ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE
February 26, 2001
3:50 pm

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln

MEMBERS ABSENT

Senator Pete Kelly

COMMITTEE CALENDAR

Trails and Easements: Dept. of Fish and Game

WITNESS REGISTER

Ms. Tina Cunning
ANILCA/State-Federal Issues Program
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724

Ms. Robin Willis
Habitat Division
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724

ACTION NARRATIVE

TAPE 01-16, SIDE A
Number 001

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee meeting to order at 3:50 pm and announced a discussion of RS 2477s and 17(b) easements.

MS. TINA CUNNING, DNR, said they were asked to bring the training workshop that they use for their own staff on access to Alaska's

land and waters as it relates to hunting, fishing, viewing and those kinds of interests. She included a power point presentation with her discussion.

MS. CUNNING said that access is important to ADF&G because, "If you can't get there, you can't hunt, fish, trap, or otherwise use and enjoy our fish and wildlife and water resources."

She showed the committee a pie chart of what the land ownership used to be in Alaska in 1997. Constitutional provisions under the Public Trust Doctrine for access on waterways are very strong in Alaska. Under state statute there is a clear definition of the public's rights of access on waterways. The state has control of those waterways. The ownership of the land adjacent to or underneath the water does not grant exclusive rights of use to the waterways.

MS. ROBIN WILLIS, DNR, said AS 38.05.127 deals with provisions for easements along waterways. They look at them specifically during conveyances from the state to private or municipal agencies.

MS. CUNNING added that they frequently deal with titles saying that no one may obstruct or interfere with free passage on those waterways. "Basically, if you can float a boat on it, you can use it. If you're fishing in it, you can walk in it to fish. It does not give you a right to do any alteration to the submerged lands."

MS. CUNNING said:

> The ADF&G Nav Waters Program primarily serves the staff and public who are interested in access for hunting, fishing, trapping, and other uses and enjoyment of fish and wildlife. It was set up as a result of a legislative audit in 1995 originally conducted on Department of Transportation, Natural Resources, Fish and Game, and Law looking into how the state was implementing the Public Trust Doctrine rights and asserting our ownership of navigable waterways, 17(b) easement reviews and related access issues.
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> One of the recommendations that came out of that legislative audit is that Department of Law, Natural Resources and Fish and Game coordinate on these issues to be sure we're consistent and aggressive in asserting the state's management.
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> We've done that. We now have a Nav Waters team, which ends up dealing with access because of the relationships

of access conflicts to waters, 17(b) easements and RS 2477s.

MS. WILLIS added that ANSCA was passed in December 1971 creating a Native trust and put aside lands for selection of which 45 million acres were entitled to 12 regions. A 13th region got no land, but was for those folks who lived outside of the state and it recognized 220 villages who also received an entitlement of 22 million acres. The regions received the subsurface estate to the 22 million and an additional 18 million after that.

Those selections were done in three rounds, she said; the first was for the village corporations in 1974. /the second round of village selections and the first for regional corporations was done in December 1975 and the regional corporations was extended until 1976 for the third round.

MS. WILLIS explained:

> The land that was withdrawn for each village was recognized in sort of a circular fashion for them. The general selection requirements were that they be in whole sections - the village takes jurisdiction and selects the township in which it exited. They were supposed to be contiguous and reasonably compact and they weren't to create isolated tracts of land less than 1,280 acres (two sections). There were no rules for how many acres could be selected, resulting in a great number of over-selected lands that are top filed between regions, villages and the state. A great deal of confusion still exists as to what will eventually become public property.

MS. WILLIS showed the committee an example of one of the areas they were working on in Stevens Village. Regional corporations were restricted to selecting lands in even townships with even ranges and odd townships with odd ranges providing sort of a criss-cross work.

She said the 17(b) easements started with the establishment of the Federal State Land Use Planning Commission whose responsibility it was to identify public easements across only village and regional corporation lands. It didn't apply to Native allotments or any other kind of private inholding. Their main interest was access for recreation and hunting and required that, "They consult with appropriate state and federal agencies."

MS. WILLIS explained that the Land Use Planning Commission existed between 1971 and 1979 at which point the Department of Natural Resources assumed the state's lead authority for identifying and negotiating 17(b) easements. When their budgets and staffing were

reduced, they requested that other agencies and divisions take on responsibility for working, identifying, and protecting access to their lands of interest. In their case, they took on access to federal lands as well as to state public lands for hunting and fishing purposes. She said that the only thing that continues to cause confusion is that BLM continues to defer to the Department of Natural Resources as the primary state authority. This makes coordination between agencies essential.

MS. WILLIS said the history of 17(b) easements started in 1975 when BLM started conveying their properties. The first easement policy came out from the Secretary of the Interior in 1976 and included 25 and 50 ft. wide trails, 60 ft. and 100 ft. wide roads, one-acre site easements, and 25 ft. wide continuous streamside and shoreline easements. This situation was not accepted by the new landowners. So they litigated Chulista et al in 1976 trying to primarily get rid of the 25 ft. wide continuous streamside and shoreline easements. She explained:

> In order not to prevent conveyance of lands during the litigation, the federal agencies and the corporations came to an agreement whereby they both agreed to allow for conveyance, but the U.S would agree to terminate anything the courts found to be unlawful and the Native corporations would then donate replacement easements or whatever was determined to be by the courts lawful. There were about 110 conveyances issued during the time of the court hearings.
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> In 1977 the court finally came out with their decision, which required the termination of those continuous streamside and shoreline easements and, again to expedite the conveyance process, the federal government, with state concurrence, decided to go ahead and conform the easements in stages. They allowed the termination initially of the unlawful easements - the continuous shoreline ones and then they would wait until the lands went to patent for the corporations and they would get the donations at that point in time.
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> A little confusion was raised because determinations were applied to all corporations and to all conveyances whether they had the insert of the agreement associated with it or not. Trying to get determinations and the donations figured out has been a little bit of a problem.
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> In November 1978, BLM issued their new regulations, which said that easements could only be reserved for access to public lands and major waterways and there could be no

recreation on those easements. In other words, you couldn’t fish from them any more.

The general requirements that came out in regulation were that easements had to be reasonably necessary to guarantee access to publicly owned lands and waterways. The primary standard for determining what was reasonably necessary was present existing use and that was established as of December 18, 1976. So the easement had to have had use on or before 1976, which when we're doing new conveyances now is hard to come by - trying to find people who have used them during those times.

Absent present existing use, the only way you could get an easement reserved was to find that it guaranteed international treaty obligations or there was no other reasonably alternate route or site that existed, or that it was to provide access to isolated tracts of land that were created during the conveyance process.

Two other important components of the regulations were that the easements needed to be of a specific use, location and size. The standard size and uses could only be varied when justified by special circumstances. That's being questioned at this point as people try to refine the uses allowed on the easements that have been put into existence.

There is also another provision that says public easements shall be terminated if not used for the purpose for which they were reserved by the date specified in the conveyance or by December 18, 2001, which is quickly approaching. Part of the confusion is that any easement can be terminated at any time when its retention is no longer needed for public use. So any of them that are no longer accessing public property can under any authority be terminated at any time.

The question as to the deadline of December 18 is causing us some concern. An easement will not be terminated if it provides access to isolated public lands solely absent present use. That's being worked on at this point.

Important definitions that came out in ANCSA were major waterways. You can only have access from a major waterway to public land, but major waterway does not mean necessarily a navigable waterway. It is any river, stream

or lake, which has a significant use in its liquid state and present existing use was on or before December 1976.

MS. WILLIS provided them a comparison of how the easement descriptions changed between the 1976 original easement guidelines and the one they currently work with.

Number 900

SENATOR LINCOLN asked if the coastline easement was the only one that had been dropped off.

MS. WILLIS answered yes and a court case said it was no longer legal. So the 1976 ability to reserve it isn't there any more. The rest of the easements were just refined as to allowable uses or how they defined their widths or how they could be established.

SENATOR TAYLOR asked how a court at that time could get around the public trust doctrine on coast access.

MS. WILLIS replied that she didn't think they referenced it. The main part had to do with the continuous shoreline easements, which were implied to be kind of a floating easement that keeps moving and was never in a definitive location. The courts found that it needed to be in one point so that you could access up and down a coast or stream. You didn't have to have access for the public to stand on a shoreline the whole distance. The public trust wasn't mentioned.

SENATOR TAYLOR said that by elimination there were no easements on that coastline.

MS. WILLIS answered that you can have them at periodic points to allow access for the uplands in the form of a site easement at the head of a trail or at periodic points so you can get up or down a river. They are usually put at 10-mile points, depending on the kind of waterway you're working with.

SENATOR TAYLOR said he thought she said that in conveyance of state land through DNR, they insist upon preserving access easements along waterways for the public trust, but with the conveyance to private land, someone did not insist on it.

MS. WILLIS answered that was right and that was federal land to the private inholdings and the state was not a party to it. The state was on the side of reserving the coastline easements, but they didn't win.

MS. CUNNING clarified that there were two tables; one was for site easements and one was for trail easements. The site easements allow ed one-acre between a transportation mode-change. For example, if

you're on a public waterway and need to get out, pack up your raft or whatever you're using and then hike out to across the private land to the isolated piece of public land, then the trail is reserved from the site to the other body of public land or water. So there's still the ability to get on and off the public trust waters. There's just not the authorization to stand on the private land to fish, for example, in the private waters or to walk up and down the lakeshore. Then you can only do it below the ordinary high water mark.

SENATOR TAYLOR noted that Native corporations are not impacted in any way by the very same laws that are impacting everyone else in the state when it comes to the utilization of public trust rights.

MS. WILLIS agreed that there was a different standard between state lands being conveyed to private entities versus federal land that is conveyed to private entities. The definitions of the site easements are the refinements. She continued:

> There are only two opportunities for the state to provide input on access; one is at the point of a notice of proposed easements and recommendations that are sent out to all interested parties and the other part is when they actually send out their listing or their decision to issue conveyance which will provide all of the easements that they plan on reserving. That decision is appealable by any one who has a title interest, like the Native corporations, the state, or another private landowner. That's their opportunity to appeal. If they don't appeal, it goes to interim conveyance or patent and the land becomes private.

MS. WILLIS used Seldovia as an example. She said:

> When the state became a state, we were allowed to select property. The state made their selections and received tentative approval to the lands in these two townships [she pointed to them on a map]. When ANCSA passed, the Seldovia Native Association was given the ability to make their selections. These are the rings they would have been able to select from [She indicated them on a map]. The first round of selections were tentatively approved by the state. The second round they were not. This one [in Seldovia] was within the ability to select and they talked about it for a while.
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> They did all of the easement work for this area in 1974 and 75. As a consequence, they rejected the state's tentative approval in 1975 and 77 for these two

townships. The lands were then conveyed to Seldovia Native Association [one in 75 and one in 78]. One, because of the court decision, and this land was part of the agreement for conformance, the easements in this township needed to be conformed.

Over here to get a little further is Port Graham. This is the state land here. There have been proposals to provide access to the state land using these routes all the way around. There is a route from Port Graham. The concern is there are a lot of native allotments that have been conveyed at the head of the bay and there is a concern as to whether this will continue to be a valid easement to these state lands. So the easements in question for Seldovia are the Seldovia Valley, Seldovia Lake, and access to the state lands around it; and questions as to whether Seldovia Lake is a public water body that requires access being provided to it. There's also been research in the discussions about a CCC trail that was created in the 1940s that presumably came down and across and connected up to Port Graham. That's been researched, but no one has authenticated it as an RS 2477 or an historic route.

MS. WILLIS showed the committee a slide of the actual area where the trail in Seldovia Lake is. She continued:

Because the state had tentative approval to the township, they also had some inholdings on the Lake. In 1983, the state exchanged those homestead sites with the corporation near the park. In exchanging them, they reserved the public access easements from the Lake to public lands that adjoined them. In 1983, they had a continuous shoreline easement along the bay and it was removed. The lands were then surveyed and patented to Seldovia Native Association, but the easements were not conformed. So, they have not gone through that phase. In 1997, a number of individuals that lived in the community tried to get assistance in getting the easements marked, because there were trespass and location questions. BLM sent staff members down there to attempt to get the easement marked. Unfortunately, they ran into questions about where exactly the easement was located and what uses might be allowed on it and it came to a standstill. Later on that year, the corporation requested that the easements be terminated, because they no longer accessed public lands. BLM disputed that and said no; there were still sufficient numbers of state and public lands in the

area that they needed to reserve access, but they would continue discussions and negotiations as to where they were and for what uses they could be used.

Since 1998, BLM, the state, congressional delegations, legislators and almost every one has been trying to help resolve the questions that have been raised to find a solution that's acceptable to everyone.

She pointed to a route in Seldovia that had been created as a logging route with history showing that the previous president had requested DOT to help them establish a road along the route so there could be some logging in the vicinity. Since that time, the corporation has wanted to go more into an ecotourism type of environment. So the uses along there are more for motorized use than they were originally. They are still working on an acceptable settlement.

MS. WILLIS explained the easement that was actually reserved is kind of ambiguous. There were questions of section lines existing and those could be worked with. Is Seldovia Lake a public waterway? It was surveyed out and is not part of the acreage entitlement that the corporation received, so the question is what public water they need to reserve public access to.

Regulations say they can only modify the uses allowed on an easement for special circumstances and they need to know what they are and if ecotourism would fit in.

MS. WILLIS said the question that is continually raised is who should manage the easements since it's state land and there are federal easements. The state has no real authority that can be found to manage them, but it does access state lands. She understands that the corporation would not be as happy to have the state manage them as they would to have the federal agency continue to manage them.

One proposal that Seldovia City came up with to provide alternate access was to go up from the city into the state hills into the city's designated watershed, but there's a question as to whether you can take motorized use vehicles into that watershed. A small piece of land belongs to the university and they have questioned if there's access through their properties.

Number 1600

CHAIRMAN TORGERSON asked about the December 18 deadline as it applies to Seldovia.

MS. WILLIS replied that it does apply to Seldovia and they would

have the opportunity to request terminations and the public process would have to go forward and evaluate what easements are reserved and where they are located. Seldovia recently appealed a decision that was issued by BLM arguing that the easements that were reserved in the original conveyance were under the 1976 easement regulations. Those regulations did not discuss motorized vehicles in the same way the current ones do and there was discussion as to whether they could redefine those. How that appeal comes out will affect the termination process and what they are allowed to do there.

SENATOR LINCOLN asked her where the university has lands.

MS. WILLIS pointed them out to her in Seldovia Bay. She said the major problems are the 2001 termination, over-selections and never knowing whose going to have what land and what will be public at the end, marking and management of the easements and whether the state should be a participant in doing that and what are the allowable uses going to be. It's some people's feeling that during the 2001 termination project that corporations will come in and request refinement on uses of the easements as they deem necessary.

SENATOR TAYLOR said it appears that they are going to end up with a big piece of state land that is totally inaccessible.

MS. WILLIS agreed with him. She said they are opposed to it and are trying to resolve it. The corporation is very sensitive about there being non-motorized use out to that area and keeping the valley very pristine. There is a group in the city government who want to have full and free access using their motorized vehicles. They have not been able to come to a resolution.

SENATOR TAYLOR said he could understand that, but he didn't understand what the State of Alaska was going to do with the land that is inaccessible.

MS. WILLIS replied that the commissioner of DNR and his staff have been trying very hard to come to an understanding of what the state's role should be and what should be reserved. She thought the state was determined to retain access. It's just where and it what form.

SENATOR HALFORD asked if Seldovia Lake is state public water and is it navigable?

MS. WILLIS answered that it probably wouldn't be defined as navigable in the typical sense of federal determinations. It would probably be considered major water body according to BLM standard, because that's a commuting use for reserving of easements. From DNR's perspective, it would be large enough to be navigable and usable by floatplanes and other things that they would probably

want to reserve access to. It is used for ice fishing, also.

SENATOR HALFORD asked who owns the land beneath it.

MS. WILLIS answered that it is undefined because it has meandered out and has been given a title. "At one time the whole thing, including the bed of the lake, was state property because it was TA'd to the state. The TA was rejected, but they didn't convey the submerged land under the lake to the corporation. It remains state land. It is definitely not part of the entitlement of the corporation."

SENATOR HALFORD asked if that land belonged to either the state or the federal government.

MS. WILLIS said that was right.

SENATOR HALFORD asked if that wasn't the definition of public land.

MS. WILLIS replied that it is, "But there is another issue of upland owner adjacent to a large water body that's not officially state land controlling uses within…. Basically, in a lot of places if you have a lake of a reasonable size then it's not an acreage entitlement to the upland owner. But, if it's not navigable in a sense of being reserved by the state, the upland owner can manage or pretend that he owns and controls the lake bed."

SENATOR HALFORD asked if he could limit floatplane access.

MS. WILLIS frowned at him in reply.

SENATOR HALFORD said that didn't sound like where the Supreme Court was on public trust uses. They have told private property owners they didn't own their own tideland and that they could lease it out from under them.

MS. WILLIS said that's one of the reasons it remains a question.

SENATOR HALFORD asked if she wanted to get an answer to that question, how would she go about it?

MS. WILLIS said she would go back to the attorney's office.

SENATOR HALFORD asked if there was anything the state could do to assert ownership.

MS. WILLIS answered that she didn't know. In a lot of lake systems that are large enough for floatplane use and recreational use of the lake, they have been sufficient enough in use to be able to be determined major. But other systems are smaller. This one was unique in that it was state land first and then went back to the

federal government.

Number 1900

MS. TINA CUNNING said she wanted to explain a little bit about their interest in RS 2477 trails and section line easements.

The revised statute RS 2477 passed in 1866 and means that an RS 2477 right-of-way (ROW) could be established only over land owned by the federal government not otherwise restricted or reserved. Reserved meant that it was set aside as a national park, monument, forest, military reservation or similar withdrawal. If the ROW grant predated the reservation, it remains a valid property right. RS 2477s are the responsibility of the respective states to assert and manage. Examples of "reserved" are entry dates for homesteads, headquarter sites, location dates of mining claims, occupancy dates of Native allotments, public land owners, orders for federal withdrawals and reservation dates for national parks.

Some of the RS 2477s we've assisted DNR and DOT in researching the past go clear back to the turn of the previous century in trying to determine if we could document that the use predates the federal withdrawal.

The width of the easements is in the regulations DNR has proposed and, I believe, been accepted primarily the acceptance of the ROW by the public authority as the State of Alaska has done. The writs would vary depending upon what years that ROW was established. If it was a user-established trail, it's a minimum width [indisc.]

The legislature funded DOT and DNR and a major CIP in the years 1993 - 1998 to document RS 2477s. There were over 2,000 trails initially researched. Six hundred and two trails qualified as RS 2477s. Since then, 69 more have been identified and DNR recommended 12 to be removed last year.

In 1998, the State legislature passed a statute which clearly states that the State of Alaska, through that statute public use and expenditure of public funds for construction and other means, claims numerous rights-of-way across federal land under RS 2477 including section line easements and rights-of-way. It went on to list those RSTs, which they were accepting as of that time. Under that legislation, DNR is required to annually report its research findings to the legislature. They

report any trails for addition and any trails for removal, because as further research comes along, occasionally they discover that the use actually post-dated when the land was reserved. A letter was written in December of this year in which DNR identified three more.

MS. CUNNING said there are ongoing hurdles that affect the users of fish and wildlife. The federal hurdles include that the agencies frequently do not recognize the RS 2477 trails. There are instances where the federal manager may acknowledge it, but wants to permit the uses allowed on it.

Some of the state hurdles we deal with include the recording requirement that is in what was in SB 180 in which the agencies believe all of those lands are encumbered with a right-of-way. A lot of the public gets awfully anxious about that when they believe there might be a right-of-way on their property when there's alternate access. There's a number of management questions which we raised and actually we were brought down to explain some of those management questions relating to permitting RS 2477s and the section line easements. Those issues are going to be addressed by the upcoming DNR regulations. I understand they are adopting phase one regulations now to address some of that permitting. The phase two regulations that affect utilities and other activities will be forwarded sometime this coming year.

Under our state statute, RS 2477 trails and section line easements can be replaced by alternative public access only in compliance with the statute. In other words, it can't be vacated unless there's reasonably comparable alternate equivalent access for now and into the future.

DNR's new regulations do make some changes in that the old certification process is eliminated. There's an administrative adjudication of assertions now. They are clearly identifying in their regulations the use permits and widths. I understand they may be coming to the legislature requesting some changes to the legislation including the standards for vacation.

Some of our current problems that we have as an agency in dealing with RS 2477s are that there are 17(b) easements and RS 2477s overlaps and the widths that are reserved and the uses may be different. RS 2477s are broadly considered highways used for ATVs and snow machines.

We have had difficulties at times getting recognition of RS 2477 and section line easements on University lands, mental health lands, and crossing a railroad rights-of-way.

The whole issue of marking and managing section line easements between DOT and DNR was a major issue that is going to be covered by the phase 2 regulations. The role of ADF&G is in question there. We feel very strongly about monitoring section line easements because they are very important for access for outdoorsmen - our fishermen, our hunters, our trappers, etc.

Number 2200

MS. WILLIS said one problem is finding a valid survey method. There are a number of people who believe that the on-the-ground survey is the only option across private parcels and there aren't enough surveyors in the state to do the job. There are also questions as to whether GPS readings can be used and to what extent, if they can be.

MS. CUNNING said the vacation issue is major and relates to the municipal authorities issue. "Where people own property that is on an RS 2477 and subdivisions have grown up around them and there are subdivision roads that may or may not connect between the RS 2477s or section line easements, there's a strong desire to vacate the old trails that allowed snow machine or ATV access. Yet, the new subdivision roads may be within a municipality or may be managed in such a way that the historic uses of the RS 2477 are not allowed."

MS. CUNNING said they had been struggling with that one with DOT and DNR. There is also an issue of allowable uses where the section line easements come under DOT's permitting. There is an underlying assumption of general public uses that still may occur on those easements. That use is under normal state land management authority and liability clauses, but the issue of who actually does the permitting is not totally ironed out, yet.

Number 2300

SENATOR LINCOLN questioned a trail on the map that was a major road. MS. WILLIS answered her questions.

TAPE 01-16, SIDE B

MS. CUNNING explained that one of the small areas, the Copper River, has a problem with trespass during the bison hunt on Ahtna land. Signs clearly say in multiple places to get permission from the private landowner and respect the property. This area is very

valuable to the public, but the land status is very complex to research.

CHAIRMAN TORGERSON asked if they had any recommendations for this committee to help resolve any of the issues.

MS. WILLIS replied that if it weren't in the regulations and statutes and could be waived by the Secretary of the Interior, it would make sense to wait until the whole conveyance occurs before doing a full overview of determinations. Any of the easements that don't access public lands currently could be terminated at any time. So they are not preventing any of the corporations from getting rid of easements that are inappropriate.

SENATOR LINCOLN asked how CIRI tied into the matrix of land status around the Port Graham, Seldovia and English Bay areas. She asked if the CIRI was a party to the easement.

MS. WILLIS explained that the pink area on the map was mostly private. CIRI would have some surface rights underneath the land, but the easement is on the land itself. Their patents and conveyances usually aren't subject to easements.

MS. WILLIS discussed some of the areas with Senator Lincoln regarding CIRI.

SENATAOR TAYLOR noted, "Hunting and fishing are not permitted from or on a 17(b) easement." He thought that was the purpose of them.

MS. CUNNING explained that their purpose is to get you from one body of public land or water to antoher body of public land or water using private land minimally. "If you want to hunt and fish on adjacent land, you get permission from the private land owner."

MS. WILLIS added, "It's just a right of passage."

CHAIRMAN TORGERSON thanked everyone for their participation and adjourned the meeting at 4:45 pm.