ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
February 15, 2017
3:30 p.m.

MEMBERS PRESENT

Senator Cathy Giessel, Chair
Senator John Coghill, Vice Chair
Senator Natasha von Imhof
Senator Bert Stedman
Senator Shelley Hughes
Senator Kevin Meyer

MEMBERS ABSENT

Senator Bill Wielechowski

COMMITTEE CALENDAR

Overview: State Legal Efforts Related to the Alaska National Interest Lands Conservation Act

- HEARD

SENATE BILL NO. 6
"An Act relating to industrial hemp; and relating to controlled substances."

- MOVED CSSB 6(RES) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 6
SHORT TITLE: INDUSTRIAL HEMP PRODUCTION
SPONSOR(s): SENATOR(s) HUGHES

01/09/17	(S)	PREFILE RELEASED 1/9/17
01/18/17	(S)	READ THE FIRST TIME - REFERRALS
01/18/17	(S)	RES, JUD
02/08/17	(S)	RES AT 3:30 PM BUTROVICH 205
02/08/17	(S)	Heard & Held
02/08/17	(S)	MINUTE(RES)
02/13/17	(S)	RES AT 3:30 PM BUTROVICH 205
02/13/17	(S)	Heard & Held
02/13/17	(S)	MINUTE(RES)

WITNESS REGISTER

JONATHAN SCHUMACHER, representing himself
Anchorage, Alaska
POSITION STATEMENT: Supported SB 6.

EMBER HAYNES
Denali Hemp Company
Talkeetna, Alaska
POSITION STATEMENT: Supported SB 6.

DON HART
Professional Paralegal Services
Wasilla, Alaska
POSITION STATEMENT: Supported SB 6.

RHONDA MARCY
Alaska Hemp Industries
Wasilla, Alaska
POSITION STATEMENT: Supported SB 6.

CARRIE HARRIS, representing herself
Anchor Point, Alaska
POSITION STATEMENT: Supported SB 6.

KAREN BERGER, representing herself
Homer, Alaska
POSITION STATEMENT: Supported SB 6.

FRANCINE BENNIS, representing herself
Trapper Creek, Alaska
POSITION STATEMENT: Supported SB 6.

AARON RALPH, representing himself
Anchorage, Alaska
POSITION STATEMENT: Supported SB 6.

LARRY DEVILBISS, representing himself
Palmer, Alaska
POSITION STATEMENT: Supported SB 6.

BRUCE SCHULTE, representing himself
Anchorage, Alaska
POSITION STATEMENT: Supported SB 6.

COURTNEY MORAN, Earth Law, LLC
Portland, Oregon
POSITION STATEMENT: Supported SB 6.

ATTORNEY GENERAL JAHNA LINDEMUTH
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Provided Overview of State Legal Efforts related to the Alaska National Interest Lands Conservation Act.

JESSIE ALLOWAY, Attorney
Special Litigation Section
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Provided Overview of State Legal Efforts related to the Alaska National Interest Lands Conservation Act.

TOM LENHART, Attorney
Natural Resources Section
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Provided Overview of State Legal Efforts related to the Alaska National Interest Lands Conservation Act.

KENT SULLIVAN, Attorney
Natural Resources Section
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Provided Overview of State Legal Efforts related to the Alaska National Interest Lands Conservation Act.

ACTION NARRATIVE

3:30:42 PM
CHAIR CATHY GIESSEL called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Meyer, Hughes, Coghill, Stedman, Von Imhof, and Chair Giessel.

SB 6-INDUSTRIAL HEMP PRODUCTION

3:31:21 PM
CHAIR GIESSEL announced consideration of SB 6, sponsor by Senator Hughes. [CSSB 6, labeled 30-LS0173\U, was before the committee.] Public testimony was open.

JONATHAN SCHUMACHER, representing himself, Anchorage, Alaska, said the industrial hemp industry would bring in much needed revenue for the state.

EMBER HAYNES, Denali Hemp Company, Talkeetna, Alaska, supported SB 6. She and her husband own a business in Talkeetna that grows and harvests Alaska plants to create herbal sundries. She looks forward to the day she can incorporate Alaska-grown hemp seed oil into her Alaskan Devil's Club Balm. Her family and many others across Alaska are currently adding protein to their diets with hemp seed, powder, and meal. She personally supplements their animals' feed with high-protein, non-viable hemp seeds, and right now she has a new litter of pigs nestled in some Dove Tree Hemp Herd Bedding, a product she uses on a daily basis that she wished could be all-Alaskan grown.

She asked if there might be further clarification on the language in Section 1 (l) and (n) where it asks a registrant to keep three years of records, and to add that the department shall provide at least three days' notice before inspecting the records. She said these could be working days and that is why further time should be allowed. Other than that, she hopes to see this industry flourish in Alaska and be exported worldwide.

3:36:33 PM
DON HART, Professional Paralegal Services, Wasilla, Alaska, supported SB 6 and said it's extremely important for cultivation of hemp to be legalized in Alaska, because Canada has made such a success after legalizing it there; they ship all of their hemp products into the United States.

He said that hemp grows very well in the northern climate and Alaska has a lot of land to grow it on. Instead of saying it can be raised as an affirmative defense or using the definition only in the criminal statutes, to really benefit the farmers it would be better to remove it entirely from AS 17.38. The reason is that the definition of marijuana includes all parts of the plant of genus cannabis. If it's not removed it will be illegal anyway.

Secondly, AS 17.38.210 (a) allows hemp growing in Alaska to be excluded by initiative. Two Alaska Supreme Court cases, Carmen v. McKechnie and Griswold v. the City of Homer, state that zoning by initiative or the municipality is invalid and unconstitutional, because it creates a taking action.

3:40:57 PM

RHONDA MARCY, Alaska Hemp Industries, Wasilla, Alaska, supported SB 6. She said she has an undergraduate degree, a Master's degree, and along the way she studied industrial hemp at Oregon State University. She supports the industry in Alaska and to that end her business is trying to help the people who want to have an industry in Alaska to process and have end products for the hemp they are growing.

She visited a University of Kentucky hemp field two years ago and found that the nutritional contents of the green part of plant is higher than in alfalfa and when the meat of the seed is added it is 100 percent complete nutrition with Omegas 3, 6 and 9. One of the reasons hemp will be such an asset to Alaska is that it can be food for fish/salmon fry. Currently, last years fry are ground up and fed back to the current years fry, a decreasing nutritional cycle. Hemp is a perfect fish/salmon food that Alaskans could grow, and that would also contribute to having a stronger salmon industry in Alaska.

She suggested making a tribute to Senator Johnny Ellis for starting this issue last year.

3:43:25 PM
CARRIE HARRIS, representing herself, Anchor Point, Alaska, supported SB 6. She believes industrial hemp should be allowed as well as cannabis. "The benefits are amazing." She feels that in voting to legalize cannabis people set aside the issues the federal government has with it.

3:44:10 PM
KAREN BERGER, representing herself, Homer, Alaska, supported SB 6. She said she was also testifying in the spirit of Julie Suzerini, another hemp advocate. Thirty other states favor this type of legislation and she would like to see Alaska as number 31. Agriculture is a big part of Homer's economy and the economic base of our state needs all the help it can get.

3:45:08 PM
FRANCINE BENNIS, representing herself, Trapper Creek, Alaska, supported SB 6. She also wanted to thank Senator Ellis for his work on this issue. She said hemp is an amazing substance that can be used for many things. The U.S. Declaration of Independence was written on hemp paper, and both Thomas Jefferson and George Washington had hemp plantations. Alaska can really use another viable industry, and it will be well received here. It is easy to grow here; Canada is begging the United States to develop an infrastructure for growing hemp products,

because they can barely keep up with U.S. demand. Canada started growing legally in 1998 and by 2010 they had over 25,000 acres in cultivation. China is also producing hemp, but is buying it from Canada, as well. Right now this country is importing over $1 billion worth of hemp products from Canada including food and clothing.

3:48:07 PM
AARON RALPH, representing himself, Anchorage, Alaska, supported SB 6. Hemp has over 50,000 uses. It is great as a dietary supplement and many food products can be made out of it. It produces a higher amount of cannabidiol, which is a great tool in treating most neurological disorders.

3:48:51 PM
LARRY DEVILBISS, representing himself, Palmer, Alaska, said he doesn't use marijuana, but supported SB 6. He is a farmer in Palmer and has been in many places around the world where hemp is grown. It is unfortunate that it happens to be in the cannabis family. Hemp has a lot of practical benefits that could become an economic driver in Alaska. He mentioned that a Palmer initiative banned marijuana products but exempted hemp, because of its beneficial uses and none of the negatives that are associated with other cannabis products.

3:50:28 PM
BRUCE SCHULTE, representing himself, Anchorage, Alaska, supported SB 6, but shared some of the concerns over the scope of regulation and government involvement as well as the fees. He hoped the fees could be kept to an absolute minimum. He knew of a lot of large tracts of land that could benefit from the hemp industry, but there are also smaller land owners who could benefit, and he would hate to see them left out because of high fees. He observed recent news about CBD-containing products around the state and he hoped that a clear distinction could be made between hemp-based CBD products and its distance cousin, marijuana products, so it wouldn't be open to challenge later on.

3:52:56 PM
COURTNEY MORAN, Earth Law, LLC, Portland, Oregon, supported SB 6. She is an industrial hemp attorney with her firm, Earth Law, LLC, and it has been her honor and pleasure to work with Senator Hughes and Buddy Whitt and with all the comments from the Division of Agriculture and this committee in drafting legislation that does conform with federal law. SB 6 sets up a robust regulatory framework that will provide for a successful

and sustainable industrial hemp program for farmers and manufacturers throughout Alaska. She thanked the committee for their thoughtful questions and discussion on SB 6 clarifying that industrial hemp is an agricultural product subject to regulation by the Division of Agriculture.

MS. MORAN noted that industrial hemp products, themselves, are legal and always have been, but its cultivation has been a federal issue for the past 80 years. The legality of industrial hemp products was clarified by the Ninth Circuit Court in the 2004 Hemp Industries Association (HIA) v. Drug Enforcement Agency (DEA) case. Mr. Carter with the Division of Agriculture mentioned during this committee's March 13th hearing that Section 763 of the Consolidated Appropriations Act of 2016 provides that:

> No funds may be used by any federal agency to prohibit the transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with Section 7606 of the Agricultural Act, in or outside the state in which industrial hemp is grown or cultivated.

This language provides clarity for industrial hemp product sales across state lines. Also, as discussed in the past two hearings, Section 7606 of the U.S. Agriculture Act of 2014 (the Federal Farm Bill) provides a directive from Congress by not only defining industrial hemp notwithstanding the Controlled Substances Act and giving authority for the State Department of Agriculture and institutions of higher education in states that have already legalized industrial hemp to research the growth, cultivation, and marketing of it. This measure provides clear federal authority for the implementation of a state program.

She recalled comments about why Alaska is following federal guidance for industrial hemp if the state is not following federal guidance for marijuana, and the rationale was that clear legal authority is lacking federally for marijuana except for the Department of Justice's Cole Memo Guidance of 2013. In contrast, there is clear federal statutory authority, and SB 6 will create the state legal authority for Alaska. That institutions of higher education and universities can engage in industrial hemp research is also provided in Section 7606. Approximately 20 universities throughout the U.S. are currently conducting industrial hemp research and SB 6 will provide that authority for Alaska institutions of higher education.

Another important provision of SB 6 provides that food is not adulterated solely because it contains industrial hemp. Other states, such as Colorado, have had this issue, because it is not clarified, and SB 6 will take care of this right away for farmers and manufacturers at the beginning of the program's implementation. She closed thanking them for their support and encouragement for agricultural industrial hemp development in Alaska.

3:56:09 PM
CHAIR GIESSEL, finding no one else to testify on SB 6, closed public testimony. She said the committee had updated fiscal notes and asked Senator Von Imhof, the member who is on the Senate Finance Committee, if she had any comments on them.

SENATOR VON IMHOF reviewed the four fiscal notes as follows:

> 1. The DNR provides a zero value. The cost of administering the registration program will be determined after regulations are drafted. Those costs will be recovered by approximately 25 farms and the department anticipates to register that in the first year. Additionally, the department anticipates a 10 percent growth of interest from the agricultural community each year after.
>
> 2. The Department of Law: does not anticipate a fiscal impact at this time. Zero value.
>
> 3. The Department of Public Safety: passage of this legislation is not expected to result in a significant increase in the crime labs controlled substance analysis workload. Therefore, no fiscal impact to the crime lab is anticipated. Zero fiscal note.
>
> 4. The Department of Public Safety: passage of this legislation is not expected to have an impact on the enforcement efforts of the Alaska State Troopers. Therefore, a zero fiscal note is being submitted.

CHAIR GIESSEL recognized Division of Agriculture personnel who were ready to answer questions. She invited Senator Hughes to make closing remarks.

SENATOR HUGHES thanked the committee for hearing the bill and everyone who testified. She thanked the Division of Agriculture

for their work with them. She also recognized Bruce Bush from MatSu.

3:58:20 PM
SENATOR COGHILL moved to report CSSB 6(RES), labeled 30-LS0173\U, from committee with individual recommendations and attached fiscal note(s). There were no objections and it was so ordered.

3:58:48 PM
At ease

Overview: State Legal Efforts Related to the Alaska National Interest Lands Conservation Act

4:00:24 PM
CHAIR GIESSEL called the meeting back to order and said on Monday the committee heard testimony from the Department of Natural Resources (DNR) and the Alaska Department of Fish and Game (ADF&G) on the Alaska National Interest Lands Conservation Act (ANILCA). Today they would hear from the Department of Law about the state's legal efforts related to it.

4:00:52 PM
ATTORNEY GENERAL JAHNA LINDEMUTH, Department of Law (DOL), Juneau, Alaska, introduced herself and said she had with her today Assistant Attorneys General Jessie Alloway from the Special Litigation Section, and Tom Lenhart and Kent Sullivan from the Natural Resources Section. They would walk through the list of federal issues and conflicts dated January 23, 2017.

ATTORNEY GENERAL LINDEMUTH said they would spend about two minutes per case. Most issues are in litigation and while they are happy to describe the claims and their procedural posture, as the attorneys for the state, they don't want to get too far into strategy or the legal merits of different issues.

She started with the Sturgeon Case saying she became Attorney General about six months ago. However, before that she was in private practice at Dorsey & Whitney and actually worked on this case. She has more in-depth knowledge about this case perhaps than the other cases.

ATTORNEY GENERAL LINDEMUTH said the Native Corporations in the state were aligned and actually worked together on these matters. She is the one who drafted the Ninth Circuit brief and the Supreme Court brief for the Arctic Slope Regional

Corporation (ASRC) and Cook Inlet Regional, Inc. (CIRI) in support of the Sturgeon Case. The parties have actually waived conflicts because they were aligned and she can now represent the state on this matter.

ATTORNEY GENERAL LINDEMUTH said the theme in a lot of cases in recent years has been that the federal government, through regulation, has tried to expand federal jurisdiction and federal powers in the state, and in doing so have, she believes, violated the actual statutes and governing laws that really control the issue. In many instances, these area manifested in changes in positions.

4:03:45 PM
In the Sturgeon case, there had been long standing federal regulation confirming that the federal government didn't have regulatory power over the in-holdings within the CSUs or the federal parks and refuges in Alaska, and the state, the Native Corporations, and private lands really accounted for a lot of that. So, when ANILCA was passed there were millions of acres of private and state lands within the CSUs that would be in-holdings, in effect. The federal government changed its interpretation of a regulation that flipped the statute on its head by deciding that indeed the federal government could regulate the in-holdings and took the very statute that confirmed they couldn't regulate them and tried to say that meant that they could regulate them. That particular interpretation went all the way up to U.S. Supreme Court and Alaska won. So that issue is off the table.

They are back in front of Ninth Circuit now and the federal government is arguing different, weaker arguments to expand federal jurisdictions, and the state is just waiting to hear from the Ninth Circuit about whether any of them have purchase.

4:05:20 PM
ATTORNEY GENERAL LINDEMUTH said this case has often been described as a "navigable waters case," but it wasn’t limited to navigable waters before. It was over all lands. In fact, it has led to the federal government actually asserting oil and gas regulations that would regulate oil and gas exploration even on state and private lands. The federal government backed off on those regulations in November and did not go forward with passing the additional oil and gas regulations, but are waiting to see what happens with the Ninth Circuit. She turned the presentation over to Ms. Alloway to describe the Mosquito Fork Case.

4:06:07 PM
JESSIE ALLOWAY, Attorney, Special Litigation Section, Department of Law (DOL), Juneau, Alaska, said the next group of cases she would talk about involve the state's assertion of ownership over the submerged lands underlying the navigable waterways. With few exceptions she said the state owns the submerged lands under navigable in-fact waterways as well as tidally influenced waterways. The dispute with the federal government on navigable waterways usually comes in two forms: one, they will say the river is not navigable. They'll say it wasn't navigable at the time of statehood by a water craft that was relevant at the time, or two: they'll say that pre-statehood the federal government either reserved the land for itself or conveyed the land to another third party, so the state's interest was defeated at statehood. Each of those issues has come up in the group of cases she would talk about.

The first is the Mosquito Fork Case and that was over whether the river was navigable in fact. The DNR's Public Access and Assertion Defense Unit and some members of the Alaska Department of Fish and Game (ADF&G) worked closely with the DOL to bring this case. It was litigated for over three years, and three weeks prior to trial the United States (U.S.) issued a disclaimer of interest and recognized the state's ownership to the Mosquito Fork, so that ended the need for a trial. But that did not end the case.

The state decided to bring a motion for attorney's fees arguing that the U.S. had acted in bad faith throughout the course of the litigation by making arguments that were frivolous and contrary to Ninth Circuit precedent. Judge Gleason agreed with the DOL and last fall awarded the state approximately $600,000 in attorney's fees and costs. The U.S. is currently appealing that decision to the Ninth Circuit; the state is cross appealing on the issue of whether the state is also entitled to get reimbursed for the expert witness fees this litigation incurred. That is approximately another $380,000. That case is currently before the Ninth Circuit; briefing is scheduled to begin in April.

4:08:54 PM
The second case is the Stikine River that dealt with the other type of issue of whether there was a pre-statehood withdrawal, specifically the Tongass National Forest withdrawal that defeated the state's interest in the Stikine River.

MS. ALLOWAY said the DNR had been trying to get a recordable disclaimer of interest to the Stikine River for at least five years through a Bureau of Land Management (BLM) administrative process by which and BLM simply refused to act on the application. So, once the Mosquito Fork trial went away, the DOL filed a second complaint to quiet title to the Stikine River. That case went a little bit smoother and didn't take three years, and within a year, the U.S. filed another disclaimer of interest recognizing the state's ownership instead of filing an answer. That case is still pending, because even though the DOL did not seek attorney's fees they sought costs as the prevailing party of $400, but the U.S. is appealing that determination over whether the state is the prevailing party. It is related to an issue in the Mosquito Fork case, but these cases are both being appealed to the Ninth Circuit and will likely be heard by the same panel. She has been told by the U.S. that their notice of appeal is provisional; they haven't received full authority from the solicitor general to pursue it and she should receive an update next week on whether they are going to pursue it.

4:10:57 PM
The next case is the Kuskokwim River that is an administrative appeal. DNR did receive a recordable disclaimer of interest for most of the Kuskokwim, except for a small section in McGrath that the U.S. claims was withdrawn pre-statehood. The DOL has appealed that to the Interior Board of Land Appeals (IBLA), an administrative body that hears cases for the BLM. That was fully briefed over a year ago, and they are simply waiting for a decision.

4:11:13 PM
MS. ALLOWAY said the next case is the Knik River and whether it is navigable in fact. In September 2015, BLM issued a conveyance decision purporting to convey portions of the Knik River to Eklutna Native Corporation to satisfy their entitlement. In doing so, they neglected to reserve certain 17(b) easements that the state thought were necessary in order to preserve public access to the Knik Public Use Area. The 17(b) issue is being appealed to the IBLA and the state is working closely with Eklutna as well the BLM on settlement negotiations. That part of the case will likely be settled, but they are still dealing with whether the Knik River is navigable from the Eklutna conveyance area up to the glacier and are in ongoing negotiations with BLM on that issue. The state has filed a 180-day notice of its intent to quiet title.

4:12:27 PM

TOM LENHART, Assistant Attorney General, Natural Resources Section, Department of Law (DOL), Anchorage, Alaska, said the first case he had on the access of land issue has a deceptively simple title of "Roadless Rule." It's a story of 16 years of continuous litigation that has wound its way through 8 different federal courts and it will be a challenge to cover it in two minutes but he would try. The story starts in 2001 in the last 10 days of the Clinton Administration when the Department of Agriculture worked desperately to finalize the rule and get it out the door before the change in administrations. The rule essentially sets aside 58 million acres of U.S. National Forest land. To put that into context, 58 million acres is 2 percent of the United States. Out of that 58 million acres almost 15 million is in Alaska and about 9 million of it is in the Tongass. The Roadless Rule prohibits road construction and timber harvest in roadless areas. It is nearly as restrictive as a wilderness designation.

MR. LENHART said there are harms to utilities and community access, particularly in Southeast, to timber, mining, geothermal, and others. As a result, throughout the litigation the department has had a large coalition of particularly Southeast interests who have joined the state as intervenors in various cases.

When the rule came out in 2001, the State of Alaska and others almost immediately went to federal court with the initial challenge. In 2003, the SOA entered a settlement with the federal government and as a result of that settlement, a second rule was promulgated, best known as the Tongass Exemption Rule, that quite simply exempted the Tongass National Forest from the Roadless Rule. That exemption remained in effect until 2011 when the federal district court in Alaska invalidated the exemption, reinstating the Roadless Rule.

4:15:25 PM
The State of Wyoming had also challenged the Roadless Rule and succeeded in getting injunctions in the Tenth Circuit, so the Roadless Rule for most of its life has never actually been in effect. That changed in 2011 when the Tongass exemption was invalidated; almost simultaneously, the Tenth Circuit also lifted the injunction. So, at that point the Roadless Rule actually went into effect across the country for the first time.

In response to what happened in 2011, Mr. Lenhart said, the State of Alaska did two things: one they appealed the Tongass exemption ruling and had to go it alone because at that point

the federal government was not interested in defending the exemption. So, they played no part in what followed. The appeal started with a three-judge panel in the Ninth Circuit and it was successful there. On a 2:1 margin the exemption was reinstated. But in what is a relatively rare situation, the Ninth Circuit granted "en banc" review of that decision. It was reheard by an 11-judge panel and there the state lost 6 to 5. So, the Roadless Rule was once again reinstated. The state pursued that to the Supreme Court, but they chose not to hear the case. At that point, in July 2015 the Roadless Rule was in effect and has been in effect in Alaska since then.

The state also filed a new complaint on the same day the appeal was filed in the federal district court for the District of Columbia (D.C.) once again challenging the underlying Roadless Rule. That was six years ago. He listed the court cases saying:

> We've been down the road with the federal government where first they challenged us on venue trying to take the case back to the State of Alaska. Then they challenged us on statute of limitation, which was actually granted. We went to the Circuit Court of Appeals in D.C. We were successful. So the case was reinstated and remanded back to the district court for argument on the merits.

4:17:45 PM

> We initially completed the briefing on the merit in September of 2015; waited for a full year for a decision and almost on the one-year anniversary, the judge in that case ordered a supplemental briefing. So, we have completed the supplemental briefs; the last one was filed on January 24 of this year. So, once again it's ripe for decision and we await a district court decision. Now, obviously, whoever loses in the district court, there's a right to appeal to the Circuit Court. "Will we go there? We always have."

MR. LENHART said the next case is King Cove, but it's also a story of life and death. King Cove is a community of about 900 people; Cold Bay is a community of about 80 people and they are about 30 miles apart on the Alaska Peninsula. King Cove has a small gravel airport; it's not certified for night operations. King Cove also has terrible weather so that the airport is not serviceable for a good chunk of the year. Cold Bay has the unique circumstance of having a 10,000-foot paved runway that was built in WW II, and it still serves today as an emergency

landing field for even Boeing 747s inbound over the Pacific. For medical emergencies you can almost always get out of Cold Bay, but frequently you can't get out of King Cove.

No road connects them, so for a medical emergency in King Cove on a day that is not flyable the options are by Coast Guard helicopter or ocean transport, and because it's a day with high wind, both modes of travel are a very rough trip. What has been proposed for years is to finish a short 12-mile gravel road over the Izembek National Refuge connecting the two villages.

Going back to 2009, Mr. Lenhart said, the U.S. Congress and the Alaska Legislature both passed authorizations for a land exchange that would give the state the small strip of land through the national refuge that would be needed to construct the road. That was subject to approval by only the Secretary of Interior based on an environmental assessment. And in 2013, the secretary decided that a road was not needed and opted for the "no action alternative" for no road. Her decision rested very heavily on a finding that a theoretical alternative of transport between the two communities was using a landing craft. This was not supported by the record. In fact, the record was adamantly in the other direction.

So, a plaintiff's group from King Cove went to federal court on that. The State of Alaska intervened as a plaintiff in support, and the case was lost at the district court level. The state has appealed to the Ninth Circuit and the briefing was completed in August 2016. It's been six months now and the court has not even docketed the case for oral argument.

One other option that is also being pursued is there is a possibility of additional federal legislation, and that HJR 6 by Speaker Edgmon, was recently passed by the state legislature in support of that legislation.

4:22:25 PM

KENT SULLIVAN, Natural Resources Section, Department of Law (DOL), Juneau, Alaska, said he would talk about the Chicken RS2477 litigation. The RS2477 issue arose out of the Mining Act of 1866. It basically indicated that anywhere the public creates a road, trail, or highway across unreserved federal land, it creates a public right-of-way (ROW) in favor of the state.

To a state like Alaska with relatively few roads and infrastructure, RS2477 is incredibly important. It has been estimated that roughly 70 percent of the roads and highways in

the western U.S. arose by an RS2477. Despite the fact that Alaska is the largest state in the country, it has fewer linear miles than Connecticut, the third-smallest state. Just the codified RS2477s that have been recognized by the State Legislature so far comprise roughly 20,000 linear miles. There are very few highways in Alaska and RS2477s actually tie them all together.

Having large federal conservation units making up such a large percentage of the state makes having RS2477 rights very important. So, Mr. Sullivan said, one of the things DNR was tasked with many years ago was creating favorable RS2477 precedent, particularly against the federal government, because there are not a lot of cases in the entire country (less than 200 nationwide). The legislature made appropriations and funded DNR to basically analyze RS2477 and among other things to find best-case scenarios for cases to bring to create precedent.

After many years, some of the RS2477s in the Chicken area appear to qualify to do that, and litigation was filed on six of them roughly three years ago. They are all very similar in how they arose; they have strong historical support and they cover approximately 40 square miles. They are used by hundreds of recreationalists every fall and many miners to access mining claims. They go through federal Wild and Scenic River corridors among others. That case was filed and those claims were brought. The state was initially challenged by a couple of allotment owners who had property near Chicken and who these RS2477s ran across their allotments before going up onto federal land. The challenge was basically on a procedural issue saying that the state couldn't bring RS2477 claims against the Native allottees. When the trial court ruled against the state on that issue, it was appealed and the Ninth Circuit confirmed that while the state couldn't get a RS2477 confirmed against the Native allottees, in fact, the state could in essence condemn what it already held by RS2477. He explained that the court wasn't saying that the state didn't have RS2477 rights across the allotment; it simply said there wasn't a procedural mechanism in place that would allow the court to address it. Again, the state believes it has rights-of-way there and now the case is back down before the trial court and is proceeding.

Once the allotment issue is addressed the case will continue against the federal government as to the real focus. In this particular instance, the federal government has attempted to place very onerous restrictions on miners among other things for using these rights-of-way and has required them to do

environmental assessments before using them, to pay thousands of dollars in fees annually, and has even purported to require miners to have BLM employees accompany them on the first trip in and the first trip out to and from their mining claims across a state RS2477 right-of-way. Needless to say, this case is very important from a state sovereignty perspective and basically will create and establish favorable precedent on RS2477 issues as against the federal government.

4:28:16 PM
MR. LENHART said the next case is the Big Thorn timber sale. One notable thing is that it is one of the very few cases on the list where the state is aligned with the Forest Service. The state is always aligned when the Forest Service does actually sell some timber, but the problem is getting them to have timber sales.

He said the Big Thorn sale is important because it is the largest timber sale that has come up in decades. It is 120 million board feet, which is actually at least a couple of years-worth of timber for the one remaining mill. It was challenged by multiple environmental organizations. One of the key issues in this case is the status of the Prince of Wales Island wolf population. The state is always an important player in those instances, because it is the primary manager of the wolf in conjunction with the federal government, but since the state is manager and the wolves are the issue, it's rather important that the state support the federal government on these types of challenges.

In this case, the state prevailed in district court. So, the sale went forward. It was appealed to the Ninth Circuit where the plaintiff sought a preliminary injunction and did not get it. The oral argument was held on February 3, 2016, and a decision is awaited still, but since there is no preliminary injunction the best information he could find is that approximately one-half of the total timber that is authorized to sell under this record of decision is actually already cut.

4:29:56 PM
MR. SULLIVAN said the next issue he would address is 4407 easements that arose pursuant to a congressional grant to the State of Alaska for the purpose of tying together Alaska communities, resources, and power sources in order to get across Forest Service land in Southeast, because it has so much Forest Service land that is very disconnected. This is an attempt by Congress to give the state an easy means to get across those

Forest Service lands. The case in litigation right now extends the road system from Ketchikan to Shelter Cove and gets it very close to Ketchikan's power source. Ultimately, the hope is that the road may go all the way to the Canadian border and connect to the existing Canadian road system and utilities and intertie all of them together.

MR. SULLIVAN said the problem is that the federal government has failed to recognize the 4407 grant and has challenged the state in many respects on it. One of the cases that arose actually conveyed permits and an authorization to construct that road, but it was challenged by environmental groups. The state intervened and agreed that everything had been put in place to allow the road to be built. That case has been fully briefed, but at the same time the state decided that it would be a good idea to have a case that addressed the grant, itself, and basically force the federal government to recognize that 4407 easements exist and that it couldn't simply re-characterize an easement as they are doing with road building. The state wants the federal government to recognize that these easements were being done per the 4407 grant, because a lot fewer restrictions that can be put in place. So, a second case was filed in December to do just that, and the federal government's answer is due very soon. Once that happens, that case will also be briefed on summary judgement like the other case.

4:33:14 PM
MR. SULLVIAN said both cases have now been combined and joined, and a decision is hoped for by the end of the year after the summary judgement briefing is complete.

The other good news on the 4407 issue is that it's not limited to just the Shelter Cove Road. Some other projects are in development including Katlian where the road will be extended northeast from the Sitka ferry terminal to Forest Service lands and an existing Forest Service road system on Baranof Island. Roughly 16 miles of road are needed to link the two road systems, and once that is done it will open up a world of roads to access Forest Service lands. That project is very far along in the process and the Department of Transportation and Public Facilities (DOTPF) is doing the design work on it right now. The state is anticipated to be in a position to request the 4407 permit by late this year.

Another 4407 project of interest is a road linking Petersburg to Kake. That one is in the works but in very preliminary stages. In summary he said 4407 is very important for interconnecting

roads, resources, communities, and power sources in Southeast and the state is actively pursuing it.

SENATOR COGHILL asked if 4407 is Forest Service code.

MR. SULLIVAN answered no; it arises out of the SAFT-LU section of the Congressional grant, and he would get the citation for him.

SENATOR STEDMAN said that citation is in Representative Young's Transportation bill - section 4407. He had marked those easements on a map and that was the beginning of this process. Shelter Cove was funded 10 years ago just to give the committee a timeline of how long it takes to get something done. Katlian is probably eight in a bond package voted on by the people.

His understanding on dealing with 4407 issues is that the log transfer facilities (LTF) where the timber industry would put the timber into the water involved some deed transfers to the Forest Service and some land exchanges in conjunction with the 4407s, and he is under the impression the state had put up its property but didn't get the deed from the other guy.

MR. SULLIVAN said that was true, and a lot of these arose out of situations where the federal government wanted access to shore facilities. The State of Alaska owned and controlled a lot of access points to salt water, and the federal government wanted to be able to go from federal land down to the salt water for various access reasons of its own. It wasn't something that was beneficial to just the state; it was actually beneficial to both sides. The state has done everything it needs to do to uphold its end of the deal and now it is waiting for the federal government to convey these easements as it has been directed to do. But there is a lot of reluctance and feet dragging on the part of the government.

4:38:01 PM
That is what they are trying to accomplish by way of these cases: get them to recognize that the federal grant for 4407 easements exists and are valid and something they have to adhere to. This is very important, because once that occurs there are a bunch of them out there.

4:38:33 PM
SENATOR STEDMAN noted the state values its tidelands and marine access extremely high, and for it to give them up as well as access is a big deal. One might be fortunate enough to have

patent to that claim previous to statehood, or outside of that a claim had to be filed by 1963. He noted that it was disheartening that the state would put something so valuable on the table, and in return a reciprocal exchange is not occurring. He thanked the department for dealing with the issue upfront and getting it settled.

4:39:36 PM
ATTORNEY GENERAL LINDEMUTH said maybe with the change in administration at the federal level, many of these issues will be worked out more quickly and without litigation. She proposed skipping pages 4 and 5 since the hearing time is limited; she and Mr. Sullivan return to Juneau regularly and could continue that conversation. She turned to the water and fishing cases on page 6.

4:40:32 PM
ATTORNEY GENERAL LINDEMUTH started with the Waters of the U.S. case saying Alaska joined a coalition of 12 other states in filing in federal district court in North Dakota challenging an EPA rule defining waters of the United States. That change in definition in the federal regulations was designed to greatly increase Clean Water Act jurisdiction: again the federal government making regulatory changes to expand their powers. The federal district court in North Dakota entered an injunction against enforcement of that rule in the plaintiff states and the Sixth Circuit extended that stay nationwide. So, right now they are seeing pretty good that that rule is not being enforced, and the basis for the injunction showed the state has strong merits on the claim. Again, with the change in administration they are hoping it can be resolved quickly. She invited Ms. Alloway to cover the stream protection rule.

4:41:48 PM
MS. ALLOWAY said shortly before leaving office, the Obama Administration finalized a rule related to surface coal mining. It was initially meant to deal with intermittent and perennial streams, but the rule was expanded and affected the state's permitting process including how the state grants permits, the types of reclamation required, and how operations are bonded. Alaska joined with several other states including Ohio and West Virginia to challenge the stream protection rule on both the processes, how they were implemented as well as the content of the rule. That litigation is still pending and the U.S. has not filed an answer, but what has happened is that both the House and the Senate have voted to rescind the rule using the Congressional Review Act. That resolution has yet to be signed

by President Trump, however. Assuming that happens, the state will have to relook at that litigation.

4:42:55 PM
ATTORNEY GENERAL LINDEMUTH commented that the Congressional Review Act allows Congress to review recently passed regulations, and it has to be done within a short period of time, 60 legislative days. There is no reason to think President Trump won't sign this, and it will be the second time that this act has been used to undo regulation. In other words, the planets are aligned right now.

She said the fish and game cases are on page 7. The Salmon Fishery Management Plan Case is the United Cook Inlet Drift Association v. National Marine Fisheries Service (NMFS). This is a rare case where the state is aligned with the federal government. She explained that the state and the federal government have had a long-standing agreement that the state manages fishing in the federal waters off of Cook Inlet (offshore waters beyond three miles). The state has managed that salmon fishery since statehood, and to clarify the state management, the NMFS approved Amendment 12 to the Federal Salmon Fisheries Management Plan confirming state management. The North Pacific Fisheries Management Council (NPFMC) approved that amendment and removed that area of Cook Inlet from the management plan. In both, the NMFS and the NPFMC concluded that the state's management of that fishery is better at preventing over-fishing, which is the primary focus of the Magnuson Stevens Fishery Conservation and Management Act, the federal law that oversees that fishery.

Third parties litigated that issue and the Ninth Circuit concluded that the Magnuson Stevens Act requires that councils adopt a federal management plan for every fishery that is in need of conservation and management, a defined term under the act, and concluded that the federal and state governments had conceded that this fishery is in need of conservation and management, something that didn't happen on the record. The court held that the Magnuson Stevens Act only allows states to manage a fishery through a delegation of authority set forth in the federal plan, itself. The trick here is that federal management plans usually require catch limits that are different than the state's escapement-based management. So, there is that difference in management styles. The state lost this case in the Ninth Circuit and is working on an appeal to the U.S. Supreme Court that is due at the end of February. Meanwhile this case has been remanded back to the district court for a remedy, and

there is litigation over what the remedy will be. The issue whether this is something that requires a remedy now when there is no fishing in those waters while a plan gets put in place or, as they hope happens, there is a stay and fishing is allowed until the council is allowed to reconsider the plan and make that change in the future.

4:47:13 PM
ATTORNEY GENERAL LINDEMUTH turned over the last two cases for today to Ms. Alloway.

MS. ALLOWAY said she would talk about the National Park Service (NPS) Subsistence Collection Rule before finishing with the litigation against the Park Service. The Collection Rule was recently finalized just for the Park Service and it applies to subsistence users in Alaska. In some ways the rule is beneficial, because it resolves a conflict that existed between the national regulations and ANILCA and it makes clear that subsistence users can collect plants and non-edible animal parts on federal lands. But the problem with the rule that ADF&G has is that the regulation actually requires subsistence users to obtain a permit before they go out and collect non-edible plants. Given how Alaska works, ADF&G just feels like this is an overburden on subsistence users.

ADF&G has concerns about other things in the regulations including some changes to how subsistence users can engage in bear baiting. This is a relatively new regulation, so the Department of Law is working with ADF&G on how to proceed by analyzing all options.

4:50:53 PM
MS. ALLOWAY next talked about litigation with the NPS and NFWS that each separately promulgated regulations that prohibit certain hunting methods and means that were authorized by the state on preserve and refuge lands. The state is not alone in this battle. It filed the lawsuits and two additional lawsuits have been filed, one by Safari Club International and that has already been consolidated with the state's case and recently the Alaska Professional Hunters Association as well as the Sportsman's Alliance Foundation filed a separate lawsuit to challenge these regulations.

Based on the hearing she listened to on Monday, it's clear that the legislature is very concerned about preserving the state's rights under ANILCA and this case raises several of the provisions that Ms. Magee and Mr. Palach discussed on Monday and

were very instrumental in helping prepare this case. They developed comments on behalf of ADF&G throughout the regulation process and have set up the case quite well for DOL to pursue it. Several of the ANILCA provisions they already talked about on Monday will be at issue including section 1314, which says that ANILCA does not expand or diminish the state's authority over the management of fish and wildlife on public lands as well as section 1313, which expressly provides that the taking of fish and wildlife on national preserves for sport purposes as well as subsistence uses is allowed. They will also pursue another claim, whether the federal government meaningfully consulted with the state as they are required to do when developing these regulations.

It's early on in the litigation and the United States hasn't had to file its answer yet. The state has a motion to intervene by several environmental groups that need responses, but there is something that is percolating with the Congressional Review Act that might impact part of the case as Attorney General Lindemuth talked about previously.

She said that Representative Young has introduced a resolution that would impact the USFWS's versions of the regulation, but how they calculate the 60 legislation is quite complicated. They are still within the timeframe for the USFWS regulations, so he has proposed a resolution and that is going through the House this week. It has passed the Rules Committee and there may be a vote on it tomorrow. A similar provision is in the Senate. If that is passed and the Congressional Review Act is used to nullify the USFWS provision, that would impact the state's litigation and they would have to figure out how to go forward against the NPS.

MS. ALLOWAY said that is all they were planning on covering today.

ATTORNEY GENERAL LINDEMUTH said that case illustrates what she has been talking about. The state has had a long standing understanding based on federal statutes that the state manages all fish and game in Alaska, and the federal government under the Obama Administration with recent federal regulations is trying to change the rules of the game and expand the federal powers over those areas, which they think violates the governing statutes.

She said with the few remaining minutes they could take questions or take up the Endangered Species Act, or she and Mr.

Sullivan could come back and talk about the access and land cases on page 4 and the Endangered Species Act cases on pages 5 and 6 at another time.

CHAIR GIESSEL said they would hold the other two issues for another time and said this review was fantastic.

4:53:26 PM
SENATOR COGHILL said he wanted to hear what is being done on the Endangered Species Act, because it is time sensitive.

CHAIR GIESSEL said that would take more than five minutes and she would have them back in the very near future.

ATTORNEY GENERAL LINDEMUTH said to answer what they are doing on that in the short term, the Alabama case involves the definition of critical habitat. There is a letter from all of the attorneys general that are involved in that case, including her, to the new administration asking them to reconsider and pull that regulation. That case is stayed and could be reconsidered by the new administration, but the rest of the cases involve more litigation background and detail that can be covered in the next hearing.

4:54:40 PM
SENATOR HUGHES thanked them, because they did an excellent job of breaking down the cases in a very understandable way.

CHAIR GIESSEL remarked that Attorney General Lindemuth's expertise was evident and the committee sincerely appreciates it. These are critical issues for Alaska and she is out there defending us, she said.

4:55:36 PM
CHAIR GIESSEL adjourned the Senate Resources Committee meeting at 4:55 p.m.