

**ALASKA STATE LEGISLATURE
JOINT MEETING
SENATE STATE AFFAIRS STANDING COMMITTEE
HOUSE STATE AFFAIRS STANDING COMMITTEE
January 24, 2013
9:00 a.m.**

MEMBERS PRESENT

SENATE STATE AFFAIRS

Senator Fred Dyson, Chair
Senator Cathy Giessel, Vice Chair
Senator John Coghill
Senator Bill Wielechowski

HOUSE STATE AFFAIRS

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Lynn Gattis
Representative Shelley Hughes
Representative Doug Isaacson
Representative Charisse Millett
Representative Jonathan Kreiss-Tomkins

MEMBERS ABSENT

SENATE STATE AFFAIRS

Senator Bert Stedman

HOUSE STATE AFFAIRS

All members present

COMMITTEE CALENDAR

OVERVIEW: FEDERAL OVERREACH - PRESENTATION ON STATE ACTIVITIES
RELATED TO RS 2477 EASEMENTS OVER FEDERAL LANDS AND DISPUTES
OVER SUBMERGED LANDS AND NAVIGABLE WATERS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record.

WITNESS REGISTER

ED FOGELS, Deputy Commissioner
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Presented information on federal overreach into resource development in Alaska.

KENT SULLIVAN, Assistant Attorney General
Natural Resources Section
Department of Law
Juneau, Alaska

POSITION STATEMENT: Presented information on R.S. 2477.

SCOTT OGAN, Manager
Public Access Assertion and Defense Unit
Division of Mining, Land & Water
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Presented information on navigability issues.

ACTION NARRATIVE

9:00:40 AM

CHAIR BOB LYNN called the joint meeting of the Senate and House State Affairs Standing Committees to order at 9:00 a.m. Present at the call to order were Senators Coghill, Giessel, and Chair Dyson, and Representatives Gattis, Hughes, Isaacson, Keller, Millet, and Chair Lynn. Senator Wielechowski and Representative Kreiss-Tomkins arrived shortly thereafter.

OVERVIEW: FEDERAL OVERREACH - PRESENTATION ON STATE ACTIVITIES RELATED TO RS 2477 EASEMENTS OVER FEDERAL LANDS AND DISPUTES OVER SUBMERGED LANDS AND NAVIGABLE WATER

9:02:58 AM

CHAIR DYSON introduced the topic of the meeting, as well as the testifiers. He said that Ed Fogels is a Deputy Commissioner at the Department of Natural Resources and is responsible for overseeing five divisions - Agriculture, Forestry, Mining, Land and Water, Parks and Recreation and Support Services. He said that Scott Ogan, a long-time friend, leads the Department of Natural Resources' Land's Navigability Project with a mission to protect the public rights associated with navigable and public

waters, and to ensure that the state's title to lands beneath navigable waters is protected. He noted the importance of today's topic. He quoted former-president Dwight D. Eisenhower who said, "Don't let the pressing keep you from doing what is important."

9:05:06 AM

ED FOGELS, Deputy Commissioner, Department of Natural Resources, introduced the topic of "Federal Overreach into Resource Development in Alaska." He said he would review the history of the Statehood Act in order to explain how the state determined its land position.

MR. FOGELS related that Alaska was purchased in 1867. In 1884 Congress extended the Federal Mining Law to Alaska, which allowed mining claims to be staked. In 1903 the federal government allowed homesteading in Alaska. Many federal conservation units and national parks and refuges were established before statehood, such as Mount McKinley and Glacier Bay National Parks, National Petroleum Reserve-Alaska (NPRA), Katmai National Park, Kenai and Kodiak National Wildlife Refuges, and the Tongass and Chugach National Forests.

CHAIR DYSON recalled that NPRA was set aside as a Naval petroleum reserve.

MR. FOGELS related that on July 7, 1958, President Eisenhower signed the Alaska Statehood Act. The Act originally gave Alaska 103 million acres of a land entitlement. With subsequent legislation, that was expanded to the 105.8 million acres of land that is the current entitlement. Alaska was given 25 years to make land selections. Subsequent legislation extended that window to 1994 to finalize selections. As of today, Alaska has received all but about 5.5 million acres of its entitlement.

9:09:06 AM

REPRESENTATIVE ISAACSON inquired if those lands are in the state's possession with clear title or if they are awaiting transfer.

MR. FOGELS explained that the 100 million acres the state owns has been transferred to the state. When a state first receives land from the federal government it is referred to as "interim conveyed," or tentatively approved. It has not been surveyed or patented. The vast majority of those lands today are considered tentatively approved, which gives the state full management rights.

REPRESENTATIVE ISAACSON asked for clarification of tentatively approved land. He asked if it could be sold without restriction, even though the state does not have clear title.

MR. FOGELS replied that the state does not have patents to the lands, but it does have full management authority and the ability to sell the land.

SENATOR WIELECHOWSKI asked if there was a plan for the 5.5 million acres that remains.

MR. FOGELS explained that half of the 5.5 million acres is in federal withdrawals, military reservations, and the TAPS pipeline corridor. He noted that those are very valuable lands that the state would like to have some day. The state will keep those acres in mind for the purpose of selection at a later date if they become available. The remaining half of the 5.5 million acres is available to the state now.

He said as the state decides how to use the remaining acreage, the process becomes more complicated. Under the Statehood Act, the state was allowed to over select lands - up to 125 percent of the actual number of acres. Native Corporations were also allowed to over select by the same percentage. He said that Native claims must be decided ahead of state claims. The Bureau of Land Management must adjudicate and decide whether to award the land to the Native Corporation first. He noted that the remaining entitlements are over selected by about 200 percent, which is contrary to Alaska National Interest Lands Conservation Act (ANILCA) provisions. The federal government has requested that the state relinquish selections.

CHAIR DYSON asked for clarification.

MR. FOGELS stated that the federal government would like to see Alaska's selections at 125 percent over the selection level. He explained that the Governor is in the process of collecting resource data and is trying to delay giving back selections.

He maintained that there is no rush at this time for the state to finish the selection process. The state is attempting to understand more about its resource values first.

[9:14:18 AM](#)

REPRESENTATIVE HUGHES asked how much of the 5.5 million acres is left and if it is a part of the over selection.

MR. FOGELS explained that the 5.5 million acres is the entitlement the state will eventually receive. He said the state is 200 percent over selected.

REPRESENTATIVE HUGHES noted the selection timeline ending in 1994 and wondered why the state is not honoring it.

MR. FOGELS clarified that 1994 was the state's deadline for submitting selections, which the state has done. It was not a date by which the state was to receive lands. The state can only whittle down the already-made selections. There is no timeline for the federal government when deciding which lands the state will end up owning.

REPRESENTATIVE HUGHES stated that some of the "hoped for" lands are on the list.

MR. FOGELS said that was correct.

CHAIR DYSON asked if land designated for parks or wilderness areas comes out of the federal share or the state's share. He wondered if it could come out of Alaska's 105 million acres.

MR. FOGELS did not think so. He explained that park lands are selected from Bureau of Land Management (BLM) multiple-use lands. He said the state would fight back on that issue. He added that ANILCA prohibits further expansion of Alaska's lands for national parks.

[9:17:47 AM](#)

SENATOR WIELECHOWSKI asked if there was a map of the 5.5 million acres. He inquired about the legislature's role in the land selection process.

MR. FOGELS offered to provide a map of all of the state's selected areas. He explained that DNR has prioritized the selections so that the federal government is aware of their importance to the state. The selections are adjusted from time to time pending new information. At this point, the state has made the selections and the commissioner of DNR will now work with BLM to accept or reject the selections.

MR. FOGELS continued to say that after the Statehood Act, the Native Claims Act had not yet been settled yet. In 1968 Prudhoe Bay was discovered and it was necessary to find a route for TAPS to Valdez. That forced the Native Claims issue. The Alaska

Native Claims Settlement Act (ANCSA) was signed into law in 1971.

He noted that while the state was trying to figure out the Native Claims issue, the federal government froze Alaska's land selections and transfers, and rejected most of the state's selections. During the ANCSA debate, people were talking about withdrawing lands for the Native corporations and for conservation system units. That issue was tabled, but the "V2 Lands Debate" provision withdrew most of the good lands from state selection. He related that when ANILCA was finalized in 1980, Alaska lost many valuable lands.

[9:22:16 AM](#)

CHAIR DYSON asked if the same was true with ANSCA. He wondered if the lands awarded came from the state.

MR. FOGELS explained that since the state's land selections were frozen by the federal government, Native corporations were able to select some of those lands and the state's selection pool shrank.

MR. FOGELS said that in 1980 President Carter signed ANILCA, which drew 100 million acres into conservation system units in Alaska. He listed the lands that were lost for development: Orange Hill Deposit in Wrangell St. Elias, copper deposits, Misty Fjords National Monument, Admiralty Island Monument.

REPRESENTATIVE ISAACSON asked if ANILCA was an executive order or was passed by Congress.

MR. FOGELS said it was passed by Congress.

He said ANILCA was designed to protect Alaskan's rights and needs for traditional access. Congress set aside management provisions that federal land managers are supposed to take into account. He noted that ANILCA has two "no more" provisions that forbids the establishment of more wildlife refuges. He spoke of letters the state has written to BLM addressing violations of the "no more" clause. There is an office within DNR that monitors federal land activity.

[9:26:51 AM](#)

REPRESENTATIVE KELLER emphasized that those who were around when ANILCA was passed were very upset that 60 percent of Alaskan land was off limits. He stressed that protections were laid down and must be strictly paid attention to.

MR. FOGELS gave a current example - the Delta River Special Management Area, where the state protest was denied by the Secretary of the Interior.

MR. FOGELS touched on the Outer Continental Shelf Lands Act (OCSLA) created on August 7, 1953. The state manages submerged lands out for three miles; the federal government manages submerged lands from there to the territorial limit.

He referred to the state land status map which he said hasn't changed much. He summarized status of the remaining lands and the need for more information. In addition to the 105 million acre land entitlement, Alaska also owns 65 million acres of submerged lands, tide line lands, and shore line lands.

[9:31:11 AM](#)

REPRESENTATIVE HUGHES requested clarification of the colors on the map.

MR. FOGELS related that the blue lands equal about 100 million acres of entitled lands, the largest land entitlement of any state. That land was intended for use for economic independence. The green land is ANILCA. The pink lands are Native Corporation lands, and brown lands are BLM federal, multi-use lands.

He offered to answer questions.

CHAIR DYSON complimented Mr. Fogels on his presentation.

MR. FOGELS concluded that the state must build strong relationships with the federal government. The Interstate Mining Compact Commission (IMCC) - Senator Giessel's SB 2 - is an important way to band together with other states regarding mine issues.

He explained the Super Fund Law - CERCLA 108(b) - EPA's initiative to assume control of bonding for hardrock mining. He termed it worrisome. He said the bonding part determines the cost of reclamation. Whoever has control over bonding controls the money. He suggested that IMCC is the vehicle to prevent federal control over bonding. Currently, EPA looks at Alaska as a state that is doing it right, with respect to bonding.

[9:37:24 AM](#)

CHAIR DYSON pointed out a resolution written last year that supported DNR's efforts towards state independence. Commissioner

Sullivan said that it is valuable that the people of Alaska support state control. He asked if another resolution would be supportive.

MR. FOGELS said he would take that idea back to Commissioner Sullivan.

He continued to discuss IMCC and its organizational structure. The Office of Surface Mining is the federal body that has delegated coal mine regulation to the states. In the last few years they have established an Enhanced Oversight Directive that scrutinizes states inappropriately. Mining states are disturbed by this initiative so IMCC has taken it on.

He pointed out that IMCC is also working on Endangered Species Act issues.

MR. FOGELS stressed that DNR sees federal overreach coupled with decreasing resources of the U.S. Army Corps of Engineers, as a serious concern to Alaska's economic health. At one time, federal agencies recognized that Alaska's wetland situation was unique in the nation and agreed to handle permitting with more flexibility (the Alaska Joint Memorandum). It is not clear if the federal agencies have been implementing this Memorandum in recent years.

He noted that the Governor has introduced HB 78 and SB 27, bills that establish authority for the state to evaluate and seek primacy for wetlands permitting. He emphasized that Alaska is unique and should have more flexibility on wetlands permitting.

[9:42:28 AM](#)

REPRESENTATIVE ISAACSON asked how much of the cooperative agreement with the Corps is affected by recent U.S. Supreme Court decisions that make any standing water wetlands.

MR. FOGELS agreed that the Supreme Court decisions put new sideboards on how wetlands are delineated and make reclamation decisions difficult. He gave an example of mining in the 40-Mile district and fears of compensatory mitigation costs for wetlands. He said DNR believes that if Alaska can assume primacy the state will have much more control over wetlands policies.

CHAIR DYSON asked committee members to consider additional questions to submit to DNR.

REPRESENTATIVE MILLETT asked Mr. Fogels if he would discuss the National Ocean Policy, which is not going through the congressional legislative process, and what it means to Alaska's coastline.

MR. FOGELS replied that DNR has not had a lot to do with that initiative. He noted the Governor has concern about where the federal government is going with National Ocean Policy. He offered to provide more information at a later date.

He discussed the President's Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska (IAWG), which was established by an executive order to help permitting and efficient development of energy resources development. He noted that Alaska did not get a seat on the working group and was told that it is a federal working group. He reported increasingly better communication with the group and he hoped that it would help with wetlands permitting issues, especially on the Outer Continental Shelf (OCS). He believed that IAWG would be addressing National Ocean Policy issues, also. The group was tasked with writing a report on Integrated Arctic Management. He referenced letters from the Governor and from himself to Deputy Secretary Hayes that basically stated the state's concerns about Arctic management. The letters said what was not needed is additional layers of governance or regulatory activity. What is needed is a more collaboration relationship with the federal government.

9:49:32 AM

KENT SULLIVAN, Assistant Attorney General, Natural Resources Section, Department of Law, presented information on R.S. 2477. He said that R.S. 2477 arose out of Section 8 of the Mining Law of 1866 and was later re-designated as Section 2477 of Revised Statutes of 1878. It was a simple one sentence enactment that says, "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

He related that the grant is self-executing - it comes into being automatically when a public highway is established across public lands in accordance with the law of the state. All rights-of-way existing on the date of repeal of R.S. 2477 in 1977 were expressly preserved. He described how rights-of-way come into being: when the elements have been satisfied for their creation and federal courts have said, "We'll look to state law to determine whether or not those elements have been satisfied." Each state has different requirements to show whether R.S. 2477 has been fulfilled.

He explained that R.S. 2477 is a grant by the federal government as an offer for a right-of-way that can be accepted by the states and by the public. In Alaska, the acceptance can be manifested by public use or through actions by public authorities.

MR. SULLIVAN related how highways came to be defined. Historically, highways included foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors of transportation. Under AS 19.45.001(9), highways include a highway, road, street, trail, walk, bridge, tunnel, drainage structure, and other similar or related structures or facilities.

He discussed how R.S. 2477 applies to Alaska. It includes historic routes which exist not only on federal lands, including present day BLM, Park Service, and Forest Service land, but also on former federal lands which are now held by the state or owned by private parties, including Native corporations.

CHAIR DYSON asked if Native land is included.

MR. SULLIVAN said it was included, as well as homesteaded land.

CHAIR DYSON asked if there is a mechanism for someone purchasing land to research whether there is an old route on the land which might be re-activated.

MR. SULLIVAN said not necessarily. It is a legal interest similar to prescriptive and implied easements. It is incumbent upon the private property owner to research the background of the property. He noted that DNR has a database of recognized R.S. 2477's.

CHAIR DYSON asked if that information is included in a title company search.

MR. SULLIVAN said no. Title companies search only things that have been recorded, such as deeds and easements.

[9:57:10 AM](#)

REPRESENTATIVE ISAACSON used an example of a person in the Bettles area and asked what happens when primacy is denied in spite of supporting documents.

MR. SULLIVAN replied that in Alaska, there are many ways to assert the existence of an R.S. 2477, which is a state-owned

interest. However, the courts have recognized the ability of private parties to assert interest with regard to R.S. 2477's themselves.

REPRESENTATIVE ISAACSON clarified an example of restricted trail access. He inquired about the policy to maintain a clear highway.

MR. SULLIVAN noted that every dispute is different. In some instances the state has intervened and initiated litigation to remove blockage of an R.S. 2477, and in some instances they have not. There are many blockage issues out there.

REPRESENTATIVE ISAACSON asked how long it takes DNR to resolve these issues.

MR. SULLIVAN said it depends on if there is an existing file or not. He stated that his background is in real property litigation. He said R.S. 2477 cases are extremely difficult and complex due to the need to research ancient claims or documents, or to find living witnesses, and federal immunity issues.

[10:04:07 AM](#)

MR. SULLIVAN spoke of controversy surrounding R.S. 2477. From the federal agency perspective, R.S. 2477 was created in anticipation of travel needs. He pointed out that federal land managers began to emphasize conservation as the highest priority, which caused problems. From an environmentalist perspective, there is fear that R.S. 2477 is being used as a land grab. They are afraid of what may happen if ownership of the right of ways is given to the state, as opposed to the federal government.

He shared Utah's current efforts with pursuing R.S. 2477's the last 15 or 20 years. Utah has statute-of-limitation concerns and was forced to file all claims by June of 2012. They filed 22 separate cases involving over 10,000 rights-of-way. He concluded that Alaska can learn much from Utah's efforts, although there are many differences between the two states.

CHAIR DYSON thanked Mr. Sullivan for providing such interesting information.

[10:09:31 AM](#)

At-Ease

[10:10:14 AM](#)

REPRESENTATIVE KELLER explained the goals of the Citizen's Advisory Commission on Federal Areas (CCACFA). He related that CCACA works with state and federal agencies on land issues. He provided a brief history of the organization.

10:13:23 AM

At-ease

10:16:50 AM

SCOTT OGAN, Manager, Navigability Project, Department of Natural Resources, Division of Mining, Land & Water, Department of Natural Resources, provided information on the Public Access Assertion and Defense Unit (PAAD). He shared the PAAD mission statement, which is to protect the Alaska lifestyle through the assertion and defense of access to Alaska's public lands and waters. He listed statewide policy issues such as statehood entitlements, navigability, R.S. 2477, ANCSA easements, as well as day-to-day litigation strategies. He said he was overseen by a group called the Interagency Navigability and Access Team, made up of representatives from DNR, DF&G, and DOL.

He mentioned the Equal Footing Doctrine, which says that all states are admitted to the union on equal footing with other states, including the 1953 Submerged Land Act, which granted the title to submerged lands beneath navigable waters. He listed case law examples, such as Daniel Ball, Utah, Kandik/Nation, Gulkana, and PPL Montana. He said the Supreme Court affirmed Alaska's opinion in all cases.

10:22:30 AM

CHAIR DYSON thanked the presenters.

CHAIR LYNN also thanked the presenters.

10:23:22 AM

There being no further business to come before the committee, Chair Dyson adjourned the Joint Senate and House State Affairs Committees at 10:23 a.m.