

**ALASKA STATE LEGISLATURE  
SENATE RESOURCES STANDING COMMITTEE**

March 8, 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 LITIGATION ON FEDERAL ISSUES

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

JAHNA LINDEMUTH, State Attorney General  
Department of Law (DOL)  
Anchorage, Alaska

**POSITION STATEMENT:** Provided an overview of state litigation on federal issues.

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

**POSITION STATEMENT:** Provided an overview of state litigation on federal issues.

**ACTION NARRATIVE**

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**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 Coghill, Hughes, Meyer, Stedman, Von Imhof, and Chair Giessel.

**Overview: State Litigation on Federal Issues**

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CHAIR GIESSEL stated that the business today is to continue a meeting that was started on February 15 on federal issues that the State of Alaska is disputing or litigating with regard to access and use of the state's lands, waters, and subsurface rights. She said some of the more contentious and complicated issues were intentionally left until today.

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JAHNA LINDEMUTH, State Attorney General, Department of Law (DOL), Anchorage, Alaska, said she was working from a table dated January 23, 2017 called "List of Federal Issues and Conflicts." She recapped that they had already covered navigable waterways and most of the access to land cases, but left some of those and the Endangered Species Act cases on pages 4 and 5. The water, fish and game, mining, and oil and gas cases have already been covered.

She started with the lands into trust issue and the Akiachak litigation where several tribes filed a lawsuit against the federal government saying that the Alaska exemption that disallowed Alaska tribes from taking lands into trust was illegal and inconsistent with federal statute. The federal government fought that and Alaska intervened on the federal government's side. The federal district court ruled against the federal government's position, and then the federal government changed its mind. It complied with the federal order and changed their regulations to allow Indian tribes in Alaska to take lands into trust.

The federal decision said there is no basis for treating tribes in Alaska differently than tribes in the rest of the United States. In changing sides, the federal government did two things for Alaska's position. It left no case in controversy because the original lawsuit had been between the tribes and the federal government. It also meant that Alaska had a new federal regulation interpreting federal statute that was contrary to the position Alaska was taking in that case, a very hard legal battle to fight.

So, when she became Attorney General last August, the department was facing a deadline of whether to appeal the Ninth Circuit's decision that had ruled the case moot and that procedurally Alaska was out of luck. She talked it over with the governor, the lieutenant governor, explaining that her approach to litigation generally is that although the AG may have the statutory authority to make final decisions, it is something that you want client involvement in no matter what, and you want to have consistency.

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Her legal advice was consistent with the policy decision that was made, which was to not fight lands into trust making it an absolute bar to allowing something in Alaska, but rather to deal with it on a case-by-case basis. And that is where they are today.

She explained that in going forward, whenever the federal government receives an application to put lands into trust it will give notice and allow both the state and any local governments to comment. Although it doesn't say this in the regulation, anyone can comment. It's not limited to states and local governments. If a Native Corporation is impacted or if there is a resource project, anyone can weigh in on that application.

She also explained that lands into trust does not give an absolute right to any Indian tribe to have any particular parcel taken into trust; it is something that is completely within the discretion of the Department of Interior (Interior) and the Bureau of Indian Affairs (BIA). So, if the BIA says no to a particular parcel, there is no right to appeal or challenge it, because it's completely discretionary.

ATTORNEY GENERAL LINDEMUTH said in dealing with this on a case-by-case basis and actually sitting down with the Department of Interior, Indian tribes, and all of Alaskans and working openly and collaboratively through any concerns puts her in a better position to advocate for what the state wants in any particular instance.

Often during litigation, parties take very polarized positions and predict the worst case scenario, and if one loses all the horror that you predicted will be what you are facing. So, one of the things to consider in deciding whether to go forward with litigation or not is that in working through issues more

collaboratively, you can take a more middle ground and have your absolute issues addressed.

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SENATOR COGHILL said the idea of commenting is appropriate, but for example, if the state and citizens comment, is that equitable comment? Who has more standing if it's completely discretionary to the BIA?

ATTORNEY GENERAL LINDEMUTH said her understanding in talking with the BIA is that they really don't want to end up in litigation as has happened in the Lower 48 on every parcel. However, all of her comments thus far are from discussions with the prior administration, and the big question going forward is what the new administration does with this. Secretary Zinke and whatever team he puts in place may take a completely different view and it's possible that very few allocations may move forward in the next four years.

SENATOR COGHILL commented then, that it is an open question on how much our voice counts.

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CHAIR GIESSEL said she wondered what the implications were for resources development in the state - since this is the Resources Committee.

ATTORNEY GENERAL LINDEMUTH said that issue is at her forefront and Governor Walker is very pro-resource development. She thinks this will be a fairly small issue given the amount of land available for Indian tribes to put into trust as it currently exists. The big picture is that Alaska has 330 million acres; approximately 60 percent is federal, 28 percent is state, and 12 percent is owned by the Alaska Native Claims Settlement (ANCSA) corporations. Less than 1 percent is owned by private parties, which includes Indian tribes.

She has a long history of working with ANCSA corporations, and the purpose of providing ANCSA lands to both regional and village corporations is to provide a source of economic development, which often leads to resource development on those lands. The significant legal issue remaining is whether a split estate could be taken into trust if, for instance, a village corporation transfers a surface estate to a tribe and the regional corporation still owns the subsurface estate, which is the dominant estate, and wants to do resource development.

ATTORNEY GENERAL LINDEMUTH said she actually thinks that ANCSA runs contrary to allowing lands into trusts. However, she had talked it through with Interior under the prior administration and they didn't see split estates as a problem, because it is done in the Lower 48. But the Lower 48 doesn't have ANCSA and that makes it completely different. The Ninth Circuit has authority on the whole subsurface estate and that is a greater right than the normal mineral assignment or reservation than one sees in the Lower 48.

In talking with regional corporations, she didn't find a uniform position on this issue, but most of them also believe that it is not possible for a split estate to be taken into trust. If something like that were to be proposed, probably the regional corporation that is impacted would object and potentially litigate. The state would weigh in on that issue in favor of resource development (and creating a situation where some Indian tribe who has a surface estate could take more off the resource project through a tax or some other type of fee and that is inconsistent even with 7i sharing that results from resource development of subsurface assets).

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ATTORNEY GENERAL LINDEMUTH said this is a huge legal issue that remains, but it may not arise for many years. However, she has tried to start the discussion on this issue, and if there is consistent thought on it, a federal regulation could address it without the need for litigation.

SENATOR STEDMAN said there is concern throughout the Southeast region as to how taking properties off the tax rolls will work in cash economy communities. Her synopsis noted a situation that was worked out between the City of Craig and the tribal association there. Craig was the first community to do it, but pretty much every community in Southeast has tribal lands within it and a significant population of the community are members of those tribes. What has she seen in that arena?

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ATTORNEY GENERAL LINDEMUTH responded that issues needs to be addressed and is one of those things that local government can address in its objection. She actually participated in a panel before the Municipal League in the fall and one of the things she recommended then that is consistent with what the Department of Interior is recommending is that tribes should approach local governments in the state before they actually file an application and talk through their concerns. And if a local

government hears of a potential application, it should contact the Indian tribe before it is noticed and under a 30-day deadline. When a parcel is slated to be taken off the tax rolls there can be a payment in lieu of taxes beforehand to the local government. The benefit to the tribe is that the municipal government doesn't file an objection on that lost revenue basis, since the payment in lieu of taxes addresses the heart of the potential objection.

In Craig, that particular parcel wasn't on the tax rolls and the City of Craig didn't raise it as a concern. They filed an objection, but it was overruled by the Department of Interior, because it didn't have a legal basis. It's just that they wanted more time to figure out how this would impact them.

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SENATOR STEDMAN recalled his conversation the Craig administrator about the parcel not being on the tax rolls, but Craig had helped a tribal association make a local policy. Because it would be tough for the tribe to pay taxes on a large tract of land in the middle of town, and the community didn't want them to lose it, so they worked with the tribe. All of these instances are going to be different in each community, but that is the biggest concern he has heard from all of his communities on this particular issue.

CHAIR GIESSEL said lots of folks were very concerned the state did not contest this case and the reason it comes to mind is because the AG just described talking with the different departments and the governor about whether to go forward in contesting the Akiachak ruling. Her question is as the attorney general for the State of Alaska who she is serving: the governor or the people of Alaska?

ATTORNEY GENERAL LINDEMUTH replied that her answer is "both," and it is certainly the people of Alaska at the end of the day, but the highest elected official for the people of Alaska is the governor. Between the two of them they discuss policy, which is what an elected official should do on a day-to-day basis. For some cases, like rate cases, she represents the people of Alaska by statute, and the governor isn't involved at all. She explained how she represents different interests by assigning assistants to work with them.

CHAIR GIESSEL pointed out that there are differences between an appointed attorney general and an elected one.

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ATTORNEY GENERAL LINDEMUTH said she brought the comments filed for the Village of Craig application and a two-page overview of lands into trust, the document she is using with their client departments and folks to solicit comments on any impact on any particular application. She thought it would be useful for the committee to see, both for purposes of a quick legal analysis of what lands into trust is and the procedure the state is using to make sure of full input on any comment given on any particular application.

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She said part of her charge with the governor and the lieutenant governor was to do outreach to citizens of Alaska, to understand concerns, to help inform any comments, but also to educate folks. She has met with the Municipal League, presented to the Mining Association and the Alaska Federation of Natives (AFN), and will present to the Resource Development Council (RDC) later in the year on this and other federal issues that are being faced right now. Lands into trust is a controversial issue even for tribes and she didn't see a huge number of them running out to do it.

ATTORNEY GENERAL LINDEMUTH said her take on this stems from the many court decisions over the need for tribes to have jurisdiction over certain matters, like child protection and civil diversion agreements that would actually need a land base. As attorney general, she wants to talk with tribes about how to be a more proactive player in public safety in their communities by having civil remedies for low level misdemeanor crimes.

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CHAIR GIESSEL said lands into trust brings up another issue, the state's loss of access to resources through RS2477s and the Klutina Road, and she wanted an update on it.

ATTORNEY GENERAL LINDEMUTH replied there has been some misinformation and fear over the fact that the state is in settlement discussions, but there is currently no settlement with Ahtna on those issues. To put this in context, on February 15, Mr. Sullivan covered the Chicken/Ahtna, an RS2477 case against the federal government that the state had chosen to litigate. Ahtna initiated the claim nine years ago saying the state couldn't access a 24-mile road between Copper Center and the Klutina Road. They are almost \$700,000 into that case and were looking at going to trial at the end of April.

Often what happens as the trial approaches, parties ask themselves the risks and benefits of going to trial and that often leads to settlement talks that work for both parties. That's what happened. At the end of January they had a full day with a professional mediator and even though it actually went until 10 p.m., it still wasn't worked out. So the parties spent the next two weeks in discussions and came up against the court deadline for the case. She decided to not release the court date without a framework of decisions points for getting to a settlement. That was reached last week, which is when they jointly asked the court to take it off of the calendar. The parties have given themselves 90 days to work through the issues and to get to a settlement document. If they don't get to a settlement the issues still need to be litigated so she can't say much about it.

ATTORNEY GENERAL LINDEMUTH said two years ago they lost an important summary judgement motion addressing scope of use. Ahtna had challenged the existence of the RS2477, but it also said even if the state has one, it can't be used for anything but to drive down the road from point A to point B. So, the secondary issue is what you can do on an RS2477. Judge Guidi's order is still standing on that case, and if this were to go through a six week trial they would still be facing an appeal to the Alaska Supreme Court.

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One of the things they talk about in deciding whether to look at a settlement is if it is the best vehicle to challenge a particular issue. So, if the state loses this case in front of the Alaska Supreme Court, it means that it has lost the ability to access all RS2477s for fishing, hunting, parking, and everything else, and she wants to preserve the most access and the most important rights that she can in a possible compromise.

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ATTORNEY GENERAL LINDEMUTH said this particular litigation involves the Department of Natural Resources (DNR), the Department of Transportation and Public Facilities (DOTPF), the Alaska Department of Fish and Game (ADF&G), and the Department of Law (DOL). So, it is complicated to get client buy-in. She would be happy to talk through the settlement with the committee if it actually happens.

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CHAIR GIESSEL said the concern is that once the settlement is reached it is too late for public comment, and they are the ones who will lose access to these resources.

ATTORNEY GENERAL LINDEMUTH said she didn't know that it should be framed as losing access until folks see the final settlement. The required public notices and associated comments will be followed through the settlement process. She promised to comply with statutory and constitutional law on these issues.

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KENT SULLIVAN, Assistant Attorney General, Natural Resources Section, Department of Law, Juneau, Alaska, said an important concern at the time of statehood was whether Alaska would possess the land and resources necessary to avoid becoming a ward of the federal government. Consequently, the state gave a high priority to ensuring that it received what it was legally entitled to from the federal government pursuant to provisions in the Alaska Statehood Act, the Alaska Constitution, the negotiated and bargained for process resulting in statehood, and the Alaska National Interest Lands Conservation Act (ANILCA). However, despite its promises, the federal government still owns over 229 million acres of land in Alaska and occupies roughly over 60 percent of the state.

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Of concern are the on-going disputes with the federal government involving the Arctic National Wildlife Refuge (ANWR). A high priority for the Governor and DNR Commissioner Mack is ANWR boundaries and what the state is entitled to select that is not part of ANWR. This is what the Commissioner and the Attorney General addressed as recently as last week in Washington, D.C.

The state is seeking to ensure that it is allowed to select lands that it is legally entitled to from statehood. The problem is that the state has determined that the boundary of ANWR is defined by the ordinary high water mark of the Canning River. There is no dispute on what creates the legal boundary of ANWR; both the feds and the state agree that it's a PLO that originally withdrew the area prior to it becoming a refuge that basically said it's the western bank of the Canning River. The dispute is over where that is exactly. The state is confident about where that line should be drawn, but due to a federal surveying discrepancy, the federal government defines it as being part of the Staines River, another tributary entirely that is actually located many miles to the west and over tundra.

SENATOR VON IMHOF said she is very familiar with that area, because she has flown it in a super cub and it is a couple hundred miles.

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MR. SULLIVAN presented a map showing the disputed ANWR boundaries that occupied about 20,000 acres. The Staines River doesn't have a discernible river channel and the federal government claims that it is actually part of the Canning River and therefore, they are using the boundary of the Staines River, but it is a much shorter body of water that dries up into virtually nothing. So, in order to make the federal proposal work, that boundary must go across open tundra for many miles, which is difficult to do under the PLO definition of going along a bank of a river.

He said the state is arguing that any competent surveyor should have been able to determine that boundary easily on the ground in the 1960s and has filed two cases before the Interior Board of Land Appeals (IBLA) that are ongoing. The state is arguing that the area in yellow is outside the boundaries of ANWR, and therefore the state ought to be able to select those lands as part of the Statehood land selection process. Once the lands are in the state's hands, it can do what it sees fit with them. Hopefully, the issues will be resolved in the not too distant future.

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CHAIR GIESSEL asked if he knew where the single well was drilled in the 1002 area.

MR. SULLIVAN said he didn't know exactly.

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MR. SULLIVAN said the state is addressing one more issue with regard to ANWR and that is the 1002 area. Section 1002 of ANILCA set aside the Coastal Plain of ANWR for further investigation of its oil and gas potential. Back in the mid-1980s the Department of Interior and others investigated the potential of that area, but ANILCA provides that oil and gas production can't occur until approved by an Act of Congress. Based on the investigations that occurred, the Department of Interior recommended that the 1002 area be opened to production, but up to now, Congress has failed to pass a bill implementing those recommendations. So, Senators Murkowski and Sullivan introduced SB 49, the Oil and Gas Production Act, on January 5, 2017 that would allow exploration and production in a portion of the 1002

area, and the administration continues to be very supportive of those efforts.

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SENATOR HUGHES said she hoped that topic came up in their meeting with the President today.

MR. SULLIVAN said he would follow up on that as everyone is anxious about it.

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ATTORNEY GENERAL LINDEMUTH said she also was in Washington, D.C., last week for a different reason and met with the congressional delegation. She gave each of them the same federal issues list that they have and encouraged them to watch the hearings on them, because they frame the discussion on many other important points that the Walker administration is pushing with the Trump administration. One of them is the Waters of the U.S. order that is being reconsidered. Another is the Endangered Species Act (ESA) cases as follows:

1. The Polar bear critical habitat case was filed in 2013. Polar bears were a designated an endangered species and their habitat covers 187,000 acres on the North Slope. It's the state's position that that is far too big of a designation and isn't supported by science. That was challenged in Ninth Circuit and the state lost. Working with Arctic Slope Regional Corporation (ASRC) and the other Native Corporations and tribes involved in that litigation they filed a petition for certiorari to the Supreme Court and that is pending. She thinks the Trump administration is trying to decide what position they are going to take on appeal.

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2. The critical habitat case of Alabama v. National Marine Fisheries Service (NMFS): In that case Alaska joined Alabama and 18 other states in filing a lawsuit challenging the new rule that defined critical habitat under the ESA. As with the Polar bear designation, it was a huge designation in Alaska. Then the federal government changed the definition of critical habitat that would grant them greater power to designate even more area as critical habitat. That is something many other states didn't take kindly to. It is a multi-state direct action effort in which Alaska is a plaintiff.

One of the main things achieved by filing in Alabama is that the Ninth Circuit won't review any particular decision that comes

out of the District Court Case; it will be the Eleventh Circuit. That case has been stayed by an agreement of the parties to allow the new administration to get up to speed. She is hopeful for a similar result to the Waters of the U.S. ruling last week.

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3. The last two cases are similar: the bearded seal case and the ringed seal case. In 2012 the NMFS listed the Beringia distinct population segment of the bearded seals as threatened. They also listed four subspecies of the ringed seal as threatened or endangered. The state is working with the Alaska Oil and Gas Association and the North Slope Borough and has filed complaints on both issues. In both cases, the state won at the district court level. The bearded seal case was overturned at the Ninth Circuit and the petition for rehearing was filed on January 9. The ringed seal case is still at the briefing stage before the Ninth Circuit, but she doesn't hold out much hope given what happened with the bearded seal case.

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The problem with both cases, as the state sees it, is that neither of them is a threatened population today. What the federal government is trying to do is use the ESA as a tool to address climate change, but it is not designed to address that issue. Federal scientists did climate model projections going out 100 years of what will happen to these populations. That is not good science. Nobody would have gotten populations right predicting today's numbers 100 years ago, and they are hopeful that the new administration will see more eye-to-eye with Alaska on this issue.

ATTORNEY GENERAL LINDEMUTH offered to address any other concerns the committee has.

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CHAIR GIESSEL adjourned the Senate Resources Committee meeting at 4:26 p.m.