

**ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE STATE AFFAIRS STANDING COMMITTEE
SENATE STATE AFFAIRS STANDING COMMITTEE**

February 26, 2013
8:01 a.m.

MEMBERS PRESENT

HOUSE STATE AFFAIRS

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

SENATE STATE AFFAIRS

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

MEMBERS ABSENT

HOUSE STATE AFFAIRS

Representative Charisse Millett

SENATE STATE AFFAIRS

Senator Bert Stedman
Senator Bill Wielechowski - excused

COMMITTEE CALENDAR

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

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

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

POSITION STATEMENT: Presented an overview on federal overreach related to activities of the Departments of Law and Natural Resources.

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

POSITION STATEMENT: Provided information during the overview on federal overreach related to activities of the Departments of Law and Natural Resources.

JOANNE BLACKBURN
Anchorage, Alaska

POSITION STATEMENT: Testified during the overview regarding federal overreach and the activities of the Departments of Law and Natural Resources.

STAN LEAPHART Executive Director
Advisory Commission on Federal Areas
Department of Natural Resources
Fairbanks, Alaska

POSITION STATEMENT: Gave a PowerPoint presentation regarding the Advisory Commission on Federal Areas.

ACTION NARRATIVE

[8:01:03 AM](#)

CHAIR BOB LYNN called the joint meeting of the House and Senate State Affairs Standing Committees to order at 8:01 a.m. Representatives Keller, Isaacson, and Lynn, and Senators Giessel and Dyson were present at the call to order. Representatives Gattis, Hughes, and Kreiss-Tomkins, and Senator Coghill arrived as the meeting was in progress.

[8:01:05 AM](#)

CHAIR LYNN handed the gavel to Chair Dyson.

[8:01:07 AM](#)

**OVERVIEW: Federal Overreach: Activities of Departments of Law
and Natural Resources**

[8:01:40 AM](#)

CHAIR DYSON announced that the only order of business was the overview regarding federal overreach: activities of the Departments of Law and Natural Resources.

[8:01:59 AM](#)

SCOTT OGAN, Manager, Public Access Assertion and Defense Unit, Division of Mining, Land and Water, Department of Natural Resources (DNR), presented an overview on federal overreach related to the activities of the Departments of Law and Natural Resources. He said under the Equal Footing Doctrine, each state was admitted to the Union on equal footing with all the other states. He said the Submerged Lands Act of 1953 granted title to lands beneath navigable waters. He indicated that the states were left with the task of sorting out which waters are navigable. He mentioned Daniel Ball, a case during the civil war to determine whether a river was capable of being used for travel, trade, or commerce, because if it was, it would be considered navigable for title purposes. He said the problem in Alaska is there are so many rivers and there is so little historical information, it is an intensive job to research that history. He indicated that the division employs three people within the Office of History and Archeology, within DNR, to assist with the research. He relayed that the money given by the federal government to put toward that effort is almost gone. He offered his understanding that "there's an increment in the budget to the state to pick up that effort."

MR. OGAN talked about case law. He said [states] are not allowed to reclaim lands that were withdrawn before statehood. He mentioned a case in Utah, regarding the Salt Lake, where a determination was made that "it did not defeat state title." He explained that there has to be a clear and convincing argument that U.S. Congress expressly intends to defeat state title, otherwise there is a good chance that the state can prove it owns the riverbed. He said Kandik and Nation rivers were deemed navigable by the 9th Circuit Court of Appeals. The case was appealed to the U.S. Supreme Court and denied. He mentioned another case involving John Sturgeon, who was threatened to be cited for operating his [hovercraft] on the Nation River, which is basically a state sovereign river. Mr. Ogan said that in

this case, "they are basically using the Reserve Water Rights Doctrine as ... an authority that gives them the right to regulate." He said the doctrine states that "if water came off federal lands and it's in a state river, [then] that extends their jurisdiction into that river in case law precedence." He relayed that Alaska National Interest Lands Conservation Act (ANILCA) was set by the Katie John case, which is the authority by which subsistence fisheries are managed.

MR. OGAN offered his understanding that the Gulkana River was the first and possibly last river on which the state, about 20 years ago, achieved a quiet title action. He said that was an important case because it addressed the issue of susceptibility. He said [the river] did not have to be used for travel, trade, and commerce, but if the river has not changed its natural and ordinary condition since statehood and can currently be used, it is considered susceptible to navigation, which is why "it's stayed on." Mr. Ogan indicated the department has made some progress getting the U.S. Bureau of Land Management (BLM) to clear titles based on susceptibility.

[8:07:46 AM](#)

MR. OGAN said in PPL Montana, LLC v. Montana, a power company sued the State of Montana for back revenues in rents for space for a dam, claiming navigability. He said most of the river in question is navigable, but that particular section is not; therefore, the court decided in favor of the state. Mr. Ogan said that case changed the department's thinking to consider parts of rivers that may not be navigable and, thus, may not belong to the state. He said by riparian law, the upland land owner owns the bed of the river if the state does not own it. He said, "We're pretty happy with where it went, because it really strengthened the susceptibility argument, and the [U.S.] Supreme Court said that ... modern day boats, if they ... navigate the river - then it's ... state owned. So, generally we're pretty happy with the clarity."

[8:09:10 AM](#)

MR. OGAN directed attention to the next slide, which asks, "Is it Navigable?" He said the question can mean whether the river is navigable "for title" or "for public trust purposes." He relayed that in statute, submerged lands are considered lands beyond the mean low tide mark in salt water; tidelands are those lands between mean low and mean high; and shorelands relate to fresh water lakes and rivers.

8:10:13 AM

SENATOR DYSON asked Mr. Ogan to confirm that the land between mean high and low water is always public land and public access.

MR. OGAN answered that is correct. He said the state owns the tidelands and all the way to the mean high tide mark. He said people often confuse mean high tide with ordinary high water. He clarified that ordinary high water is the riparian boundary. In response to Chair Dyson, he said riparian boundary means the line between the submerged lands and the uplands. He said this definition is taken from the Daniel Ball case, and, [as shown on the slide entitled, "Title Navigability"], is in AS 38.04.062(g)(1), which read as follows:

(1) "navigable water" means water that, at the time the state achieved statehood, was used, or was susceptible of being used, in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel on water; the use or potential use does not need to have been without difficulty, extensive, or long and continuous;

MR. OGAN said the definition of navigability is broad, as seen in AS 38.05.965(13), which read as follows:

(13) "navigable water" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes;

MR. OGAN stated, "It's navigable under statute, but it doesn't mean that we own it." He said the ownership test is based on the aforementioned Daniel Ball federal case. He said, "That's the standard that we fight when we do a quiet title action." However, regarding public trusts, Article 8, Section 14 of the Constitution of the State of Alaska says that the people have the right to access the navigable waters of the state, as

defined by the legislature, and the legislature has defined navigable as almost any public purpose. He said, "So, notwithstanding the ownership of that land underneath it, the people have the right to access the waters in the state of Alaska, and it's a constitutional right." He indicated that tension can develop when BLM purports to convey a riverbed. He explained, "Sometimes we believe they convey riverbeds that belong to the state." He said the underlying property owner, usually a Native corporation or village corporation, believes it has the right to control who goes on a particular river and will sometimes "lease that exclusive right to a lodge," for example. Then people show up in anticipation of using the river bed and are told it is private property. He said, "That's going to be an issue that's going to come to the forefront, because we're being pretty adamant that the public has a right to use it. ... They can't trespass an upland when they get to that water - it doesn't give them that right - but it certainly gives them the right to be on that river."

[8:14:07 AM](#)

SENATOR DYSON asked Mr. Ogan to talk how the Alaska National Interest Lands Conservation Act (ANILCA) conflicts with the Constitution of the State of Alaska and traditional land use. He asked who decides which law is supreme.

MR. OGAN answered that ultimately it is the court that makes the final decision regarding a quiet title action. He mentioned a recordable disclaimer of interest process, which was negotiated between the state and the federal government, through which if both parties agree that a body of water is navigable, the federal government will disclaim an interest and "clear the clouds to our title." He said the problem is that over the years, BLM has conveyed lands the state believes it owns and reversed navigability determinations over the years. Currently the state is in litigation, regarding Mosquito Fork at 40-Mile, trying to reestablish precedence it had established under Gulkana.

[8:16:41 AM](#)

MR. OGAN directed attention to a slide entitled, "Ordinary High Water Mark." He said something that looks like a riverbed is probably a riverbed. He said that is defined on whether or not there is upland vegetation. He said the standards of the ordinary high water mark ordinary high water mark (OHWM) are subjective and contentious, and the property boundary on an OHWM

is an ambulatory one. He said the Matanuska River is a good example of a river whose boundary shifts. He remarked that there is an employee in DNR whose sole task is to make riparian boundary determinations. He directed attention to the slide entitled, "Quiet Title Actions." He said quiet title actions quiet other claims to a title, are expensive, are time consuming, have an uncertain outcome, but are necessary when no other option exists. He expressed his hope for less contention in the future as a result of case law. He highlighted the slide entitled, "Recordable Disclaimers of Interest," and said they are cost effective at approximately \$50,000, as compared to approximately \$1 million for each quiet title action. He reported that Alaska has the only successful recordable disclaimer of interest (RDI) process in the U.S., and he indicated that improving the process was his mission when he first was hired in his present job.

[8:18:47 AM](#)

REPRESENTATIVE ISAACSON asked why it costs up to \$1 million to get a quiet title.

[8:19:04 AM](#)

MR. OGAN explained that some points of law can be done on summary judgment, whereas quiet title actions require extensive title search and hydrological and historical research. He emphasized the labor intensive nature of quiet title actions. He gave credit to Kent Sullivan, in the Department of Law, for anticipating anything that could make the state's claim nonsufficient.

[8:20:04 AM](#)

KENT SULLIVAN, Assistant Attorney General, Natural Resources Section, Department of Law, echoed Mr. Owen's remarks that quiet title actions are fact intensive and historically based. He stated that unlike a breach of contract case, where the court determines whether a contract was signed and the argument pertains to the law, in a quiet title case the argument is over the facts. For example, in a navigability case, expert witnesses testify regarding the hydrological aspects of a stream based on information gathered through a "fact-intensive effort." He said the recordable disclaimer of interest process does not require the same level of evidence that would be brought before a court for a quiet title case.

[8:22:26 AM](#)

REPRESENTATIVE ISAACSON asked, "How large or how small of a tract of land are we talking about? Are we talking about a complete water system or are we just talking about an acre at a time?"

MR. SULLIVAN said the answer is both. He stated that in one particular R.S. 2477 right-of-way case, which he said is similar to a navigability case, a private party had blocked the road. He said the state elected to file a case specifically addressing the private party's property, rather than the entire 20 miles of road. In this example, the court would be confirming the R.S. 2477 right-of-way as to that parcel - not the entire road. He explained that that can be simpler and less expensive than a quiet title action for the 20-mile stretch of road. In other cases, where many parties are disputing the R.S. 2477 right-of-way, the state may choose to bring a quiet title action involving dozens of miles of road. Those actions are far more complex than the single party quiet title action, he said.

[8:24:41 AM](#)

REPRESENTATIVE ISAACSON asked how a recordable disclaimer of interest process interacts with a quiet title action, in terms of change of land ownership.

MR. SULLIVAN responded that a recordable disclaimer of interest is as good as a judgment, once the parties agree to and sign off on it; "it's just a different process of getting to that point."

[8:25:47 AM](#)

REPRESENTATIVE HUGHES referred to Mr. Ogan's previous remarks about the high cost of quiet title actions and disputed conveyances. She asked how the process works when "applying to conveyances that shouldn't happen."

MR. OGAN answered, "It is a problem." He relayed that when he served as a Representative, the legislature passed Senate Bill 305, which instructed DNR to send letters to all the Native corporations to inform them that BLM may have erroneously conveyed lands to them that were actually state-owned, to ask BLM not to "charge that against their acreage entitlement," and to allow the corporations to select upland acreage instead of the submerged lands. He indicated that contrary to expectations, the response was minimal. He ventured, "That's

probably the best solution short of quiet title actions." He said the state has applied for recordable disclaimers of interest on rivers where there is "a mixed bag of ownership" and where [DNR] believes BLM has erroneously conveyed submerged lands to Native corporations. He continued as follows:

I hope that it'll put the Native corporations on notice that they're owning riverbeds that really they got charged -- their acreage entitlement was charged for those riverbeds, and that might be the motivation that will get them to approach BLM to reconsider and give them some more upland acreage. So, hopefully that'll be the resolution. We don't have enough time, or enough lifetime, to litigate all those.

[8:28:13 AM](#)

MR. OGAN noted there has been a slight shift in BLM's attitude toward recordable disclaimers of interest with R.S. 2477 rights-of-way, which has been driven by Utah's quiet title actions related to 18,000 R.S. 2477 rights-of-way in that state.

MR. OGAN directed attention to the slide entitled, "Current Issues/Litigation. He said [the state] has filed a quiet title action on Mosquito Fork. He said [the state] is being sued by Ahtna, Incorporated, on the Kotsina River. He said Fog Lake and Dream Creek out in Bristol Bay is an area of contention, because certain lodges have exclusive rights to guide their clients on the river that are in conflict with people's rights to access the river. He related that [the state] is being sued by a company on Lemon Creek over whether BLM inappropriately conveyed submerged lands before statehood. He said the state believes it has a good case that those lands were held in trust for the future state; therefore, that issue will probably be answered. He said [the state] recently settled a 25-year dispute with a man who was mining in a state riverbed in Skagway. He said he thinks the Sturgeon/Nation River case is one of the watershed cases that will determine how far the federal jurisdiction extends into state rivers.

MR. OGAN directed attention to the slide entitled, "Mosquito Fork." He said the state issued mining claims on the Mosquito Fork River; the federal government determined the river is non-navigable; the state filed a complaint; BLM "denied all our issues"; the present phase is the discovery phase; and the state has conducted hydrological work on this remote river and has

"floated it." He offered further details. He said, "We believe that river's unquestionably navigable."

[8:31:11 AM](#)

MR. OGAN moved on to the slide entitled, "Kotsina River." He described the alluvial fans of the Kotsina as "a fire hose in slow motion," shifting back and forth naturally and carrying a lot of gravel, which originates from a steep, mountainous area. He reiterated that [the state] is under dispute with Ahtna, Inc., over that river. He directed attention to the slide entitled, "Sturgeon/Nation River." He noted that the Sturgeon/Nation River is "about the smallest river we have adjudicated as navigable."

[8:32:43 AM](#)

SENATOR DYSON expressed particular interest in the Matanuska River, because its meandering has taken out private property. He questioned how "ownership deals" are figured out for those with titles to private property that extends into an alluvial fan under state jurisdiction. He then asked who would have jurisdiction over post-flood attempts to restore a river's course to "somewhere it's been before but does less damage."

MR. OGAN said the courts make decisions on a case-by-case basis, but in general "the title to the bed moves with the bed of the river." Using an example of a state-owned riverbed with a riparian owner upland from the river, he indicated that gravel and soil that is gradually and imperceptibly deposited by the river upland - called accretion - belongs to the upland owner, while land [left exposed] by the [gradual recession of water] - called reliction - belongs to the state. He added, "If it's avulsion, which is a sudden, perceptual act, it fixes the boundary." He said the state hires national experts to figure out where the boundaries are, because boundaries move and are sometimes subject to interpretation.

SENATOR DYSON surmised that the deposit and erosion activity of an alluvial fan would stay within the fan.

MR. OGAN said that is generally the case; however, there are court cases regarding dams, dykes, and accretion resulting in upland soil and vegetation.

[8:36:31 AM](#)

MR. OGAN directed attention to the slide entitled, "What Kind of Boat Before Statehood?" He said research shows that before statehood, Native Alaskans used skin boats for subsistence. He said miners typically used polling boats and "polled and lined boats up rivers." He mentioned that Peterborough boats were used in Alaska quite extensively. He showed slides of an historic poling boat in the Chicken, Alaska, area, which was used in the 40-Mile area pre-statehood and is being excavated. He said David Seaman, a noted boat builder from Homer, Alaska, created a set of working drawings.

[8:38:58 AM](#)

REPRESENTATIVE HUGHES asked whether frozen rivers are considered navigable.

MR. OGAN answered, "We do not consider frozen rivers a test for navigability, and we also do not consider just simple ... float plane use; and those are based on case law." He added, "They have to be navigable in their ordinary condition."

REPRESENTATIVE HUGHES suggested that the ordinary condition of some rivers in Alaska would be frozen.

[8:40:03 AM](#)

REPRESENTATIVE ISAACSON, referring to Mr. Ogan's previous description of the movement of a river, offered his understanding that "if it's a meander, ... [then] the ownership changes" and "if it's a sudden occurrence, then the ownership is fixed."

MR. OGAN responded that that is generally correct, but remarked that a flood could take out someone's front yard, and that homeowner would then own a riverbed.

REPRESENTATIVE ISAACSON asked who would have ownership in the case of a sudden occurrence that "does not swamp your property."

MR. OGAN offered an example in which miners made a road next to a river and "the channel eventually moved over there and abandoned the existing riverbed." He said the state's position is that it owns the portion of the riverbed that was abandoned, because it was an avulsive act and the new river bed is owned by the upland owner. He relayed that an avulsive act can be a natural or manmade occurrence. He said there is other case law that disagrees with that philosophy. For example, in a case

related to the Colorado River, the State of Arizona sued to a quiet title to a riverbed it believed it owned after a damn was built. The court ruled that that was secreted land, which belongs to the upland owner, which was BLM.

REPRESENTATIVE ISAACSON said that in Omaha, Nebraska, near Eppley [Airfield], there is a section of [the Missouri River] that is Iowa, because the river changed course suddenly and "stranded Iowans in the middle of ... Omaha." He questioned what might result if such a thing were to occur in Alaska. He asked, "Is that going to be contested ownership or is that going to be fixed to those who were there, and so you don't have to go through the idea, well, this is now federal land or this is now state land - it's whosever land it was?"

MR. OGAN said the answer depends on whether anyone raises the issue. He indicated that the example Representative Isaacson gave is a classic example of an avulsive event.

[8:44:08 AM](#)

SENATOR DYSON asked if a property owner who has experienced his/her property eroding into a river can backfill land materials out to the original line.

MR. OGAN answered yes, if the land owner obtains the proper permits from the Corps of Engineers.

SENATOR DYSON asked if the state ever gets into trouble for taking land that was "perceived to be private property."

MR. OGAN deferred to Mr. Sullivan.

[8:45:14 AM](#)

MR. SULLIVAN related that there is case law related to R.S. 2477 rights-of-way, where challenges have been made and quiet title actions have been filed and title land owners have said there is a potential "takings issue." However, in the Widener (ph) case, the court ruled that the statute of limitations had passed on the takings, so the court refused to grant any relief for the takings. He offered his understanding that this is an issue that has not come up often.

[8:46:51 AM](#)

MR. SULLIVAN began his presentation regarding R.S. 2477 rights-of-way. He explained that he would begin the PowerPoint presentation at the point at which he left off during the previous meeting of the Senate State Affairs Standing Committee and House State Affairs Standing Committee [on 2/14/13]. He directed attention to the slides showing the following R.S. 2477 rights-of-way routes: the Dalton Highway, from Livengood to Prudhoe Bay; Farmers Loop Road, in Fairbanks; DeBarr Road, in Anchorage; Klutina Lake Road, out of Copper Center; the Iditarod Trail; and the Chilkoot Trail. He then showed slides illustrating the varying characteristics of R.S. 2477 rights-of-way, including those in the area of Chicken, Alaska; an R.S. 2477 right-of-way built to serve a cemetery outside of Chitina, Alaska; and the Chicken Ridge Trail near Chicken, Alaska, which is heavily used by miners and hunters.

MR. SULLIVAN directed attention to a slide entitled, "Why are R.S. 2477s important?" He said Alaska is the largest state in the country, but has fewer public roads than Connecticut, the third smallest state in the country. Alaska has 16,302 miles, while Connecticut has 21,020 miles. He showed a slide depicting Alaska's highway system without R.S. 2477 rights-of-way, with the exception of the Dalton Highway, followed by a map of Alaska with the R.S. 2477 rights-of-way. He stated, "Without R.S. 2477, we're very limited on what we might be able to do with regard to development of travel corridors in the state."

[8:50:22 AM](#)

MR. SULLIVAN, in response to CHAIR DYSON, said the map that shows the R.S. 2477 rights-of-way is on DNR's web site. The link to the web site is found at the end of the presentation.

[8:50:31 AM](#)

MR. SULLIVAN continued to the slide that shows that R.S. 2477 rights-of-way are critical to: give public access to the state's land and resources; enable the state to reasonably manage, maintain, and develop its lands, resources; and maintain state sovereignty and preserve the state's rights. He directed attention to the slide entitled, "Previous R.S. 2477 Research, Investigation & Legislative Codification." He said an R.S. 2477 right-of-way project was begun in the early 1990s in an effort by DNR to systematically review potential R.S. 2477 rights-of-way in the state. This was done by researching Alaska Road Commission reports, United States Geological Survey (USGS) maps, and United States Postal Service (USPS) records and contracts,

and it culminated in the legislature's codification of over 600 routes in AS 19.30.400.

MR. SULLIVAN turned to the slide entitled, "Recent R.S. 2477 Developments," and noted that in 2011, the legislature authorized a [\$599,000] increment increase to DNR [for FY 2012]. Since that increase, he said, DNR has conducted extensive field work and historical research related to R.S. 2477 rights-of-way and had DOL hire an attorney dedicated to R.S. 2477 right-of-way work. Mr. Sullivan said he is the person who was hired to fill that position. He said DNR has engaged in peer-to-peer meetings with representatives in Utah, because that state is years ahead of Alaska in its efforts to pursue R.S. 2477 rights-of-way; the intent is to learn from Utah's successes and failures.

MR. SULLIVAN said Alaska's R.S. 2477 right-of-way prosecution strategy was developed and refined, based on the information gleaned from Utah, including the careful selection of initial claims to prosecute in order to avoid establishing bad case law. He said, "There may not be existing case law on a particular issue right now, but if you succeed in court in getting an issue resolved, then you can take the precedent and you can apply it to other situations. And that's why it's incredibly important to put your best foot forward in these ... early R.S. 2477 cases." Mr. Sullivan said another development has been the preparation of a detailed analysis of what is needed to take an R.S. 2477 right-of-way case to trial. He said what is needed to take a case to trial can be somewhat different from what is needed in order to make a preliminary determination that an R.S. 2477 right-of-way exists; the level of evidence needed for a trial is huge. He emphasized the importance of identifying key witness testimony. He explained that a witness who is going to have knowledge as to an R.S. 2477 right-of-way will be fairly old today; therefore, it is important to identify those witnesses and preserve their testimony to the extent possible.

[8:55:28 AM](#)

MR. SULLIVAN directed attention to a series of slides addressing "Recent Legal Developments." He referred to the aforementioned case in Chickaloon - State v. Lonewolf - where a private landowner blocked an R.S. 2477 right-of-way - a loop road that connects with the Glenn Highway. He said that right-of-way was in a neighborhood and was being used by homeowners in the area. He explained that Mr. Lonewolf felled several trees across the road and erected a detour sign, which forced people to drive up his loop driveway, within 10-15 of his house, at which point he

would stop the driver, tell them to slow down, inform them that it was not a public right-of-way, and then let them go on their way. Mr. Sullivan said this created a safety issue, and the state did not want to provide the opportunity for a landowner to harass people using a public right-of-way or have emergency vehicle services disrupted. The state sued to enjoin Mr. Lonewolf and prevent him from doing that. The state got an injunction initially and a default against Mr. Lonewolf and will likely get a judgment soon in that case.

MR. SULLIVAN said in another case - Dickson v. State - a private landowner sued the state seeking to prevent use of a portion of the historic Iditarod Trail near Knik. He said the matter is continuing in litigation. Mr. Sullivan said historically the Iditarod Race went across this trail until the landlord blocked it in 1982, but since then there is another R.S. 2477 right-of-way route that has been used across the property for the Junior Iditarod races and a lot of the other Iditarod qualifying events. He said this matter continues to be actively litigated.

[8:58:04 AM](#)

MR. SULLIVAN said that as part of the Valdez to Copper Center Trail, Klutina Road is one of Alaska's most historically rich R.S. 2477 rights-of-way in Alaska; however, in Ahtna, Inc. v. State, Ahtna, Inc. sued the state, claiming that road is not an R.S. 2477 right-of-way. He said that case continues to be litigated. He then related that DOL has prepared a draft complaint addressing litigation in the Chicken, Alaska, area, involving R.S. 2477 rights-of-way, which involve dozens of miles of road across numerous parcels of private property, federal property, and mining claims. He said that case will soon be filed.

[8:59:11 AM](#)

REPRESENTATIVE KELLER asked Mr. Sullivan if he thinks the state is making a mistake by not assigning more attorneys to focus on federal overreach.

MR. SULLIVAN said he cannot speak for DOL, but his own perception is that federal overreach issues are an important part of the whole analysis, but not the only part. He explained that R.S. 2477 rights-of-way involve a lot of state law, not just federal law, and those laws overlap; therefore, an attorney looking only at federal overreach would be viewing only "a portion of R.S. 2477." He said of the cases he mentioned

previously, three are in state court, while one will be in federal court.

9:01:50 AM

REPRESENTATIVE HUGHES, regarding attrition of witnesses, asked if the state is adequately funded to support "doing the research while they're still alive."

MR. SULLIVAN answered that a multitude of issues are being addressed within budgetary constraints, but more could always be done.

REPRESENTATIVE HUGHES asked Mr. Sullivan to confirm whether the current program is robust enough to gather the information needed before the witnesses have died.

MR. SULLIVAN said that is a difficult question to answer. He said with unlimited resources it would be possible to identify more witnesses; however, he said, "We're happily working within our budget," and "we're doing what we can."

CHAIR DYSON expressed appreciation for the work that Mr. Sullivan does.

9:04:14 AM

JOANNE BLACKBURN stated that there are some guiding principles and subtle laws regarding riparian rights within the U.S. She concurred with Mr. Ogan that the Equal Footing Doctrine was established by federal court and certainly has application in Alaska. She said she finds it ironic that the State of Alaska has not placed an R.S. 2477 right-of-way on the railroad tracks, which she said are at the exact location the Iditarod Trail was run at 20-Mile. She stated, "No one who loves dogs or was in a hurry to save lives would have run their dogs up on the ledges and precipices that we see; they ran along the bottom of the valley." She said it is agreed by the U.S. Department of Agriculture, the U.S. Forest Service, and the Alaska Railroad Corporation that "the railroad itself is the exact ... superhighway that was used for this transportation." She said this corridor has not been claimed for the people of Alaska.

MS. BLACKBURN offered her understanding that the railroad was built in 1923 under the 1875 Licensing Act; therefore, what was obtained by the federal operation of the railroad was a permeable right-of-way. She said the infrastructure is aging

and sinking into the riparian mud. Ms. Blackburn stated it is ironic that "they" have claimed a private parcel arising out of tidelands on either side, the patent of which is derived from the U.S. Department of Transportation, not from BLM.

MS. BLACKBURN opined that Alaska's lack of claim to the actual Iditarod Trail is a glaring omission. She added, "And by virtue of that I lose confidence." She stated that under the Equal Footing Doctrine, no federal agency can lean upon a fledgling state and take its assets. She said real estate is handled like real estate anywhere else.

CHAIR DYSON interjected his thanks for Ms. Blackburn's testimony and said if there was time the committee would get back to her.

[9:08:25 AM](#)

STAN LEAPHART, Executive Director, Citizen's Advisory Commission on Federal Areas (CACFA), Department of Natural Resources, gave a PowerPoint presentation regarding the commission. He reviewed information pertaining to the background and history of the commission, as shown on a PowerPoint slide: As a result of the Alaska National Interest Lands Conservation Act (ANILCA), the commission was established as a temporary advisory agency in 1981, authorized initially for seven years, reauthorized in 1988 for ten years, and again in 1998 for an additional five years, but it was shut down before the end of that period. He indicated that in 2007, Representative [Mike] Kelly and [then Representative] John Coghill were involved in legislation to reestablish the commission, and the commission reestablished its operations in 2008. He said the commission is currently scheduled to sunset in June [2014].

MR. LEAPHART relayed information regarding membership, as shown on another slide: three members are appointed by the governor; three members are appointed by the Speaker of the House, one of whom is a member of the House; and three members are appointed by the President of the Senate, two of whom are members of the public, and one of whom is a member of the Senate. He said statute directs that the public members be "representative of diversity of users and uses of federal land in the state." He related that two weeks ago, a member of the commission resigned, but the commission welcomed Senator Coghill as its newest member at its last meeting.

MR. LEAPHART directed attention to the next slide, which lists the duties of the commission [under AS 41.37.220(a) through (d)], and he cited subsection (a), which read as follows:

(a) The commission shall consider, research and hold hearings on the consistency with federal law and congressional intent on management, operation, planning, development, and additions to federal management areas in the state.

MR. LEAPHART offered his understanding that then Senator Betty Fahrenkamp, the commission's first chair, interpreted that language to mean the commission closely watches the actions of federal agencies. Directing attention to the next slide, he paraphrased [AS 441.37.240], which read as follows:

The commission may request the attorney general to file suit against a federal official or agency if the commission determines that the federal official or agency is acting in violation of an Act of Congress, congressional intent, or the best interest of the state.

MR. LEAPHART said the commission has filed suit against the federal government regarding cabin regulations that were adopted in the late 1980s; however, the case was dismissed for lack of standing.

[9:12:00 AM](#)

MR. LEAPHART directed attention to the next slide, which addresses agency cooperation and shows [AS 41.37.250], which read as follows:

Each state department, agency, board, and commission shall cooperate with the commission in the fulfillment of the duties of the commission under AS 41.37.220.

MR. LEAPHART, referring to information on the next slide, regarding administration, stated that the commission is within the Department of Natural Resources (DNR), has two staff members who answer to the commission but work closely with other agencies, has an office located in the DNR Northern Region office in Fairbanks, and meets a minimum of three times a year, usually in Anchorage, Juneau, and Fairbanks. He noted that the website is also listed on that slide.

9:12:41 AM

MR. LEAPHART turned to the slide regarding working relationships and consultation. He said the commission reviews and analyzes public land management agency documents, planning documents, regulations, and policies, talks to the public, and submits comments on those planning documents. He said the commission works the ANILCA program, but is independent of it. He said the main focus of the commission is to talk to members of the public to identify issues and problems. He related that the commission works with congressional delegation, which has been a big help in drawing attention to the issues.

MR. LEAPHART turned to the next slide, and he noted that ANILCA came out of Section 17(d)(2) of the Alaska Native Claims Settlement Act (ANCSA), which directed the Secretary of the Interior to withdraw up to 80 million acres for the purpose of creating national parks, wildlife refuges, and wild and scenic rivers [systems]. ANILCA was passed in December of 1980, following over eight years of debate.

MR. LEAPHART highlighted the next slide, which shows conservation system units and federally designated areas in Alaska, including: 17 national park areas covering [over] 51 million acres, [over] 32 million of which are designated wilderness - the most restrictive classification of federal land that exists; 16 national wildlife refuges covering [over] 76 million acres, over 18 million acres of which are designated wilderness; and 2 national forests covering over 22 million acres. Mr. Leaphart relayed that more than 90 percent of the total refuge system is in Alaska. He further noted that the only wilderness area in the forest land is in the Tongass, which totals about 7 million acres. He said there are two wilderness study areas in Chugach National Forest, which are managed as if they were wilderness, because they are congressionally designated study areas.

MR. LEAPHART said the Bureau of Land Management (BLM) has three designated areas [covering 2,686,026 acres] and manages six wild and scenic rivers. He said there are 26 designated national wild and scenic rivers in Alaska, which total almost 3,200 river miles. Alaska also has one national trail system, which is the Iditarod Trail. In total, he reported, Alaska has approximately 154 million [federally designated] acres.

MR. LEAPHART directed attention to a map on the next slide, which shows the federal conservation system units in Alaska

after the passage of ANILCA: the areas in [red] are national wildlife refuges; the areas in blue are national park units; the blue lines represent wild and scenic rivers; and the national forests are the Tongass and the Chugach.

[9:16:21 AM](#)

MR. LEAPHART referred to a slide showing 32 years of ANILCA changes and challenges, and he said many of the park plans are 25 years old and are in revision process. He said BLM is dealing with three of its wild and scenic river management plans, as well as the Steese National Conservation Area and the White Mountains National Recreation Area.

MR. LEAPHART turned to the next slide, which lists key past litigation: Northern Alaska Environmental Center v. Evison, which he said essentially terminated all mining in three park units in Alaska; Sierra Club v. Penfold, which involved three of the six wild and scenic rivers managed by BLM and changed the way people were able to mine and had a major impact on placer mining; and Alaska Wildlife Alliance v. Jensen.

[9:18:22 AM](#)

CHAIR DYSON asked if the organization in Utah is similar to CACFA.

MR. LEAPHART offered his understanding that [Utah's] primary focus is on the failure of the federal government to honor its state's compact. He said Alaska's focus is more on softening the blow of federal management. He added, "We're strictly an advisory group."

CHAIR DYSON asked if Utah has policy power.

MR. LEAPHART answered, "My understanding is that they do."

[9:19:20 AM](#)

CHAIR DYSON asked what Mr. Leaphart would like the legislature to know and what action he would like it to take.

MR. LEAPHART, in response, directed attention to a slide that shows plans, policies, and projects reviewed in 2012. He indicated that the list represents about 14,000 pages of material, all of which dictate how the aforementioned 150 million acres are managed. He said the commission has found

that over the last 32 years, federal agencies have "gradually chipped away at those special provisions" [of ANILCA]. He said he knows the public is overwhelmed, and he emphasized how difficult it is to focus the man power available just to ANILCA related issues. He explained that ANILCA is not the only federal law that the commission addresses; it attends to Acts addressing forest service management and BLM management, such as the Federal Land Policy and Management Act. He said the commission is busy and policies are changing constantly. Agencies don't have much institutional memory, so they do not recognize all the agreements that were reached administratively.

9:23:30 AM

REPRESENTATIVE ISAACSON recollected that Mr. Leaphart had said that in litigation there are some people whose land has been taken and they have not yet been compensated. He posited that that seems to be an onerous omission, and he asked if there is something the legislature could be doing to help.

MR. LEAPHART responded that there was legislation passed by the delegation to set up a compensation system; however, the problem is there is disagreement over the value of the claims. He offered further details.

9:24:44 AM

MR. LEAPHART directed attention to a slide showing what is currently under review. He said the big issue this year is that the National Park Service implemented a number of regulations to preempt state hunting regulations on national preserves. He said, "The problem was ... they had a minimal number of public hearings and they never used the board process the way it was intended to be used." He said compendium process has improved over the years, but the agency has consistently failed to follow its own procedures for implementing closures and restrictions.

MR. LEAPHART directed attention to a slide showing upcoming issues. He said one of the two forest plans will undergo a full revision, and the Tongass is going to undergo a five-year review. The other areas, he said, are updates of existing plans. For example, the Central Yukon Resource Management Plan is about 25 years old. He highlighted the BLM Guide Capacity Study & Environmental Assessment for BLM Lands, and he offered his understanding that depending on the outcome of that study, BLM may be restricting the number of guides they will be permitting to operate on their lands.

MR. LEAPHART turned to the next slide, which shows key issues that the commission looks at when considering a plan. He directed attention to the second one on the list, which is the ANILCA "No More Clause," and he said he put together a memorandum which shows the legislative history of the "No More Clause" [included in the committee packet]. He said Alaska's delegation, based in part by requests made by the legislature, made certain the clauses were in ANILCA, and the agencies have consistently violated those clauses.

[9:28:14 AM](#)

MR. LEAPHART directed attention to a slide with "Suggested Reading." He recommended the second source listed, d(2), Part 2 - Alaska National Interest Lands Conservation Act of 1980 - Promises Broken, which was put together by the Alaska Miners Association. He said A Land Gone Lonesome deals with cabin owners and "Yukon Charlie preserves." He said the commission went to Eagle in 1984 to hold hearings about park service cabin regulations. He recollected that at that time, there were 14 people living in the preserve, but currently no one lives there. He concluded the presentation with the final slide, which shows a cartoon of a juggler and the caption, "What is involved in implementation of ANILCA?" He offered to answer questions.

[9:29:26 AM](#)

REPRESENTATIVE KELLER emphasized that Mr. Leaphart and his staff condense 14,000 papers filled with information for the commission, which then takes action and writes letters, so if Mr. Leaphart asks for help, then the legislature should listen.

CHAIR DYSON said the legislature needs Mr. Leaphart to specify what help is needed both in statute and resources. He then asked Mr. Ogan to address the issue previously raised by Ms. Blackburn.

[9:30:51 AM](#)

MR. OGAN stated that the right-of-way of the railroad was already in place at statehood. He said he does not have first-hand knowledge of where the historic R.S. 2477 right-of-way route between Seward and Anchorage is, so he cannot sufficiently answer the question.

CHAIR DYSON asked Mr. Ogan to get back to the committee on that point. He commended all the presenters on their efforts.

[9:31:49 AM](#)

CHAIR DYSON handed the gavel back to Chair Lynn.

[9:32:14 AM](#)

ADJOURNMENT

There being no further business before the committee, the joint House State Affairs Standing Committee and Senate State Affairs Standing Committee meeting was adjourned at 9:32 a.m.