

Revised August 22, 2008, 1:57 p.m.

This transcript has been prepared as expeditiously as possible in order to provide information to the public. Editorial changes have been made for clarity. . We apologize in advance for any inadvertent transcription errors.

This is a transcript of the continuation of the APOC hearing on Kraft vs. DNR (08-14-CD), which was heard on August 21, 2008.

Present were Commission Hickerson (Chair) Commissioner Dean (telephonically), Commission Ballenger (telephonically).

After deliberation:

Chair Hickerson: This is a continuation of the APOC hearing on complaint 08-14-CD, Kraft v. Department of Natural Resources. It is approximately 8:20 p.m. and the commission has had opportunity to consider the evidence presented and reviewed most of the exhibits. We did not hear the DVD. But this is where we are: under article [IX] section 6 of the Alaska Constitution it provides no appropriation of public money may be made except for a public purpose. We're looking at that as part of expenditures of public monies. These are definitely public monies. We find that the state did receive, under AS 15.13.145, money that was specifically appropriated. It was appropriated under Senate Bill 221 that reads:

Section 67

(c)The sum of \$25,000 is appropriated from the general fund to the Office of the Governor to facilitate educating the public regarding current state regulation of mining and mining activities in the state, including providing information that may influence the out come of an election on initiatives affecting those mining activities, for the fiscal years ending June 30, 2008, and June 30, 2009.

(d) It is the intent of the legislature that the appropriation made by (c) of this section meet the requirements of AS 15.13.145.

Paragraph (d) of Section 67 from Senate Bill 221 shows intent of the legislatures that the appropriation made by (c) of the section meets the requirements of AS 15.13.145.

In the bill review that was transmitted from the Department of Law to the Governor, the Department found that [SB 221, section 67(c)] was a legal appropriation. Respondent exhibit 7.

... Subsection (c) of the bill provides \$25,000 to the Office of the Governor to educate and provide information to the public regarding mining regulation activities and activities in the state, including information that "may influence the outcome of

an election” on initiatives relating to mining. ... Section 67, paragraph (d), is intent language in which the legislature states its intent that the appropriation made in (c) of the section meets the requirement of AS 15.13.145. ...

[There is a footnote to that bill review] and in the footnote it references section (b) of AS 15.13.145. [So it was] specifically appropriated, so we don’t think there was a question whether or not it was specifically appropriated. But what are the allowable uses of that money?

An attorney general’s opinion (1992 Alaska Op. Atty. Gen. 9, 1991 WL 561444 (Alaska A.G.) states:

With respect to elections, this office has in past opinions narrowly construed power of the state officials to expend public money or use public property in support of partisan position in an election campaign. 1980 we wrote, “the first [barrier to the expenditure of public money or property] is that there must be clear and explicit statutory authority to expend public money in support of a partisan position. ...

The commission has determined that this requirement has been met. [Further the AG opinion states,] “The second barrier is the rule that public funds may be expended on political activities only if the government’s involvement is fair and neutral.” Basically the Commission has looked at this. Public funds used by public individuals in a public process are supposed to be carried out in a fair manner, fair to the public. Senate bill 221, to us, means to educate in a fair manner. The education may in fact influence an election by providing information about that ballot measure to the public, [but it must be fair and neutral].

And so, we looked into the website and the concerns the complainant made to see whether or not the website is in fact fair and neutral and we found in certain areas that the website is not a correct representation of the ballot measure as we read [it] tonight. I would like to point out some of the areas of the web page that presents us with a concern that the website is not fair and neutral. If you would refer to the complainant exhibit 4 page 1. And I am not going to highlight every Commissioner’s concern, I will just give you a flavor from where we are right now.

On page 1 the second bullet from the bottom, “unlike existing law and regulations, the ballot measure does not address matters such as how the law is to be applied or the penalties for violation the law.” Well that may be correct. DNR has the authority to adopt regulations that address that issue. So that bullet gives the impression that there would not be an opportunity to adopt regulations or enact other laws that may be necessary to fully address how the law is to be applied or what the penalties or process would be for violations of the law.

The next bullet perhaps is a bit of a concern to the Commission. It states “the ballot measure appears to exempt existing large-scale metallic mines that have all their permits. However, the existing mines will likely need changes to their permits to accommodate

future changes in their operations. All future changes in facilities or operations at existing mines would fall under this initiative.” From a reading of Ballot Measure 4 under section 3, the scope, the Commission doesn’t believe it is a correct statement. Section 2 and Section 3 talk about the scope and Section 2 is the meat of the initiative; that’s how we understand it. [The Ballot Measure reads], “Section 2 of this act does not apply to existing large scale metallic mineral mining operations that have received all required federal, state, and local permits, authorizations, licenses, and approvals on or before the effective date of this Act or the future operation of existing facilities at those sites.”

Reading this section, it is the Commission’s interpretation that only new facilities would be subject to this Act. That is a different statement than contained in the Web site, “future changes in facilities or operations at existing mines would fall under this initiative.” There may be obviously [differing] interpretation of how the scope is going to be applied. Reading the wording and the ballot measure, and that provision I just quoted on page 2 of the complainant’s exhibit, seems inconsistent.

On page 3 in Exhibit 4, the second paragraph addresses the same concern. “Ballot Measure 4 would apply on a statewide basis to mines extracting metallic minerals, but only those mines that use or disturb more than 640 acres. ... There are currently three metal mines in Alaska exceeding 640 acres: the Red Dog, Fort Knox and Pogo mines.” This paragraph seems to indicate to the Commission that Ballot Measure 4 would apply to Red Dog, Fort Knox and Pogo mines. If we read the scope correctly under Section 3, it would only in fact apply to new facilities. So we feel this is misleading.

Under Exhibit 4 page 5, [it] explains how state laws are changed. We question the relevancy of having the section in there versus referring to [the division of] elections; however the reading of it seems to be correct. I think the complainant objected to this being in the context of the other provisions.

On page 7 we have not had the opportunity of hearing experts on state regulation of large mines today, but according to the complainant, the content again is okay. But in the context the rest of the Web site, there are objections.

Exhibit 4 page 9, there are some concerns there. It seems to indicate on the bottom, “however, water quality is already protected for human, salmon and other uses under the federal Clean Water Act and state water quality standards. Ballot Measure 4 does not contain any provisions relating to the public process to be followed in changing water quality standard or issuing permits for mines.” This seems to be in direct contradiction to the Web site that talks about how state laws are changed, in fact state laws and standards can change just as you outline on your Web site. So this seems to leave the impression if Ballot Measure 4 passed, that there would not be further changes even if they are needed, which indicates there may or may not be need for additional change. There seems to be some contradiction in the Web site as [it suggests] there may be need for change and Ballot Measure 4 doesn’t address it when in fact the Web site contains a whole page on how state laws are changed. So for members of the public not familiar with legislative and administrative process, they might be confused.

Exhibit 4 page 11, Ballot Measure 4, the legal summary. Again as we recall, the complainant didn't object to it, but objected to it within the context of the website. Those are some specific concerns that the commission has been able to address today.

What we would ask the parties to do, because we believe that the state has the authority to in fact provide educational information that may affect the election, that under the guidance of the prior attorney general's opinion that also refers to case law, the state may use public money in support of a position, but it needs to be in a fair and neutral way. So we would ask that the parties attempt to arrive at a Web site that would be acceptable to both parties. There may not be agreement on the issues, and if there is not, we suggest an alternative that would allow the supporters of Ballot Measure 4 an opportunity to insert their interpretation. For instance, the scope. Where there is a difference of opinion, you would provide public access to present an alternative interpretation or effects, and by doing so the Commission believes you will be doing a good service for the public since public funds have been appropriated to educate the public on a public initiative.

We would like the parties to meet to give us status report, if not absolute change in wording of the Web site by tomorrow at 2 p.m. Until then DNR shall remove its Web site, and state officials in their official capacity shall not publicly advocate against Ballot Measure 4. If the parties are unable to enter into a stipulation that is acceptable to the commission, we will make a further decision at that time.

Questions and Answers from the complainant's attorney and State of Alaska DNR

Chair Hickerson: Mr. Kendall, do you have any questions at this time?

Mr. Kendall: Yes, I do, commissioner. Did I hear correctly, as of now the Web site is down and that we are supposed to work on an agreement by 2 p.m. tomorrow and only if we agree with the contents would it go back up? Is that correct?

Chair Hickerson: At 2 p.m. tomorrow we will determine whether or not the Web site will continue to be under a cease and desist order according to AS 15.13.380.

Mr. Kendall: So if my understanding is correct, as of now, it is down until we come to an agreement of what it can say before it can go back up?

Chair Hickerson: We will hear what agreement you have been able to reach at 2 p.m. tomorrow. At that time the commission will have to make a determination as to whether or not to continue a cease and desist order or lift it.

Ruth Hamilton Heese: Commissioner, if I may speak for the State. I hear it differently from the counsel to the complainant here. That you are not saying an agreement must be reached, but that you will be reviewing what is proposed by the parties, whether or not

they reach an agreement, or whether our offices say it differently or the complainant's office would say it differently. We will need to reach a bargaining point by 2 p.m.

Chair Hickerson: Yes.

Ms. Hamilton Heese: Thank you.

Mr. Kendall: Thank you for the clarification, and I don't know, and probably the state could answer logistically, how quickly can that happen if we don't agree with the contents. I guess I worry about the actual logistics of it. Then again, it's their Web site. I don't know how quickly they can alter it.

Ms. Hamilton Heese: Commissioner Hickerson, I don't think that the issue is how quickly the Web site can be altered. If it needs to be altered regarding this issue, I think we are prepared to face consideration of what you laid out here, and we will be willing to work with guidance to discuss this issue.

Mr. Kendall: Yes, sometime tomorrow morning or via e-mail later we can work it out, so we can gather some interested parties and come up with some kind of common grounds on the content.

Chair Hickerson: And it is my understanding from Mr. Fogels that he has people standing by that can immediately take down the sections of the Web page. Is that correct, Mr. Fogels?

Mr. Fogels: Yes, it is. My Web person lives in Jewel Lake. As soon as I give them a call, they would drive downtown, go into the office and pull the sites.

Chair Hickerson: Thank you all very much. Is there anything further to come before the commission at this time?

End of transcription.

Telephonically present were: Commissioner Dean, Commission Ballenger, Complainant Attorney Scott Kendall, DNR staff; Ruth Hamilton Heese, Ed Fogels, from the media Megan Baldino (Channel 2).

In person: Chair Hickerson, Executive Director Holly Hill, Assistant Director Christina Ellingson, Campaign Disclosure Coordinator Kim Wilson, Recording Secretary Maria Bulfa.