR. WRIGHT said that John Hutchins from DOL tried and was unable to find any challenges to TAPS either during or after that period.

SENATOR COGHILL asked for an explanation of the language in Section 5 on page 5, lines 23-25.

MR. DUBLER explained that the action refers to the signing of the lease with the state. All the references are to the state lease of the right-of-way between AGDC and DNR.

MR. WRIGHT said Mr. Hutchins was prepared to expound on the answer he gave about challenges.

[2:41:38 PM](#)

JOHN HUTCHINS, Assistant Attorney General, Civil Division, Department of Law (DOL), said the 60-day language came from the Trans-Alaska Pipeline Authorization Act, but the original model was probably from the Emergency Price Control Act of 1942. In *Yakus v. United States*, the U.S. Supreme Court upheld the 60-day limit to challenge the constitutionality of the Act or an action by the Office of Price Administration (OPA). He said he wasn't aware of an Alaska case.

SENATOR WIELECHOWSKI asked what the fact scenario was.

MR. HUTCHINS summarized that it was a wartime challenge of the constitutionality of the federal OPA price regulation statutes that said that a case could only be brought within 60 days of an action. The U.S. Supreme Court reviewed the case and upheld that provision of the statute.

CHAIR FRENCH referred to the April 15, 2011 memorandum from Legislative Counsel, Donald Bullock Jr. that discussed how Moore

v. State might apply to HB 215. He read the following from page 5:

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable.

CHAIR FRENCH explained that the Moore case concerned oil and gas leases in Kachemak Bay. A provision in that lease barred someone from bringing a challenge after a certain length of time. On page 5 of the memo, Mr. Bullock said the court indicated disfavor of limitations and found that the plaintiffs were "not guilty of inexcusable delay" and that sufficient prejudice was established on the record.

MR. HUTCHINS responded that laches is common-law doctrine and it was his belief that Moore was distinguishing between common law in statute and the statute of limitations. This is about a statutory limitation on bringing an action, and the question is whether the Legislature has the power to impose a time limit to bring an action. He opined that Yakus and the cases that affirm the Yakus holding were more relevant than Moore was.

CHAIR FRENCH asked Mr. Hutchins to forward the Yakus citation to his office.

[2:45:43 PM](#)

SENATOR PASKVAN asked what type of constitutional challenges the bill seeks to limit, and questioned how the Legislature could validate that it considered specific limitations if they weren't presented.

MR. HUTCHINS replied the most obvious constitutional challenge would be an action by the commissioner to deprive someone of a property interest without due process.

SENATOR PASKVAN assumed that this was about due process regarding the potential loss of an economic interest as opposed to a non-economic interest.

MR. HUTCHINS agreed that it primarily deals with things that could be measured by an economic loss.

SENATOR PASKVAN reiterated that the specific issues related to economic due process ought to be on the record.

MR. DUBLER highlighted that DNR already issued the lease and AGDC followed all the statutory due process requirements in applying for the permit.

CHAIR FRENCH clarified that he was saying that AHFC already had the right-of-way and that HB 215 would pass it to AGDC.

MR. DUBLER agreed.

MR. HUTCHINS added that [AS 38.35.200(c)] would affect more than the existing right-of-way decision. It would also affect permitting decisions that relate to the right-of-way so there is potential for a constitutional challenge relating to a permitting decision that's not yet been made.

[2:49:31 PM](#)

SENATOR COGHILL asked what a final judgment would be reviewed Section 5, page 6, lines 28-30:

Notwithstanding AS 22.10.020(c), except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief,

MR. HUTCHINS posed a hypothetical example of someone who had a permit to use part of the land in the right-of-way corridor. The construction activity and pipeline impaired the ability of that person to exercise his rights under his land use permit. He believed that the commissioner did not account for his use of the land or adequately notice him of the pipeline such that he could comment so he brought a constitutional challenge. If the court were to decide in his favor, he could get an injunction that would reverse whatever the commissioner had done that affected his interests.

[2:51:17 PM](#)

SENATOR PASKVAN asked if the court would be unlikely to grant injunctive relief if the total remedy was money.

MR. HUTCHINS said yes and that was one reason that provisions that bar temporary injunctive relief were upheld in the past. However, there could be circumstances under which a damages remedy could be held to be inadequate. He cited a hypothetical example of a stream crossing that required construction that could not be remediated entirely with money. An injunction might be barred in such a case.

SENATOR COGHILL summarized his understanding of the circumstances under which the court would not grant injunctive relief.

MR. HUTCHINS responded that the point is to prevent legal delays from delaying the project.

[2:53:23 PM](#)

SENATOR WIELECHOWSKI asked if the exact route of the pipeline was established.

MR. DUBLER explained that AGDC applied for several alternative routes in the draft EIS process, but the preferred route minimizes the length of the pipeline and the impact on the environment. The final EIS, due this summer, will come with a record of decision and the federal right-of-way.

SENATOR WIELECHOWSKI asked if someone who wants to file a constitutional challenge within 60 days of the effective date of this Act potentially would not know the route.

MR. DUBLER clarified that this only applies to the state portion; DNR already issued that lease and the route is established.

SENATOR PASKVAN asked how state law compared to federal law for things such as stream protection.

MR. DUBLER deferred the question to Tina Grovier.

MS. GROVIER stated that the provision in Section 5 models the Trans-Alaska Pipeline Authorization Act (TAPAA) and her understanding was that there would not be any comparable federal statute that would apply to federal land.

CHAIR FRENCH asked if the federal government treats challenges to federal rights-of-way the same way that AS 38.35.200 does for TAPS.

MS. GROVIER said no, and clarified that while the federal government has treated challenges to its rights-of way in this manner in the past - under TAPPA for example, she did not believe that there was an example that would apply to the AGDC pipeline.

SENATOR PASKVAN restated that he was trying to understand the current system for someone to challenge a federal right-of-way because of a stream crossing, for example.

[2:58:33 PM](#)

MS. GROVIER offered to follow up.

CHAIR FRENCH commented that the state will treat its rights-of-way in one legal method and it was fair to ask what legal method the federal government will use for its rights-of-way.

[2:58:57 PM](#)

SENATOR COGHILL asked if the U.S. Army Corps of Engineers (USACE) and the Bureau of Land Management (BLM) would explain both federal and state rights-of-way to the public in meetings going forward.

MR. DUBLER responded that the USACE focused on federal rights-of-way through the draft EIS process, and AGDC already held public meetings along the proposed route from Barrow to Wasilla.

SENATOR PASKVAN mentioned a conflict last summer on an Interior waterway, and asked if federal right-of-way laws might preempt state laws if a federal waterway passed through land in the state right-of-way.

MR. HUTCHINS explained that the Clean Water Act uses the phrase "Waters of the United States," and there was some ambiguity as to what that means. Clearly, it includes navigable waters and adjacent wetlands, but a waterway in the Interior probably is not "Waters of the United States" unless it is adjacent to a river that is a navigable waterway, he said.

SENATOR PASKVAN asked Mr. Hutchins to submit a written explanation so he could better understand where federal law may and may not apply.

MR. HUTCHINS agreed.

CHAIR FRENCH asked if the provision in subsection (d) on page 7, lines 9-13, was necessary because the state was taking primacy on permits.

MR. HUTCHINS deferred the question to Ruth Heese who was responsible for the provision.

[3:02:32 PM](#)

RUTH HAMILTON HEESE, Assistant Attorney General, Civil Division, Department of Law (DOL), representing the Department of Environmental Conservation (DEC), explained that subsection (d) applies to three clean water and clean air programs that the U.S. Environmental Protection Agency had approved DEC to administer. She said that to add clarity, DOL suggested the sponsor make the following changes to the language in AS 38.35.200(d):

Page 7, line 9, following "decision"  
Insert "or authorization"

Page 7, line 10-11, following "under"  
Insert "a program approved or delegated" and  
Delete "authority delegated to the Department of Environmental Conservation"

3:05:17 PM

CHAIR FRENCH summarized that appeals of DEC permitting decisions that relate to the Clean Water Act do not fall under the restrictions in AS 38.35.200(c).

MS. HEESE clarified that it applies to both the Clean Water Act and the Clean Air Act.

CHAIR FRENCH observed that land was being restricted.

MR. WRIGHT explained that removing the second reference to DEC [page 7, line 11] keeps the EPA from taking control from the state of programs under the Clean Air Act. He said the state has the ability to administer programs under the Clean Water Act under the language that Ms. Heese described, and the sponsor would be happy to make the suggested changes.

CHAIR FRENCH thanked the participants and held HB 215 in committee.

3:06:58 PM

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 3:06 p.m.