

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

February 16, 2005

3:38 p.m.

MEMBERS PRESENT

Senator Thomas Wagoner, Chair
Senator Ralph Seekins, Vice Chair
Senator Fred Dyson
Senator Bert Stedman
Senator Kim Elton

MEMBERS ABSENT

Senator Ben Stevens
Senator Gretchen Guess

COMMITTEE CALENDAR

OVERVIEW: Alaska Department of Fish and Game (ADF&G) - Land and Water Access Rights and Wrongs by Tina Cunning, Special Assistant

WITNESS REGISTER

Tina Cunning, Special Assistant
Department of Fish & Game
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Mr. Dick Mylius, Director
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Department of Natural Resources
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ACTION NARRATIVE

CHAIR THOMAS WAGONER called the Senate Resources Standing Committee meeting to order at 3:40:26 PM. Senators Dyson, Stedman, Elton and Chair Wagoner were present.

OVERVIEW: Alaska Department of Fish and Game (ADF&G) - Land and Water Access Rights and Wrongs by Tina Cunning, Special Assistant

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CHAIR WAGONER announced the overview of water access rights and wrongs.

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TINA CUNNING, Special Assistant, Alaska Department of Fish and Game (ADF&G), said her agency is primarily responsible for access issues and because it manages fish and wildlife on all lands in the state, it has a primary interest in what happens related to access on all the lands, along with the Department of Transportation and Public Facilities (DOTPF) and Department of Law (DOL).

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She related a brief history of current land status that included the Alaska Statehood Act of 1959, Alaska Native Claims Settlement Act (ANCSA), Alaska National Interest Land Conservation Act (ANILCA) and the Alaska Submerged Lands Act, which clarified the land conveyance process related to waters.

MS. CUNNING said that Congress intended to protect the Alaskan life style in its land issues and under ANILCA it created a number of provisions to protect access for its residents that don't exist on conservation units in other states.

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SENATOR SEEKINS joined the committee.

MS. CUNNING pointed out key access provisions - navigable waters, Public Trust Doctrine, easements and revised statute (RS) 2477. In 1995 the Legislature became concerned that the state was not asserting ownership and management of its waterways and requested an audit of DNR, ADF&G, DOTPF and DOL. In 1996, the Division of Legislative Audit recommended that the government establish a policy oversight group charged with asserting ownership and management of navigable waters protecting the public's access to and use of those lands and waters.

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The navigability team identified two definitions for navigability for state government purposes - for title purposes and for public use, although there are many other definitions. Navigability for title addresses the ownership of Alaska's waterways and includes tidelands, submerged lands extending out to the three-mile limit and the shore lands (land underlying inland waterways). While Alaska entered the union under the

Equal Footing Doctrine the same as other states, a problem arose about how to calculate waterway acreage under the Statehood Act and ANCSA. So, Congress passed the Alaska Submerged Lands Act of 1988 to clarify that those major waterways that are likely to be navigable would not be counted against the acreage of the Native corporations or the state (because it technically got those waterways at statehood).

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Each state has a different navigability definition based on a federal test that was in effect at the time of statehood and subsequent court cases. In Alaska, one of the most significant court cases was the Gulkana decision, which said that a recreational craft could qualify a waterway as a navigable waterway if the total gross weight of the craft, plus its load, was 1,000 lbs. It also directed, because Alaska has such a poorly developed community system, that a navigable waterway could be considered navigable if it was susceptible to that use even though documentation couldn't be found to show that kind of use was occurring at the time of statehood.

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SENATOR ELTON asked how that applies to a stream that freezes in the winter and is used as a dogsled pathway.

MS. CUNNING replied this test in Alaska applies to title of the underlying land based on its abilities to hold a craft up to 1,000 lbs. Senator Elton was thinking about the other navigable waters issue, which she would discuss later.

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SENATOR DYSON asked what quiet title means.

MS. CUNNING replied that it means to take the cloud off the title. A quiet title has no recorded disputes.

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SENATOR SEEKINS stated that the state can't assert for a quiet title until the federal government has made claim for ownership.

MS. CUNNING replied that is correct and then the federal government also has to claim it has an interest in it. In the Kandik, Nation and Black Rivers case the feds didn't dispute the state's ownership. That is why the judge couldn't render a decision in the Black even though the waterway was clearly navigable.

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She said that 13 water bodies have been through quiet title action since statehood and the last one cost close to \$1 million - not a good system when the state has close to 60 million acres in navigable waterways. The Federal Land Policy and Management Act (FLPMA) of 1976 provided that an applicant could go to the Bureau of Land Management (BLM) and request that it disclaim any interest in the land and the title could be cleared. Two years ago, BLM modified that regulation to allow the states to file to clear title for navigable waters and RS (reserve statute) 2477s. An administrative process was established for states to file for a recordable disclaimer of interest. This only works in the cases of navigability where the federal government agrees with the state that a water body is navigable. To date, the state has only filed an application for recordable disclaimer of interest on waters and not RS 2477s, because they are still controversial.

The initial disclaimer of interest was for the Black River. The state has filed on 21 rivers and 10 lakes. It has received title to eight rivers and two lakes. A number are pending and five more will be filed in the following weeks. She summarized that was navigability for title purposes. The other issue on navigability is public use.

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MS. CUNNING said under the Public Trust Doctrine, the public has a right to enjoy waterways and the resources in them for those purposes that are managed under the state. This is common law and each state manages its Public Trust Doctrine lands differently because policy is evolved through the court system. In Alaska, Public Trust Doctrine lands are those between ordinary high water marks or below mean high tide. The Doctrine grants the public a right of access over navigable waters or public waters that the ownership of the underlying or adjacent land does not affect the public's rights of access on water. No one may obstruct peoples' conduct of boating, fishing, hunting activities on those waterways and if state land is involved, the state reserves "to and along" easements along those waterways for the public's uses. In Alaska, if a boat floats on it, you are allowed to float a boat on it. "If you can walk up that creek to fish, you may walk up that creek to fish no matter who owns the underlying submerged land." This includes frozen waterways for purposes of trapping and transportation.

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MS. CUNNING explained the reason the state gets so involved in navigable waters and Public Trust Doctrine issues is because ownership affects what kinds of regulations that people or agencies may try to put on the waterways. Federal agencies try to assert their authorities over waterways. If the state owns the underlying land, it's just the same as if it were dry and it belongs to the state. Private land owners sometimes attempt to interfere with the public's right of access on waterways. Grey areas that are contested are where land has changed for some reason like after an earthquake.

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MS. CUNNING quoted an 1866 statute on RS 2477s - "The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted." She reminded the committee that in 1866, there were no automobiles, so there are questions about what is meant by highway. The State of Alaska has asserted that the highways that were public use in 1866, in effect, establish the public's use as a highway.

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MS. CUNNING said that even though Congress repealed the RS 2477 in 1976, the grant of the right-of-way that existed is still valid, but new rights'-of-way couldn't be established after 1976 and have to be determined on a case-by-case basis. In 1998, 602 trails qualified after the state researched the issue.

However, statute says that the state agencies may not vacate a right-of-way unless there is an established alternate right-of-way or means of access that satisfies for now and until the reasonably foreseeable uses of the future. DNR easement regulations have been developed, but they haven't been published yet.

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Another section of her presentation concerned easements and access that the federal government manages, which the state agencies are monitoring.

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Public easement provisions under ANSCA allow there to be a reservation of an easement across corporation land for public access, so as corporations acquired their lands, they wouldn't effectively block access to state or federal lands that might be on the other side of the selection. She described some of the conveyance issues that are ongoing, but noted that BLM is

putting money into getting the Native corporation and state land conveyances done.

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MS. CUNNING moved on to discuss Title 1 of ANILCA. She said that under this title, there is a real clear distinction that the boundaries of the federal lands do not extend seaward and the federal lands regulations only apply to federal public lands. They don't apply to owners of property within a conservation system unit.

The State of Alaska is an in-holder of millions of acres of navigable waterways within these federal conservation system units. The division has to monitor the regulations very closely so they don't intrude on the state's jurisdiction on state waterways. Titles 1 through 7 address specific federal land management systems. The rest of ANILCA covers public uses.

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MS. CUNNING explained that Title 8, Section 811, guarantees traditional methods of access for subsistence purposes, which includes motorized access that applies to wilderness areas.

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Title 11 recognizes that the State of Alaska has a poorly developed transportation infrastructure and that the conservation systems would lock the state up. So, Congress tried to establish a unique process for the state to be able to get access across those conservation system units by setting up a process in 43 CFR 36.

ANILCA has other access right provisions, but the one with the most impact for Alaska is 11.10(A), which addresses basic hunting, fishing, recreation and access to in-holdings, which includes motorized access unless the units are closed due to a finding of resource damage, with a mandatory local public hearing process.

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At one time, the National Park Service restricted public access on the parks and two years ago its director had hearings and adopted regulations that allowed for the provisions of ANILCA that only restricted access for damage correcting the situation.

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MS. CUNNING said the Park Service is still working on considerations of some definitions like "traditional" and how to measure "detriment to resource value."

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She said the other access section of ANILCA that affects the division is 11.10(B) that contains the access provisions for in-holdings and definition section for things like "for economic and other purposes" and "adequate and feasible." She concluded her discussion saying that it's the division's responsibility to monitor these issues for all the citizens of Alaska.

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SENATOR STEDMAN asked if the easement the state applies to properties when it conveys them can be either above mean high tide or below or both.

DICK MYLIUS, Director, Department of Natural Resources (DNR), replied that any of those is correct. The state applies a 50 ft. easement "to and along" on upland parcels unless there is some physical reason why that can't be done or if there is a public safety issue. That is done on tideland conveyances, as well, unless the parcel is already leased and the lease doesn't provide for that easement. An easement can't be imposed after the fact. He summarized that a lot of Southeast tidelands conveyances do not have the "to and along" easement on the water side, because leases had already been issued that didn't have those kind of easements.

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SENATOR STEDMAN noted that "easement" and its use is not defined. He also noted that while Mr. Mylius mentioned the state is flexible on easements, he hadn't seen evidence of that.

MR. MYLIUS responded that the statute says that the state has to reserve an access easement unless the commissioner determines there is some public interest in not keeping it. It's usually not a reason related to topography, but more of it's a place where you wouldn't want to have public access. Often the division's topography charts are not accurate enough to indicate where the shore can be accessed.

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SENATOR STEDMAN asked if the intent of an easement is to insure that the public has access to the navigable waters.

MR. MYLIUS replied that is correct. The "to and along" means providing access to the waters and the ability to move along the shoreline. One of the reasons for the upland easement is so that at high tide people can still walk along the shore.

SENATOR STEDMAN asked if a structure can be built in an easement.

MR. MYLIUS replied no, with the exception of things like docks and boardwalks. You can build a structure if it doesn't prevent the use of the easement.

SENATOR STEDMAN asked if the 50 ft. is in regulation, not statute.

MR. MYLIUS replied that is correct.

SENATOR STEDMAN asked what the purpose is of putting a 50 ft. access easement across a shoreline that can't be transversed at high tide due to terrain.

MR. MYLIUS replied that there are probably situations where, because of terrain, the access is not usable, but the department doesn't have the information or resources to field check whether the easement can be used or not.

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SENATOR STEDMAN said he had a hard time understanding the removal of private property rights that doesn't support the end means of access to the public waterway.

MR. MYLIUS explained that when the state sells the land, if the easement is being reserved, it is not taking a private property right, because that easement is considered in the appraisal.

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SENATOR STEDMAN disagreed with that statement especially in how it related to Southeast. He thought that very few parcels could be transversed at mean high tide versus walking down the beach.

MR. MYLIUS replied that might be true of Southeast, but he is looking at it from a statewide perspective and a lot of other areas, especially on lakes and rivers, have accessible shorelines - about 90 percent are usable.

SENATOR STEDMAN explained that he thought that the Southeast Alaska type shoreline went all the way up the coast. He thought

Mr. Mylius' comments were more applicable to rivers and lakes. He wanted to know what purpose having two adjacent 50 ft. access easements served - one above and one below mean high tide.

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MR. MYLIUS replied that the off shore easement doesn't exist, because in most cases the shore is state-owned. The division doesn't get a lot of requests for building within the easements, because a lot of municipal ordinances don't allow building there anyhow.

SENATOR STEDMAN said he is a little confused about why the public would need a 100 ft. pedestrian easement and why someone should be subjected to dealing with those easements if they have property on which the easement is not specified. He asked what process someone would go through in Southeast to be able to use a 50 ft. access easement.

MR. MYLIUS replied that he would apply for a vacation of an easement to DNR and possibly through the local municipal platting board, as well.

CHAIR WAGONER commented if this is a problem in Southeast, perhaps the committee should look at changing it.

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SENATOR STEDMAN commented that people don't apply for relief because they ignore it and the state doesn't enforce it anyhow and agreed that maybe that issue should be looked at.

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SENATOR SEEKINS asked Ms. Cunning to briefly summarize what the Submerged Lands Act of 1953 did and how that affects the state in terms of ownership.

MR. MYLIUS responded that the purpose of the Act was to confirm that all states owned land out to the three-mile limit. When Alaska became a state in 1959, the Statehood Act confirmed it specifically.

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SENATOR SEEKINS said he thought that ownership included not just the land underneath the submerged lands, but also everything in the water column.

MS. CUNNING replied that was correct, although there are some exceptions. If there were pre-statehood withdrawals in which the

intent of the withdrawal was to defeat the state's title and to include federal management of resources - that had to be clearly laid out - as in the Dinkum Sands case.

MR. MYLIUS added that the issue is being dealt with in Glacier Bay and the Southeast tidelands, as well.

SENATOR SEEKINS asked if the federal government had clouded title to navigable waters by making them subject to the Quiet Title Act in ANILCA.

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MS. CUNNING replied that she has heard that argument and the Ninth Circuit Court decision in Katie John was very specific in its wording:

That the federal priority under ANILCA, Title 8, only can be applied to those waters in which there is a federal reserved water right - both those waters within the federal enclave and those waters adjacent to the federal unit where there is a claim of a federal reserved water right. Navigability - the term navigable was used in that phrase in the Ninth Circuit Court's final decision....I think you all know the state just filed suit on the issue of the failure of the federal agencies to actually apply for the federal reserve waters rights, particularly in those waters outside the units, which would be an expansion of the public lands definition by the Ninth Circuit Court.... If they are going to file for federal reserve water rights, they have to do that through a state process. Since they have not applied through the state process, we can't know where the beginning and end points are in those waters that are outside the units that they are claiming they have this jurisdiction.

I would like to clarify one other piece, though, and that is we frequently see kind of a misnomer in the press.... The federal court and the federal law did not grant the federal agencies management authority over fish and wildlife. That is a right of the state that was not affected by ANILCA. It's in 13.14 of ANILCA.... All that the federal authority is is related to the allocation to provide a federal priority to the federally eligible subsistence user. Allocation of harvest take is a regulatory tool - that's just a tool of management. It is not the actual

management and responsibility for the conservation of species. That is retained by the state.

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SENATOR SEEKINS asked if the state ever asserted the title and management issue.

MS. CUNNING replied yes in numerous places.

Your question is very broad. When we are reviewing, for example, the federal land management planning doctrines, we are very much on guard that they recognize our ownership and jurisdiction over navigable waters - both within and without of the units - that we manage those - boating access and other activities on those. So, we monitor all of those plans to be sure that's appropriately recognized. There are some pre-statehood withdrawals that are very difficult and in those cases where they don't want to agree with us on our management and ownership, we've asked that they at least recognize that there is a dispute in their management plan. That helps the public know that the sovereigns are arguing about it. It makes it a little clearer. But we don't ever give up our ownership and management position in any of those.

In the case of the federal subsistence program, based on the federal reserve water rights...that is an uncomfortable situation for everybody. It's difficult to work through. As long as they are exercising their responsibility under the federal court decision to assure that federal subsistence priority - that's what the court gave them that authority to do.

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SENATOR SEEKINS said he understands that as a citizen of Alaska, he is a beneficiary of the public lands and waters trust, but as a legislator, he is also a trustee. He asked if that confers on him responsibilities.

MS. CUNNING replied that is her interpretation.

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CHAIR WAGONER asked how many acres of the original 102.5 million acre allotment remain to be selected by the state.

MS. CUNNING responded that BLM is expediting the conveyance process to both the corporations and to the state so they can be done by 2009. It is actually providing funds to DNR to react to them.

MR. MYLIUS added that all the statehood grants, including Mental Health, come to about 105 million acres and the state has received either a patent or tentative approval to about 90 million acres. Of that, about 46 million acres are in a tentative approval status, which means the state has working title to it, but it's not surveyed and doesn't have a patent. The major cost of the accelerated land transfer process is associated with surveying that 44 million acres plus conveying to the state the remaining 15 million acres and surveying that.

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MS. CUNNING opined that both DNR and ADF&G deal with these complex land issues and it has required extensive research into land records to figure out who owns what. The problem is that Alaska is a non-recording state, which means that a person who transfers property has no requirement for recording. This makes it very difficult for people who are trying to research land status and answer questions. She gave one example of a person who owned land, never recorded it, he died, it's been passed to his wife, his wife remarried, the land was given away in an inheritance, the heir that received it lost it in a divorce battle and it's gone through five different people and never been recorded. She said it would be helpful at some point to require people to record their land transactions.

CHAIR WAGONER responded that he hadn't heard that suggestion before and indicated it was worth considering. He thanked Ms. Cunning for her excellent presentation and adjourned the meeting at [5:05:45 PM](#).