

**ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE RESOURCES STANDING COMMITTEE
SENATE RESOURCES STANDING COMMITTEE**

March 7, 2016

3:30 p.m.

MEMBERS PRESENT

HOUSE RESOURCES STANDING COMMITTEE

Representative Ben Nageak, Co-Chair
Representative David Talerico, Co-Chair
Representative Paul Seaton
Representative Andy Josephson
Representative Bob Herron
Representative Geran Tarr
Representative Craig Johnson

SENATE RESOURCES STANDING COMMITTEE

Senator Cathy Giessel
Senator Bill Stoltze
Senator Bill Wielechowski
Senator John Coghill
Senator Bert Stedman

MEMBERS ABSENT

HOUSE RESOURCES STANDING COMMITTEE

Representative Kurt Olson
Representative Mike Hawker

SENATE RESOURCES STANDING COMMITTEE

Senator Peter Micciche

OTHER MEMBERS PRESENT

Representative Mike Chenault
Senator Charlie Huggins

COMMITTEE CALENDAR

OVERVIEW(S): THE COHEN GROUP REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY'S PEBBLE MINE ACTION

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

GENERAL JOSEPH RALSTON, Retired, Consultant
The Cohen Group
Anchorage, Alaska

POSITION STATEMENT: Presented an overview of the Cohen Group Report entitled, "Report of An Independent Review of the United States Environmental Protection Agency's Actions In Connection With Its Evaluation of Potential Mining in Alaska's Bristol Bay Watershed."

HOLLY BUTLER, Law Partner
DLA Piper LLP (US)
Baltimore, Maryland

POSITION STATEMENT: Responded to questions during the overview of the Cohen Group Report entitled, "Report of An Independent Review of the United States Environmental Protection Agency's Actions in Connection with its Evaluation of Potential Mining in Alaska's Bristol Bay Watershed."

ACTION NARRATIVE

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CHAIR CATHY GIESSEL called the joint meeting of the House Resources Standing Committee and the Senate Resources Standing Committee to order at 3:30 p.m. Present at the call to order from the House Resources Standing Committee were Representatives Nageak, Talerico, Herron, Josephson, and Seaton; Representatives Tarr and Johnson arrived as the meeting was in progress. Present from the Senate Resources Standing Committee were Senators Giessel, Stoltze, Wielechowski, Coghill, and Stedman; Senator Costello arrived as the meeting was in progress.

OVERVIEW(S): The Cohen Group Report on the Environmental Protection Agency's Pebble Mine Action

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CHAIR GIESSEL announced that the only order of business would be the Cohen Group Report on the Environmental Protection Agency's Pebble Mine Action. Further, she said that today's hearing is about a federal process that falls under the auspices of the Environmental Protection Agency (EPA). During the past five years, she opined, the state has been faced with significant federal restrictions and challenges for accessing the abundant resources that the land holds. She provided examples, including: the Department of the Interior blocking the state's efforts to construct a public safety road through the [Izembek National Wildlife Refuge]; the Clean Air Act (CAA) challenges to Alaska's coal production, which will be followed by the Clean Power [Plan] regulations; and the Clean Water Act (CWA) placing all Alaskan waters under federal EPA jurisdiction - currently stayed by the U.S. Supreme Court. Today's hearing focuses on one of the many federal regulatory processes under which Alaska must function, she said.

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GENERAL JOSEPH RALSTON, Retired, Consultant, presented the overview titled, "Report of An Independent Review Of The United States Environmental Protection Agency's Actions In Connection With Its Evaluation Of Potential Mining In Alaska's Bristol Bay Watershed, Executive Summary," compiled by Secretary William S. Cohen [Secretary of Defense 1997-2001], The Cohen Group, DLA Piper LLP (US), dated October 6, 2015. He paraphrased from the following prepared statement, which read [original punctuation provided]:

Thank you for inviting me to testify on Secretary Cohen's independent review of EPA's decision-making process regarding potential mining in the Bristol Bay watershed.

Let me start by saying that I have been an Alaska resident since 1992 and spent several years at Elmendorf when I commanded the Alaskan Command during my career as an Air Force Officer. I fully understand and appreciate the complexities and the views within our State both pro and con regarding the Pebble Mine.

The Secretary's review is not about the Pebble Mine, but rather the actions of EPA as a federal agency. Secretary Cohen and I have spent most of our

professional lives in service of our country. For the Secretary - as a Congressman, Senator and Secretary of the largest Department in the Executive Branch - and my own 38 years of service in the Air Force; we both feel very strongly that federal agencies have an obligation to act in a fair manner. This is the only way they can maintain the trust of the American public.

I will summarize the basis under which the review was undertaken, the process used, and the findings.

Conditions of Acceptance

Secretary Cohen was first approached by Tom Collier and the Pebble Limited Partnership in Fall 2014. Pebble expressed concern about the fairness of EPA's decision-making process in connection with EPA's evaluation of potential mining in Bristol Bay and wanted an objective party to examine that concern.

After examining a wide range of documents, including those obtained under [the Freedom of Information Act (FOIA)], the Secretary determined that sufficient and legitimate questions existed as to the fairness of EPA's process and agreed to undertake this review, assisted by his team at The Cohen Group and the law firm DLA Piper. One of the lead counselors on this review, Holly Butler, is here today.

The Secretary conditioned his acceptance on complete independence. The Pebble Limited Partnership had no ability to edit or censor his views. The conclusions he drew were his and his alone. The Pebble Limited Partnership compensated our team according to commercially standard terms, and no portion of this compensation was contingent upon the result or content of the report.

The Secretary did not make a determination on whether a mine should be built - this is a question for engineers, scientists, and the State of Alaska. Nor did he comment on the legality of EPA's preemptive use of Section 404(c) of the Clean Water Act - this is a question for the Courts and Congressional review.

Given his substantial Executive and Legislative experience, Secretary Cohen felt qualified and agreed to review the process by which EPA assessed, and proposed restrictions to reduce, the environmental risks associated with potential mining in the Bristol Bay watershed from the perspective of a Cabinet official.

Process of Review

The Cohen Group team had unfettered access to and conducted a thorough examination of the extensive written record of more than 42,000 documents produced by federal agencies in response to FOIA requests, including EPA, Fish and Wildlife Service, Army Corps of Engineers, and National Oceanic and Atmospheric Administration. We also reviewed documents from the State of Alaska, EPA's own published record of its process, Congressional hearings, and the Pebble Partnership.

We welcomed the opportunity to speak with anyone who cared to share with us their perspective on this important topic, and we made every effort to seek out and speak with as many people representing as many different points of view as we could.

Over sixty people representing all points of view on EPA's actions - Pro, Against and Neutral - voluntarily spoke with the Secretary and our team. This included three former EPA Administrators and several former EPA Assistant Administrators for water from both Democratic and Republican Administrations, as well as members of Alaska Native Tribes from the Bristol Bay region, scientists (both opposed to and in support of the mine), former Alaska government officials, and representatives of the Pebble Partnership. We also visited the region, including the Pebble Deposit site.

EPA, through the Justice Department, declined Secretary Cohen's request to making current personnel available for interviews, citing ongoing Congressional and (at the time) the Inspector General (IG) inquiries and pending litigation. We recognized and can appreciate this decision.

Findings

The Pebble Deposit is a mineral deposit located in the Bristol Bay watershed. The deposit has been described by the Alaska Department of Natural Resources as one of the world's largest copper resources. It is located on lands owned by the State of Alaska, which have been specifically designated for mineral exploration and development under an area plan for state lands.

The Bristol Bay watershed is largely undisturbed by significant development. The economy is dominated by commercial salmon fishing and features a Native Alaskan population that maintains a strong salmon-centered culture and subsistence-based lifestyle.

Thus any regulatory authority to be exercised requires the most fair and appropriate process, particularly as it interacts with the State of Alaska, the landowner in this case.

Here EPA did not employ the well-established Permit/[National Environmental Policy Act (NEPA)] process to evaluate potential development in the Bristol Bay watershed. Rather, EPA used Section 404(c) of the Clean Water Act to preemptively impose restrictions on potential mining in the area.

- Because, to date the Pebble Partnership has not submitted a permit application, EPA relied on hypothetical scenarios for its Bristol Bay Watershed Assessment (BBWA) rather than the characteristics of a mine that is actually proposed to be built and maintained
- EPA failed to address important considerations that would be included in the Permit/NEPA Process, including meaningful participation by the State of Alaska and other federal government agencies, mitigation and controls as proposed by the developer, and an array of public interest factors;
- The Permit/NEPA Process has been used for decades and has been widely endorsed by environmental groups as being "Democratic at its core";

- EPA relied upon the BBWA in its Proposed Determination but acknowledged that there were significant gaps in its assessment and that it was not designed to duplicate or replace the Permit/NEPA Process; and
- EPA's unprecedented, preemptive use of Section 404(c) inhibited the involvement of two key participants: the State of Alaska and the Army Corps of Engineers.

These observations informed the Secretary's conclusion that EPA's application of Section 404(c) prior to the filing of a permit application was not fair to all stakeholders.

The fairest and most appropriate process to evaluate possible development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application, rather than using an assessment based upon the hypothetical mining scenarios described in the BBWA as the basis for imposing potentially prohibitive restrictions on future mines.

The Permit/NEPA Process is more comprehensive than the preemptive Section 404(c) process employed here. EPA conceded in comments to peer reviews that there were gaps in its assessment that would be addressed during a Permit/NEPA Process.

Here, as the Agency acknowledges, EPA initiated Section 404(c) in an unprecedented manner. EPA's use of Section 404(c) before a permit application filing exacerbated the shortcomings of the BBWA noted by the State of Alaska, several peer reviewers, and the Pebble Partnership: most notably, the use of hypothetical assumptions that may not accurately or fairly represent an actual project; and the failure to take into account mitigation and control techniques required by the State or that a developer might propose. Stakeholders disagree about the legality of EPA's preemptive use of Section 404(c).

An environmental impact assessment is bound to provide more accurate information if it analyzes a mine that will be built in accordance with the developer's plans, rather than a hypothetical mine plan which even EPA acknowledges is likely to be different from a developer-submitted plan. This project is too important, for all stakeholders, to pilot a new, untested decision-making process. The fairest approach is to use the well-established Permit/NEPA Process, and Secretary Cohen could find no valid reason why that process was not used.

During the course of this review, statements and actions of EPA personnel have raised questions about EPA's motives. Although Secretary Cohen found many troubling questions, he did not attempt to reach any conclusions on these issues and instead urged those with subpoena power to pursue this incomplete record.

The EPA Inspector General recently released a report of its investigation. The IG Report, however, addressed only one component of the broader process by which EPA determined it would propose restrictions on mining in the Pebble Deposit Area and it did not address the fairness of EPA's novel application of Section 404(c).

As a result of this narrow scope, the IG Report did not provide any information that directly addresses Secretary Cohen's findings, including his central finding that the fairest and most appropriate process to evaluate any development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application. The IG Report left open many questions and presented an incomplete record in material aspects. Thus, we believe there remain troubling aspects that merit review by those who have the constituted responsibility [to] take a deeper look - be it in Congress the Courts, or the Administration.

This is not about Pro-Pebble or Anti-Pebble, but rather good governance and the actions of our federal agencies and processes by which they interact with their State partners and constituencies.

How EPA conducted the process to assess potential development and protect our fish and our environment here in Alaska is of vital importance to our State, region and country.

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SENATOR WIELECHOWSKI asked whether there has been a specific impedance that has prohibited the Pebble Partnership from submitting a mining application.

GENERAL RALSTON responded that the EPA statement, indicating that a permit would be declined due to Section 404(c) issues, has given the Pebble Partnership pause to proceed.

SENATOR WIELECHOWSKI inquired about the amount of compensation that the Cohen group has received from the Pebble Partnership, and whether the contract could be made available to the committee.

GENERAL RALSTON responded that the requested information is considered confidential, and allowed that the compensation was commensurate with standard rates and terms.

SENATOR WIELECHOWSKI noted that the law firm, DLA Piper, assisted in the preparation of the document, and asked whether Stewart B. Morrow is a senior partner in the firm.

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HOLLY BUTLER, Law Partner, DLA Piper LLP (US), responded that Mr. Morrow is a partner in DLA Piper's Canada office.

SENATOR WIELECHOWSKI cited a filing, with the British Columbia, Canada, Securities Commission (BCSC), by a Mr. Morrow, in a \$3.5 million stake with Northern Dynasty Minerals, entered into about 40 days prior to the release of this report. He asked whether it is the same Mr. Morrow.

MS. BUTLER responded that Mr. Morrow initiated a company, on behalf of a client, for deposit of stock, but he personally holds no interest in, nor facilitated the purchase of, Northern Dynasty stock. She reported that no one in the DLA Piper (US) or Canada, holds any interest in stock for Pebble Partnership, Northern Dynasty, Hunter Dickenson, or any of its affiliates; no financial or business relationship exists.

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REPRESENTATIVE JOSEPHSON indicated that the EPA has established specific standards and asked why a permit application would be necessary in order to have the standards apply to a theoretical situation. He suggested that the standards should be able to stand alone.

GENERAL RALSTON opined that the EPA should wait to have a description of a project prior to applying standards and making determinations. Mitigation measures are part of the proposal, and would need to be taken into account, he added.

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CHAIR COGHILL inquired about national precedent for the EPA's omission of the stakeholders in the decision making process; the Corps of Engineers and the State of Alaska.

GENERAL RALSTON responded that it was an unprecedented action. The EPA has no prior history of invoking Section 404(c) in the absence of a permit being filed. He recalled actions that did invoke 404(c), but a permit had been filed on those occasions. He added that the EPA has acknowledged that the action may serve to establish a precedent. The concern, he opined, is that the precedent may allow the EPA to make other preemptive rulings.

SENATOR COGHILL queried whether the EPA had solicited congressional recommendations or other comments prior to the action.

GENERAL RALSTON said the Cohen Group was not allowed access to question personnel of the EPA, and a number of e-mails were not made available. An EPA official allegedly violated protocol by utilizing a personal computer for agency purposes. Due to computer failure or misuse, a 25 month period of computer communications are missing, or not available, from the EPA official who was assigned to the project site. The EPA inspector general (IG) acknowledges that there may have been a misuse of position, and Secretary Cohen has recommended that further investigation should be handled by a sector with authority to subpoena, such as the courts, the US Congress, or the IG.

SENATOR COGHILL stated his understanding that the EPA's primary investigator has subsequently fled the U.S. and cannot be sequestered.

GENERAL RALSTON acknowledged that Phil North, the EPA official in question, retired, now lives outside of U.S. jurisdiction, and has refused to be subpoenaed. There may be a possibility that Mr. North will return to the US, which would allow the authorities to continue the investigation.

SENATOR COGHILL indicated that the fairness question is of major concern for the state. He suggested that the specific area to be permitted may have varied significantly from what has been perceived as the entire watershed, and asked for clarity.

GENERAL RALSTON deferred comment.

SENATOR COGHILL opined that the application process was thwarted on every account, and stopped from reaching maturity. He said it was unfortunate that a legitimate proposal was blocked from being brought to the table.

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REPRESENTATIVE HERRON noted that today's debate is not whether the mine should go forward or not, but rather the possibility that a government official has corrupted a process. He referred to the Izembek road proposal, and stated his belief that, following the conclusion of the Environmental Impact Statement (EIS) recommending a go-ahead for the road project, corruption may have occurred in Washington, DC. He asked whether it's possible that an individual has corrupted a very thorough process.

GENERAL RALSTON said the questions being uncovered are troubling. He opined that the response from the IG regarding Mr. North's actions was dismissive. He recounted the protocol that would occur in a military setting to bring accountability to such a situation.

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SENATOR COGHILL noted that the Freedom of Information Act (FOIA) is one way to track the performance of government officials, and asked whether it was implemented to produce the report.

GENERAL RALSTON said the FOIA was invoked, which allowed access and review of over 42,000 documents; however, the 25 months of e-mails have remained unaccounted for.

SENATOR COGHILL commented that it appears to be a general plague to governance: convenient computer crashes and missing e-mails. He opined that it creates a troubling atmosphere.

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SENATOR WIELECHOWSKI inquired about disclosure of the names and affiliations of the people solicited to participate in the report.

GENERAL RALSTON responded that over 60 people were interviewed; however, in the interest of receiving candid responses, their identity is confidential.

SENATOR WIELECHOWSKI queried whether preliminary drafts of the report were made available to the public or the EPA.

GENERAL RALSTON indicated that the EPA received a copy prior to publication, but not the public or the 60 participants.

SENATOR WIELECHOWSKI asked whether the report was subject to peer review.

GENERAL RALSTON said the report is not a scientific document and, as such, not subject to peer review.

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REPRESENTATIVE SEATON noted the observations and conclusions section of the Cohen Report states that the purpose was not to comment on whether the EPA acted within the scope of its legal rights. It further indicates that the EPA had the authority to conduct the study of the Bristol Bay Watershed, as well as to invoke Section 404(c) at any time. He noted that the IG report was solicited by the Cohen Group and the Pebble Partnership, and is entitled, "EPA's Bristol Bay Watershed Assessment: Obtainable Records Show EPA followed Required Procedures Without Bias or Predetermination, but a Possible Misuse of Position Noted," Report No. 16-P-0082, dated January 13, 2016. He asked what action is being suggested, given the IG report indicates that bias and predetermination were absent from the ruling.

GENERAL RALSTON pointed out that the IG report is narrow and spans a discreet section of time from 2008-2012. Additionally, it is key that the report is based on obtainable records, and there were major omissions that involved the possible misuse of position.

REPRESENTATIVE SEATON suggested that the scope of the situation appears nebulous. The IG report indicates that an appropriate ruling was made by following procedures, and arrived at without bias or predetermination. He said:

We can always want more. And is that the point we're at? We don't like the inspector general's conclusions, and therefore we are saying we should have more.

GENERAL RALSTON repeated that the IG report covered a narrow time span and did not address the fundamental issue of whether the fairest method possible was being applied. He reviewed the continuing issues: Phil North's missing e-mails covering a 25 month period; and the Army Corp of Engineers was not contacted, which is a mandated coordination that the EPA did not follow. He opined that a number of deficiencies may exist in the IG report.

MS. BUTLER added that a number of questions and concerns alluded were not addressed in the scope of the IG report and bear directly on the integrity of the process. These include: the use of hypotheticals, third party communications with anti-mine advocates, and the EPA's refusal to accommodate specific requests made by the State of Alaska.

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SENATOR COGHILL asked whether state officials were consulted regarding the use of the 404(c).

GENERAL RALSTON recalled that the state made repeated written requests for additional time to address the issues. He said the requests were discarded by the EPA.

MS. BUTLER interjected that the State of Alaska voiced concerns at various stages of the process and included a request to suspend determinations prior to a permit being filed. She said:

The State of Alaska stated they were "damned if they do, damned if they don't." We have to participate or you'll say we stood down, and if we do participate you will say we had our opportunity.

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SENATOR COGHILL asked about the credibility of the science base used by the EPA regarding the watershed determination.

GENERAL RALSTON maintained that it was not possible to make an assessment without a permit application to indicate what the developer was proposing.

MS. BUTLER commented that the EPA established a hypothetical, relying in large part on what has been identified as a mineral/material identification report, necessary for investment purposes, versus a mine plan. A mine plan focuses on how to get the identified minerals out, she stipulated.

SENATOR COGHILL asked whether there were any assessments done on the waters of Bristol Bay.

MS. BUTLER responded that an assessment was conducted and the validity of the science used was cause for debate, which the report did not evaluate.

SENATOR COGHILL concluded there was a hypothetical with an existing assessment that is under question. He posited that Alaskans should pay close attention to what that assessment actually says for the value. He said the e-mails from the state are light, but at least show the state made some appeals. Regarding the statement about appeals by anti-mine environmental groups, he asked whether those were traced or were part of the missing e-mails.

GENERAL RALSTON indicated that the missing communications from the 25-month period mentioned could be illuminating on this topic. However, the EPA did not start the 404(c) process until requested to do so by a letter from the Alaska Native community. Early e-mails indicate that Phil North was coordinating with the Native community to solicit specific action from the EPA.

MS. BUTLER added that the IG report cites the letter exchange instance as the possible misuse of position. The impetus of the watershed assessment was the EPA's receipt of a letter from the Native Alaskan tribes. The investigation revealed that someone within the EPA had facilitated the letter exchange. Allegedly, drafts of the letter were exchanged between Mr. North and an agency attorney to craft a viable correspondence, which resulted in the watershed assessment.

SENATOR COGHILL noted that the legal groups involved would have received compensation and asked if the Cohen Group pursued that

trail, and opined that it would be an important direction to follow.

MS. BUTLER responded no.

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REPRESENTATIVE JOSEPHSON asked whether DLA Piper participated in authoring the Cohen report.

MS. BUTLER replied no.

REPRESENTATIVE JOSEPHSON recalled that a decade ago there was debate about the U.S. Securities and Exchange Commission (SEC) filings, which included sworn statements outlining the expectations/scope of the mine project. He asked whether the CWA prohibits reliance on that type of data being used for an EPA ruling.

GENERAL RALSTON responded that the SEC filing would have to be considered insufficient and in no way representative of the scope of the mine. He opined that it would lack the necessary level of detail required by a permit.

REPRESENTATIVE JOSEPHSON asked whether law prohibits the EPA from applying the 404(c) action.

GENERAL RALSTON deferred comment and opined that it is for the courts to decide.

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REPRESENTATIVE TARR commented that Native Alaskans hold unquestionable rights to request support from the federal government in an area of such great importance. She asked for comment on the weight that Native voices hold at the federal level. Also, she pointed out, Pebble could make a permit application at any time, thus triggering the NEPA process, which hasn't occurred, and questioned why the state would involve itself further.

GENERAL RALSTON deferred commenting on Pebble Partnership motives. However, he stressed, a permit cannot be issued until the ongoing legal issue surrounding the EPA's 404(c) process is resolved. The requests from Alaska Natives were reportedly heard from both sides, and the NEPA process is the fairest means for incorporating all views and all agencies involved, he

maintained. One of the troubling aspects of the Phil North e-mails, and the missing piece here, is that the EPA IG Report called the possible misuse of position was his coordination with anti-Pebble Mine groups when he is an EPA employee who is supposedly looking at this process even-handed.

MS. BUTLER added that until a permit is issued and subjected to the NEPA process, a shovel can't go into the ground, and the EPA is not relinquishing its 404(c) right.

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CHAIR GIESSEL noted that once issued, the agency is also able to withdraw a permit, and recalled a working mine in West Virginia having that action taken against it by the EPA.

SENATOR WIELECHOWSKI pointed out that the report being presented today, criticizing the EPA for process, was paid for by the Pebble Partnership for an undisclosed amount, compiled behind closed doors in a non-transparent process, and involves 60 undisclosed sources. He said it is a preliminary report that was not released for public review before disclosure, nor was it released to the 60 anonymous participants, and has not been peer reviewed. The report doesn't deal with scientific or legal issues, he opined, and holds no credibility as it represents an opinion paid for by the Pebble Partnership.

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REPRESENTATIVE NAGEAK recalled that he has lived through this type of action before, where economic opportunities are blocked by the federal government. As an example, he offered the Arctic National Wildlife Refuge (ANWR) decision where the authorization process may not have been followed.

SENATOR COGHILL said he considers the document to be a public report, compiled by an outside source, and opined that the result is non-biased.

CHAIR GIESSEL said that the state is faced with a number of federal regulations which often inhibit opportunities for development.

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CHAIR GIESSEL thanked the participants and announced the continuation of the Senate Resources Standing Committee.

ADJOURNMENT

There being no further business before the committees, Chair Giessel adjourned the joint meeting of the House Resources Standing Committee and Senate Resources Standing Committee, at 4:23 p.m.