

**ALASKA STATE LEGISLATURE**  
**SENATE STATE AFFAIRS STANDING COMMITTEE**

January 22, 2013

9:02 a.m.

**MEMBERS PRESENT**

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

**MEMBERS ABSENT**

Senator Bert Stedman

**OTHER LEGISLATORS PRESENT**

None

**COMMITTEE CALENDAR**

OVERVIEW: FEDERAL OVERREACH - ACTIVITIES OF THE DEPARTMENTS OF  
LAW AND NATURAL RESOURCES

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

MICHAEL GERAGHTY, Attorney General  
Department of Law,  
Anchorage, Alaska

**POSITION STATEMENT:** Presented information on Federal Overreach  
Activities.

DANIEL SULLIVAN, Commissioner  
Department of Natural Resources  
Anchorage, Alaska

**POSITION STATEMENT:** Presented information on Federal Overreach  
Activities.

MIKE STEFANSKI, representing himself  
Marlborough, Massachusetts

**POSITION STATEMENT:** Testified about a personal experience regarding Federal overreach activities.

**ACTION NARRATIVE**

[9:02:15 AM](#)

**CHAIR FRED DYSON** called the Senate State Affairs Standing Committee meeting to order at 9:02 a.m. Present at the call to order were Senators Giessel, Coghill, Wielechowski, and Chair Dyson. Senator Stedman was excused.

**OVERVIEW: FEDERAL OVERREACH - ACTIVITIES OF THE DEPARTMENTS OF LAW AND NATURAL RESOURCES**

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CHAIR DYSON stated that the purpose of the meeting was to discuss one of the seminal issues facing Alaska - the control of Alaska's lands. He said during the statehood debate, one of the questions asked by Congress was how the people in the new state of Alaska would be able to support themselves. It turned out that most of Alaska's income would come from natural resources. He noted that there are huge battles going on regarding ownership of those resources.

CHAIR DYSON introduced the two people testifying before the committee. He said Alaska's Attorney General, Michael Geraghty, is the state's chief law enforcement officer, overseeing the state's involvement in all civil matters and criminal prosecutions, and leading over 550 attorneys and staff in the Department of Law's (DOL) thirteen offices throughout the state.

MICHAEL GERAGHTY, Attorney General, Department of Law, acknowledged the introduction.

CHAIR DYSON stated that the Commissioner of the Department of Natural Resources (DNR), Daniel Sullivan, leads the 1,100 professionals in the department, as well as manages one of the largest portfolios of oil, gas, renewable energy, minerals, timber, land, and water in the world, in addition to overseeing regulatory activities on approximately 150 million acres of state land and 40,000 miles of coastline.

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ATTORNEY GENERAL GERAGHTY introduced his staff.

DANIEL SULLIVAN, Commissioner, Department of Natural Resources, introduced his staff.

CHAIR DYSON cautioned the witnesses regarding the use of acronyms. He said he hoped they would provide information about the history of Alaska land issues, the present situation, the scope of the problem, as well as current work being done.

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COMMISSIONER SULLIVAN introduced the topic of Federal Overreach into Resource Development in Alaska. He said the presentation involved a team effort by various agencies. He noted that federal overreach is a very important topic to Alaska. It was highlighted in the Governor's State of the State address. He said the last four years have shown an unprecedented number of attempts by certain agencies in the federal government to lock up Alaska's natural resources. He stated that he would clear up some misconceptions about the state's involvement with federal overreach. He stressed that federal overreach is a nationwide problem and a bi-partisan issue.

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COMMISSIONER SULLIVAN showed a map that depicts how important federal, state, and Native land ownership issues are in interactions with the federal government. Speaking as a former U.S. Attorney General, he noted that states made up of intermixed federal and state lands, such as Alaska, experience issues of federalism frequently. He brought up the fact that Alaska is a young state and the relationship with the federal government is relatively new. So much of Alaska's economic future is tied into the development of its land resources.

COMMISSIONER SULLIVAN noted that there are a number of federal acts that form the unique legal framework for relations between the federal government and Alaska as a sovereign state:

- The Alaska Statehood Act
- Alaska National Interest Lands Conservation Act (ANILCA)
- Alaska Native Claims Settlement Act (ANCSA)
- National Petroleum Reserve - Alaska (NPR-A) federal statutes
- Outer continental Shelf (OCS) Lands Act

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COMISIONER SULLIVAN described three troubling trends regarding federal decision making as it applies to Alaska: significant overreach, lengthy delays in permitting, and lack of state consultation and input. He described instances of federal

overreach and permitting delays, such as CD-5 and Point Thomson. He opined that the lack of state input is the biggest problem. He stressed that the consultation aspects of making decisions that affect the state are important. The state continues to emphasize to federal officials that it is the stakeholder and has constitutional rights. He said the state has the expertise needed on so many of the issues. He used the critical habitat designation of the polar bear as an example of what happens when the federal government does not consult with the state on important issues. He shared an experience regarding the Wild Lands initiative that proceeded without state consultation or notice.

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COMMISSIONER SULLIVAN described actions the state has taken to address federal overreach:

- Monitor activities
- Advocate publicly
- Build alliances
- Assume authority
- Work cooperatively
- Research legal options

COMMISSIONER SULLIVAN provided an example of the state's monitoring of activities. In 2010 there was a discussion in Washington, D.C. about designating ANWR as a national monument, despite the "no more" clauses of ANILCA. He described how the Governor was able to quickly respond with a legal opinion that dissuaded the action.

He shared examples of public advocacy, testimonies given before Congress, and articles to spur interest in Alaskan views on energy development and other issues.

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COMMISSIONER SULLIVAN gave examples of how Alaska addresses federal overreach by building alliances. He described how alliances were built with Washington and Oregon regarding the Steller sea lion. He related that the Governor is currently chairman of the OCS Governors' Coalition, which facilitates communication between the states and the federal government in support of responsible offshore development. He discussed a partnership with the North Slope Borough to challenge the critical habitat designation for the polar bear. He said another

partnership is with the Office of Surface Mining to work on coal issues.

COMMISSIONER SULLIVAN spoke of the state's work toward assuming permitting authority. Some federal environmental statutes include sections that allow state programs to receive approval from federal agencies to administer their provision. One such area is wastewater discharge permitting. Also, Governor Parnell has introduced a bill that would allow state agencies to take initial steps needed to assume wetland dredge and fill permitting responsibilities from the Army Corps of Engineers.

He detailed cooperative efforts being taken between state and federal agencies to work on big issues that affect Alaska.

COMMISSIONER SULLIVAN turned to the subject of litigation. He listed examples of the state's supporting federal decisions through litigation, such as defending challenges to the Chukchi Sea and Beaufort Sea exploration plans, and defending OCS lease sale 193 and related seismic activity. He spoke of personal opportunities when he was Attorney General where the federal government voiced appreciation for the state's support of a number of federal decisions such as the Wild Species Act (WSA).

COMMISSIONER SULLIVAN recalled the respectful relationship with the U.S. Department of Justice. He stressed that the state has very strong relationships with most federal agencies.

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COMMISSIONER SULLIVAN gave examples of the state's opposition to federal decisions through litigation. He noted challenges such as the Environmental Protection Agency's "endangerment finding."

COMMISSIONER SULLIVAN questioned how to define success. He provided a list of areas of success where success was not a win/lose situation, some of which are simply court victories. Examples of success include:

- Point Thomson permitting
- Polar bear critical habitat federal court ruling
- Tanana River bridge project approval
- Arctic drilling moratorium reversal
- CD-5 permitting
- Kensington Mine Supreme Court ruling
- Diesel timber sale federal court victory
- No executive branch ANWR monument designation

He spoke of the Wild Lands initiative, the TAPS shutdown, and the Arctic moratorium as other examples of successes.

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COMMISSIONER SULLIVAN listed a number of unresolved issues:

- Shell permitting, including the Department of Interior's current "Expedited Assessment of 2012 Arctic Operations"
- OSM response to state's position on Wishbone Hill permits
- Cook Inlet - permit delays for new companies that could support energy production in the Inlet
- NPR - A final Environmental Impact Statement and upcoming Record of Decision
- Jurisdictional/navigability issues for waterways

He added to the list the EPA preemption issue with regard to the Pebble Mine, which has not requested permits from the state yet. He went into detail about Shell permitting, describing the process of resolution to date. He stated that all of these areas will require further monitoring.

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SENATOR COGHILL pointed out that most dealings with the federal government take place in EPA Region 10. He inquired about the working relationship with Region 10.

COMMISSIONER SULLIVAN replied that the state has made an effort to work closely with Region 10. He noted the problem comes when there is a sense that the decision is based in Washington, D.C. He emphasized that one of the tools of cooperation is to form good relationships. He noted that DEC Commissioner Larry Hartig has a good relationship with Region 10. He used the CD-5 decision as an example of a decision that probably came from Washington, D.C.

SENATOR COGHILL commented that he wanted people to understand that many issues get pushed through Region 10.

COMMISSIONER SULLIVAN said he agreed that Region 10 may not be the ones advocating for overreach issues.

CHAIR DYSON requested an explanation of the laws governing federal and state relations and why they are problematic.

COMMISSIONER SULLIVAN related that Senator Dyson is referring to statutes that define the state and the federal government's

relationship to land and the use of land. They deal with how much land will be controlled by the federal government and include statutory mandates. He spoke of ANILCA and the "No More Clause" that determined which lands would be federal designations. He pointed out that a concern is when there is executive or administrative federal action that conflicts with state statutes.

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CHAIR DYSON requested clarification on what lands entitled to Alaska as a result of these Acts remain problematic.

COMMISSIONER SULLIVAN offered to provide detailed information on land entitlements from the federal government to the state and to Native corporations. He said not all land transfers have been completed; there are still 5 million federal acres of entitlement to be settled. The entitlement issues become more complicated when the amount of acreage left to be transferred is relatively small. Many people in DNR are working on the final transfer of the lands. He did not think the federal government was withholding land, but that the process was very complicated.

He offered to provide more information on ANILCA and its clauses. He spoke of recent NPRA issues which have potential implications for state statutes.

SENATOR DYSON said the question was not answered. He requested more information.

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ATTORNEY GENERAL GERAGHTY suggested the committee read the "Compact Case", a 25-page opinion issued by the Federal Court of Claims, which was affirmed in 1996 by the federal court without any changes. Many of the concerns about Alaska's ability to select its own land were addressed in the Compact Case. For example, there is an exception in the Statehood Act that allows the federal government to settle aboriginal land claims. He said he would be happy to provide a copy of the opinion, and suggested that the committee study it to learn more about the issue, which he opined, has been addressed and put to rest.

He pointed out that the U.S. is a republic made up of 50 sovereign states. The federal government is also a sovereign entity. There is a constitutional doctrine called "Federalism" that recognizes that those two sovereigns need to coexist. He said that the problem is that the state/federal relationship has gotten away from a balance.

He used Affordable Health Care Act as an example of lack of state/federal balance. It contains a provision that penalizes those who do not purchase insurance. The Supreme Court found that was an impermissible exercise of the federal government's commerce power because there was no limiting principle. The Affordable Health Care Act was eventually upheld under Congress's taxing authority. He stressed that there are limitations that are invoked from time to time. A lot of what Alaska tries to do as a state is redress imbalance. He pointed out that land issues are bi-partisan and resonate throughout the country.

ATTORNEY GENERAL GERAGHTY listed examples of state/federal issues: Arizona - voter ID and immigration laws; Montana - intrastate manufacturing and sale of firearms; Oklahoma - surface mining and reclamation. He assured the committee that it is a mischaracterization to claim that Alaska is just interested in suing the federal government; these are bi-partisan issues, not Alaskan issues, with the exception of those that are specific to Alaska, such as ANILCA and ANSCA.

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ATTORNEY GENERAL GERAGHTY covered several Endangered Species Act (ESA) litigation cases Alaska is involved in. He noted that the "game changer" has been climate change. He used the Polar Bear critical habitat federal court ruling and the Bearded Seal challenge as examples of where climate change modeling was used. He stated an objection to the extreme measures proposed by the federal government related to the ESA. He stressed that Alaska's responsibility to challenge those decisions, because the next step involves critical habitat and greatly complicates Alaska ability to develop on its lands. The district court in Anchorage did say that the critical habitat decision was overbroad and it was vacated, so now agencies can proceed with permitting in the North Slope. He quoted from the findings of the district court.

He emphasized that he does not keep score; however, the state has a responsibility to challenge these types of rulings.

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ATTORNEY GENERAL GERAGHTY brought up ESA issues related to the Stellar Sea Lion. He described mitigation measures by the National Marine Fisheries Services (NMFS). He spoke of fisheries jobs that were lost due to those measures. He described the 9th Circuit Appeal and said he was struck by how "thin" the science was that related to the fisheries' harming the Pollock species

and causing nutritional stress to the Stellar Sea Lion. He said the courts deferred to the federal government; however, NMFS issued an opinion that the science was flawed. He was hopeful that a decision could be reached soon.

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ATTORNEY GENERAL GERAGHTY turned to the subject of emission controls. The state of Alaska has brought suit against the EPA over the emission control area (ECA), a 200-mile ribbon of ocean shoreline from the coast of Mexico up to the west coast of Alaska to the Aleutians and along the East Coast. The ECA requires low-sulfur fuel to be burned in that area. He listed the air pollution problems in California and the extension of proposed EPA regulations to southern Alaska. He argued against the "one size fits all" mentality. He noted the importance of having sound scientific research. He said including ultra-low sulfur fuel requirements in Anchorage, Alaska, will raise the cost of shipping goods. He related that 90 percent of the goods consumed by 85 percent of all Alaskans come through the Port of Anchorage.

ATTORNEY GENERAL GERAGHTY brought up the Tongass timber sale issue. He said there used to be a good relationship between the state and the federal government. In 1990 ANILCA was amended by the Tongass Timber Reform Act, which changed the ruling to say "the federal will seek to meet annual demand for timber," and it was subject to conditions, including funding. As a result, the timber industry in the Tongass nearly disappeared.

He noted that the Tongass was supposed to be exempted from the Roadless Rule because of ANILCA, among other things. However, that exemption is no longer valid. There is currently a challenge to the Roadless Rule in Alaska, as well as in Montana and other states.

ATTORNEY GENERAL GERAGHTY discussed issues of navigability, such as in the Mosquito Fork River. He said there was currently a lawsuit about this.

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CHAIR DYSON said he hoped that the testimony would explain the Statehood Compact and how it relates to lands not yet conveyed. He requested information about ANILCA land selections. He also wanted to know the value of state lands that were taken away by the federal government. He questioned ANCSA and how it related to land development in remote areas due to Native corporation

involvement. He requested more information about the RS-2477 issue.

ATTORNEY GENERAL GERAGHTY explained that the state is on the verge of filing to protect state rights under the RS-2477 ruling.

CHAIR DYSON requested an explanation of RS-2477.

ATTORNEY GENERAL GERAGHTY related that RS-2477 says that a traditional use trail on federal land could be claimed by the state for its own use and ownership. A number of states, especially Utah and Alaska, are trying to determine where trails and right-of-ways exist. They must be documented by photo or by personal testimony. For example, there are trails in the Chicken area that apply to this rule. The state is in the process of gathering information on the several hundred trails that have been identified. The goal is to get the federal government to recognize that the trails belong to the state.

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COMMISSIONER SULLIVAN described the difficulties of the RS-2477 project. He voiced appreciation for legislative funding and for the work done by DOL and DNR. He noted that Alaska is working with Utah, which has also spent a lot of time working on the issue.

CHAIR DYSON related that he has meet with the board in Utah and wondered if establishing a board in Alaska would be beneficial. He asked about the Citizens Advisory Committee.

ATTORNEY GENERAL GERAGHTY spoke of his involvement with Utah in their efforts on a similar project. He opined that Alaska has all the resources presently needed to work on its trail project.

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SENATOR WIELECHOWSKI asked how many lawsuits the state has filed in the last five years against the federal government, how much they cost, and what the win/loss ratio is.

ATTORNEY GENERAL GERAGHTY thought there are currently about 10 lawsuits pending. With the exception of ESA litigations, all are done in house. He offered to provide more information.

CHAIR DYSON said he wanted to show how federal overreach is affecting individual Alaskans. He gave an example of a man named Mark Stefanski who obtained all the required permits for his

recreation mine and yet the federal government intervened and confiscated his mining equipment. Mr. Stefanski said he was pleased that the state is helping him in his fight against federal overreach.

MARK STEFANSKI, representing himself, clarified that the mining equipment belonged to his brother. He described the situation on his land in Dan Creek and the state's intervention. He related issues with the federal government's demand that he and his brother sign a right-of-way certificate. The case is still in the 9th Court of Appeals. He referenced a similar case - John Sturgeon Case. He concluded that there has been constant interference by the federal government.

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CHAIR DYSON noted that the state has been very helpful.

MR. STEFANSKI agreed.

CHAIR DYSON voiced appreciation for Mr. Stefanski's testimony.

COMMISSIONER SULLIVAN commented that the state is checking into the navigability of the Nazina River, which the state believes is navigable.

SENATOR GIESSEL thanked DOL for intervening in the Sturgeon Case.

ATTORNEY GENERAL GERAGHTY agreed that was an important case for the state to support.

SENATOR COGHILL requested to know the number of times Non-government Organizations (NGOs) have taken the state to court and how much it cost

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COMMISSIONER SULLIVAN said that many of the state's court cases are due to NGOs initiating the suits. Oftentimes the state sides with the federal government in such cases. He used lease sales as an example. He offered to provide the requested information.

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There being no further business to come before the committee, Chair Dyson adjourned the Senate State Affairs Committee at 10:29 a.m.