

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

April 1, 2002

1:25 p.m.

MEMBERS PRESENT

Representative Beverly Masek, Co-Chair
Representative Drew Scalzi, Co-Chair
Representative Lesil McGuire
Representative Gary Stevens

MEMBERS ABSENT

Representative Hugh Fate, Vice Chair
Representative Joe Green
Representative Mike Chenault
Representative Mary Kapsner
Representative Beth Kerttula

COMMITTEE CALENDAR

HOUSE BILL NO. 266

"An Act establishing and relating to the Joint Federal and State Navigable Waters Commission for Alaska; and providing for an effective date."

- HEARD AND HELD

3d SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 178

"An Act relating to the powers and duties of the commissioner of fish and game, the Department of Fish and Game, and the Board of Game, to taking and use of certain game animals, and to consideration of the budget of the Department of Fish and Game by the legislature; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 266

SHORT TITLE:FED/STATE NAVIGABLE WATERS COMMISSION

SPONSOR(S): REPRESENTATIVE(S)PORTER

Jrn-Date	Jrn-Page		Action
05/02/01	1481	(H)	READ THE FIRST TIME - REFERRALS

05/02/01	1481	(H)	RES, FIN
05/03/01		(H)	RES AT 1:00 PM CAPITOL 124
05/03/01		(H)	-- Meeting Canceled --
03/29/02		(H)	RES AT 1:00 PM CAPITOL 124
03/29/02		(H)	-- Meeting Canceled --
04/01/02		(H)	RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

RON SOMERVILLE, Consultant
to the House and Senate Majority
Alaska State Legislature
Capitol Building

Juneau, Alaska 99801-1182

POSITION STATEMENT: Testified on HB 266; provided an overview of the bill's intent and a history of navigability issues in Alaska.

ROD ARNO

Alaska Outdoor Council (AOC)

P.O. Box 1410

Wasilla, Alaska 99687

POSITION STATEMENT: Testified in support of HB 266.

ACTION NARRATIVE

TAPE 02-21, SIDE A

Number 0001

CO-CHAIR BEVERLY MASEK called the House Resources Standing Committee meeting to order at 1:25 p.m. Representatives Masek, Scalzi, Stevens, and McGuire were present at the call to order.

HB 266-FED/STATE NAVIGABLE WATERS COMMISSION

CO-CHAIR MASEK announced that the committee would hear HOUSE BILL NO. 266, "An Act establishing and relating to the Joint Federal and State Navigable Waters Commission for Alaska; and providing for an effective date." [In packets was a proposed committee substitute (CS), version 22-LS0966\C, Cook, 3/27/02.]

Number 0122

RON SOMERVILLE, Consultant to the House and Senate Majority, Alaska State Legislature, presented HB 266 on behalf of Representative Brian Porter, the Speaker of the House and sponsor of HB 266. He informed members that Senator Rick

Halford, the Senate President, had introduced an identical Senate companion bill at the end of the last session. Mr. Somerville said both bills were held, however, because Speaker Porter and Senate President Halford had wanted to speak to the U.S. Secretary of the Interior and the [congressional] delegation about the process for determining navigability. He explained that the proposed CS contains a slight change from the original version regarding the verification process for any lists developed. The packet also contained a fiscal note for \$200,000 for a two-year capital improvement project (CIP).

MR. SOMERVILLE referred to a document titled "Alaska State Legislature: Conflicts Concerning Title to Submerged Lands In Alaska, updated 3/04/02" ("White Paper"). He noted that the White Paper, which he and legal counsel Ted Popely had developed, was distributed to people in Washington, D.C. [including Alaska's congressional delegation] to outline the problem. Additional background information includes a copy of the State of Alaska v. United States of America (201 F.3d 1154) lawsuit (referred to as "Kandik-Black-Nation"), which he said helps illustrate the problem. He called this a Catch-22 regarding other states' entitlement to submerged lands.

Number 0301

MR. SOMERVILLE paraphrased from the sponsor statement, which read: "At statehood in 1959, Alaska, like all other states under the Submerged Lands Act, received title to all submerged lands underlying state navigable waters and marine waters out to three miles." Mr. Somerville remarked, "That process ... of determining ... how we get that navigability has been the real catch." He explained:

The key really is - as, of course, I've said - in all the cases and all the material that's been circulated by the Department Of Law: if it was navigable at the time of statehood, it's navigable for the purposes of title. But determining whether or not it was navigable at the time of statehood has been kind of the clinker.

MR. SOMERVILLE said the state essentially has title to approximately 60 million acres of [tidelands] and submerged lands if the state can determine where the land is. About 15 million [acres] is estimated by the [Alaska] Department of Natural Resources (DNR) to lie under navigable waters, and 45 or 46 million acres is submerged lands out to three miles. He

indicated [the process doesn't involve federal agencies and the state coming together to determine navigability], and that the final determination, in the past, had been made by the courts. Since statehood, almost every case determining whether a stream was navigable had been litigated in court. Since 1959, 13 rivers have been identified by the federal courts as being navigable for the purposes of title.

MR. SOMERVILLE estimated that about 22,000 streams and 1 million lakes in Alaska could be declared as navigable. Mr. Somerville indicted that determining navigability had been a time-consuming process. He said in 1992 and 1996, the state had sent the U.S. Department of the Interior, as required under the Quiet Title Act, a list of about 200 streams; the state had specified, "We want to quiet the title list as required by the law. We must give you 180 days' notice." He said the intent was to eventually quiet title to those 200 streams.

MR. SOMERVILLE noted that the federal government hadn't reacted "like we wanted" in order to provide the needed court tests to get "some good declaration of navigability and what criteria we might be using." The state then went forward with the Kandik, Black, and Nation rivers in northeastern Alaska. Nine years later, he said, the federal courts "were to have the court case in the Kandik-Black-Nation"; the court finally determined that the state does have title to two of those, but there was no determination on the third one. He told members, "So, two out of three, over nine years - divide that into 22,000 rivers. It's going to take us 99,000 years at this rate to settle, eventually, what rivers are navigable." He offered the foregoing as an illustration of "the kind of ... mess we're in."

Number 0591

MR. SOMERVILLE said it is important to have navigability, and whether the state lost title is arguable. He noted that a few years ago, [then] commissioner John Shively told the legislature that the state never loses title to the submerged lands received at statehood, [but the longer the issue is not addressed], the weaker the [state's] case gets. He read from the Kandik-Black-Nation case [original text provided]:

There is also a serious policy concern in favor of allowing resolution of disputes based on the United States' inchoate claim to everything in Alaska but what it has disclaimed. Eventually all the witnesses will be dead, reducing the reliability of litigation.

Someone who used one of these rivers in 1950 at age 20 is now 60.

MR. SOMERVILLE said the process in proving that a river was navigable at the time of statehood is fairly complicated. Testimony must be obtained on whether the river was used for commerce, what sort of purposes the river was used for, and who used it. He read from the Kandik-Black-Nation case [original text provided]:

The population in the area was so sparse at all relevant times--probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood--that a few deaths by old age can remove most or all the knowledgeable witnesses. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title forty years later, is effectively deprived of what it is entitled to under the equal footing doctrine.

MR. SOMERVILLE specified that the statement was from the Ninth Circuit Court of Appeals. There are three basic problems in determining navigability and quieting title to submerged lands. He pointed out that the Quiet Title Act requires the state to provide a 180-day notice [of its intention to file suit to the head of the federal agency with jurisdiction over the lands in question]. However, he said, part of the problem is that the Quiet Title Act also specifies that the federal agency can become a party as a defendant in adjudicating and dispatching title in which the United States claims an interest. He referred to the Kandik-Black-Nation case and indicated the [state didn't resolve ownership with respect to the Black River because the United States didn't claim interest in it; as a result, the district court lacked jurisdiction over the state's claim]. He said, "If they don't claim an interest, they can, in essence, hold us at bay until they decide to claim an interest."

Number 0860

MR. SOMERVILLE said there is no way to force the federal [government] to participate in a quiet-title-action adjudication process. Furthermore, a narrow interpretation by the federal agencies has created quite a quandary for the state, and has caused some of the problems the state has had in the 40 years

since statehood in acquiring title to submerged lands. He said the other problem is the navigability criteria. He told members criteria used in determining navigability are something people in the Lower 48 argue over considerably. Different criteria are used in different parts of the country to determine navigability. In Oregon, for example, if a log can be floated down a river, then [the river is] navigable. He noted that basically the criteria are still the same.

MR. SOMERVILLE paraphrased from a portion of the White Paper that read: "For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted." He then cited a U.S. Supreme Court case, which he called a "landmark decision," The Daniel Ball, 77 U.S. 557 (1870), and read: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

MR. SOMERVILLE paraphrased from a portion of a paragraph of the White Paper that read: "The greatest hurdle to overcome in the State's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability." He said the state has taken the position that the water body, if usable as a highway for transportation of people and goods, can include almost anything. The goods being transported can be for a variety of purposes; for example, the goods can be used by resource management agencies or for natural resource exploration, development, government, land management, management of fish and game resources, or scientific research. He remarked, "So, there's a broad spectrum of uses that the state has determined, for their purposes - for our purpose - of determining navigability, [for which] a river might qualify." Mr. Somerville said the same holds for recreational transportation including personal travel and professionally guided trips.

Number 1009

MR. SOMERVILLE indicated the federal government has contested [the state's determination of navigability] in a number of

cases. He highlighted Alaska v. Ahtna, [891 F.2d 1401 (9th Cir. Alaska 1989)], known as the "Gulkana case." He said:

The Gulkana case was the key one, because it was one of the first that the state was looking for to get some sort of active criteria that we could use for the purpose of holding the federal agencies' feet to the fire in determining navigability. The Gulkana [case] was a very broad, sweeping case and, in essence, said, as small as a river or as large as it is - and some times of the year the Gulkana doesn't run as much water as it might at other times of the year - despite the fact, it was still used for the purpose of commerce during a variety of times of the year. And the criteria that came out of the Gulkana case are ones that the federal agency finally agreed should be used in resolving navigability claims in the future.

MR. SOMERVILLE said the question is about how to apply the criteria of the Gulkana case to other rivers in the state. He remarked, "In other words, rivers that are similarly situated, [that] clearly fall under these category and criteria, they are in fact navigable."

Number 1141

CO-CHAIR SCALZI referred to the definition of "navigable", which he said was broad. He asked if a commercial fishery would qualify as commerce in the [state's] definition.

MR. SOMERVILLE said it qualifies, in the contention of the state, if the river was used for the purposes of getting to or going to a location for the purpose of participating in commerce. He explained that the Gulkana River was used as a waterway for purposes of trapping. Mr. Somerville remarked, "In essence, the state was saying, 'Look, it was used for commerce.'" He indicated the [definition would include a commercial fishery if it took place in that area].

CO-CHAIR SCALZI said, "That should qualify it just enough, if there's a commercial fishery; that's basically on every river where there's salmon in the state, isn't it?"

MR. SOMERVILLE answered in the affirmative. He said the question has been whether [the state] can force the federal government to apply those criteria in making navigability determinations. Mr. Somerville said another problem regarding

criteria is that prior to 1993, the Bureau of Land Management (BLM) had a very restrictive application of its determination of navigability. He mentioned that the Gulkana decision had been reached, but said [BLM] wasn't using its own manual in surveying for the purposes of conveying lands to the Native corporations. Mr. Somerville said ANCSA [Alaska Native Claims Settlement Act] passed in 1993, and BLM was using a very restrictive interpretation of the term "navigability." He explained that a lot of rivers appear to be transferred to corporations, which the state argued were navigable rather than non-navigable [rivers]. He said in 1983, and again in 1988, BLM was forced by an Act of Congress to use its manual of surveying instructions, which standardized the process that it used for determining navigability. Mr. Somerville said:

What the manual says is that if ... a lake is ... 50 acres or greater or a stream is 3 chains wide - 198 feet or greater - then the submerged lands cannot be transferred (indisc.) the uplands. You must what they call "meander" the boundaries of the submerged lands and the adjacent uplands. And that's what we use for the purpose of conveyance; in other words, only the uplands are conveyed. If it's smaller than 50 acres or less than 3 chains wide, they must do a determination of navigability - determine whether the stream is navigable or not navigable. If it's navigable, they cannot transfer the submerged lands; they must again meander the line ... of the boundaries and transfer only the uplands to the party.

MR. SOMERVILLE indicated the aforementioned was not done prior to 1983. As a result, he said, the state has a significant amount of conveyed lands with a questionable title - a "cloud" on the title - and BLM is not going back and correcting that error. He reiterated that this a problem in the determination of navigability, "but also is a key, in essence, of illustrating the problem we've had in applying the Gulkana decision."

Number 1371

MR. SOMERVILLE indicated [the objective of HB 266 is to simplify the process and come to a resolution]. He described resolving navigability on 22,000 rivers and 1 million lakes as a "huge problem." Mr. Somerville said one possibility recognized by Congress and the legislature for [resolving navigability] would be to establish a cooperative process with federal agencies to identify lakes and streams that meet the Gulkana criteria or

something similar for determining navigability. He pointed out that the [cooperative process] had been tried a couple of times administratively but had failed. He said the list would be similar to the [list] of 200 [lakes and streams] submitted by the [Alaska] Department of Law to the [U.S. Department of the] Interior to quiet title.

MR. SOMERVILLE said once the list is completed, a certification by Congress could be put in place or a process could be established by the Department of the Interior to quiet title to those appropriate streams for the purposes that the state was entitled to at statehood. He mentioned seeing whether this might be a plausible way to go, and referred to a meeting in Washington, D.C., with the Secretary of the Interior and the [congressional] delegation, but suggested the burden of this process would fall on the legislature because of timing in relation to Congress. He emphasized that nothing would be put into place unless Congress passed a similar bill.

Number 1491

CO-CHAIR SCALZI asked, "Do we have a tentative '200 list' right now of the categories?"

MR. SOMERVILLE referred to Appendix A and Appendix B of the White Paper. He said those had been included for the purposes of illustrating "something that had been submitted." Mr. Somerville said he thought there were 194 [water bodies] listed in Appendix A and that 9 [water bodies] were submitted in 1996 in addition to that list.

CO-CHAIR SCALZI asked about the criteria and the amount of time required to put the list together.

MR. SOMERVILLE said the list was put together primarily by DNR, the Alaska Department of Fish and Game (ADF&G), and the state agencies through the Department of Law. He said there had been quite a bit of information accumulated on some rivers, such as river flow, accessibility, and background information. Mr. Somerville said he believed those [water bodies] listed were "pretty well" documented.

Number 1664

ROD ARNO, Alaska Outdoor Council (AOC), testified via teleconference. Mr. Arno told the committee that the AOC is a statewide coalition of sportsmen with approximately 10,000

members, and that AOC had participated in the legislative process since before statehood. Noting that the membership of AOC is in support of HB 266, Mr. Arno said, "Clearly, as outdoorsmen and sportsmen, highway corridors are extremely important as far as access to public lands in Alaska." He said AOC had expressed concerns over R.S. 2477 [rights-of-way] and over navigable water issues in the past. He reiterated AOC's support of HB 266.

CO-CHAIR MASEK called an at-ease from 1:50 p.m. She called the meeting back to order at 1:52 p.m.

CO-CHAIR MASEK mentioned that the committee was short of a quorum and indicated HB 266 would be held over.

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:00 p.m.