ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
February 7, 2018
3:29 p.m.

MEMBERS PRESENT

Senator Cathy Giessel, Chair
Senator John Coghill, Vice Chair
Senator Natasha von Imhof
Senator Bert Stedman
Senator Kevin Meyer
Senator Bill Wielechowski
Senator Click Bishop

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

OVERVIEW: ALASKA'S FEDERAL ISSUES

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JAHNA LINDEMUTH, Attorney General
Alaska Department of Law
Juneau, Alaska
POSITION STATEMENT: Briefed the committee on Alaska's federal case issues.

JESSIE ALLOWAY, Assistant Attorney General
Alaska Department of Law
Juneau, Alaska
POSITION STATEMENT: Briefed the committee on Alaska's federal case issues.

SETH BEAUSANG, Chief Assistant Attorney General
Alaska Department of Law

Juneau, Alaska
POSITION STATEMENT: Briefed the committee on Alaska's federal case issues.

ACTION NARRATIVE

3:29:52 PM
CHAIR CATHY GIESSEL called the Senate Resources Standing Committee meeting to order at 3:29 p.m. Present at the call to order were Senators Stedman, Meyer, Wielechowski, Von Imhof, Coghill, Bishop, and Chair Giessel.

Overview: Alaska's Federal Issues

3:30:09 PM
CHAIR GIESSEL announced the presentation by the Alaska Department of Law regarding federal issues. Alaska has more federal acreage, the largest refuge and national park acreage, and more coastline than all the rest of the United States. Our Constitution says we are to develop our resources for the maximum benefit of the people and to manage our fish and game to a sustained yield. However, Alaska has a checkerboard of federal management practices and policies that often bring the Constitutional mandates in conflict.

She said this is the fourth consecutive year that the Department of Law (DOL) has participated in such an update on federal issues. Attorney General Lindemuth is joined with her Chief Assistant Attorney General, Seth Beausang, and Assistant Attorney General, Jessie Alloway. She stated that litigation is a last resort, and our Attorney General is no stranger to the court room in these arguments.

3:31:24 PM
JAHNA LINDEMUTH, Attorney General, Alaska Department of Law (DOL), Juneau, Alaska, remarked that she started this job 18 months ago tomorrow, not that she's counting. When she took office, she was briefed on all the big issues that were facing Alaska and many of them were federal issues. So, she put them all, 30 different issues, in one place making them easier to track, and they get updated quarterly. She used this format for the committee last year and she would do that again today.

She said Seth Beausang just took over the leadership of the DOL's Natural Resources Section. That section is not only responsible for providing advice to the Department of Natural

Resources (DNR) but also to Alaska Department of Fish and Game (ADF&G). It is the most important and largest section in the state.

3:33:54 PM
ATTORNEY GENERAL LINDEMUTH said for last year's presentation [to the Senate Resources Committee] the Obama Administration was just ending, and the state was in conflict with it on many issues, but the theme they will hear today is that the department is working together with the federal government on many issues and working towards resolution outside of litigation, through the Congressional Review Act (CRA) or new rule-making, and she is excited to report progress is being made.

The State filed its brief asking for cert on the Sturgeon case to the Supreme Court on Monday. Mr. Sturgeon was operating a hovercraft on the Nation River inside a conservation system unit (CSU) and the federal government said he couldn't do that. He challenged it and Alaska has participated in that litigation from the very beginning.

They had an adverse ruling at the Ninth Circuit District Court that said Alaska National Interest Lands Conservation Act (ANILCA) allowed the federal regulations under the 103(c) interpretation. The U.S. Supreme Court reversed that decision a year ago saying ANILCA 103(c) does not allow the U.S. Department of Interior to regulate state and private lands within the conservation system units, but the reversal did not reach all the other arguments the federal government was making for authority to regulate. Those issues were remanded to the ninth circuit. Argument was held last October, and the ninth circuit issued an adverse decision, again, finding that as far as navigable rivers are concerned, the federal government has authority to regulate under the Reserved Water Rights Doctrine.

The state's position is that the Reserved Water Rights Doctrine is a very limited doctrine that is intended to give the federal government the necessary amount of water needed out of a river for any federal lands, but it is not a doctrine that is meant to give full regulatory authority to the federal government. So, she is again asking the U.S. Supreme Court to review that decision and to reverse it. She is working very closely with Mr. Sturgeon and his council in pushing these arguments forward and is hopeful that the U.S. Supreme Court will take the case.

3:36:05 PM

SENATOR COGHILL said he struggles with this because it should be a state issue. However, Mr. Sturgeon lead the way. He asked if there is potential to have a state violation before the court on this issue, because of the ninth circuit ruling.

ATTORNEY GENERAL LINDEMUTH replied that at one point, Alaska did have its own challenge, and the ninth circuit ruled that the state didn't have standing to bring it. The state disagreed, but that was before she took office, and they felt the best way to support Mr. Sturgeon, who was already on appeal, was to stay within Mr. Sturgeon's case and participate as amicus. The state moved to intervene in that case as an intervener party, and that was denied by the ninth circuit. However, she is confident that the U.S. Supreme Court will hear Alaska's arguments on that.

3:37:16 PM
CHAIR GIESSEL asked what the difference is between being a party to a case and just being an amicus.

3:37:26 PM
ATTORNEY GENERAL LINDEMUTH explained that an amicus is a friend of the court and not technically a party and doesn't have standing to weigh in. To be a party, one must have a certain level of interest in the case, in other words a party will be impacted by the court's ruling. Even though the state disagrees with the ninth circuit about standing, she feels that the state's issues are being fairly represented by participating as an amicus.

3:38:09 PM
JESSIE ALLOWAY, Assistant Attorney General, Alaska Department of Law, Juneau, Alaska, said she would talk about navigability cases in which they continue making progress on getting the federal government to recognize the state's ownership in its submerged lands. When she reported to the committee last year, two cases were on appeal. The first one was the Mosquito Fork case and that was where Judge Gleason had issued an order that the U.S. had acted in bad faith during the litigation and awarded the state nearly $600,000 in attorney's fees and costs.

The second case was the Stikine Matter that related to the legal issue they argued in the Mosquito Fork case. Judge Beistline had awarded the state costs, although a lower amount, and no attorney's fees. Both judges relied on similar theories on the law. Since she last spoke with the committee, the U.S. dismissed its appeals to the ninth circuit and has paid the state those

awards. The Mosquito Fork award was paid in October and the Stikine amount was paid in the spring. Those cases are now done.

She said she didn't have anything to report on the Kuskokwim matter.

3:39:28 PM
SENATOR STEDMAN thanked the DOL for standing up to the federal government and asked her for a brief rundown of the Stikine River matter. The new administration appears to have a directional change from the state having to file litigation versus getting a quiet title settlement to some of its waters.

3:40:12 PM
MS. ALLOWAY explained that the Stikine River matter was a little bit different than the Mosquito Fork matter that dealt with whether the river was, in fact, navigable. At issue in the Stikine was whether the U.S. withdrew the submerged lands for its own purpose pre-statehood, which would mean the state wouldn't get it at statehood. She explained that in the Glacier Bay case the U.S. had previously disclaimed its interest to the tidal waters within the Tongass National Forest, but they had yet to do that for the non-tidal portions of the forest. Initially DNR filed an application for a recordable disclaimer of interest, a process that is meant to reduce costs and allow the state to clear its title without pursuing litigation. That application was pending before BLM for five years before they initially issued a decision to grant the application. The Forest Service objected and then BLM came back and denied the application. So, the state appealed that to the Interior Board of Land Appeals (IBLA), the administrative agency that handles those appeals, and the state prevailed. The Interior Board told BLM they couldn't just cite a Forest Service objection; they had to tell the state why it was wrong. So, it was remanded back down to BLM and sat there while the Mosquito Fork case was litigated. Nothing happened.

The state got the disclaimer of interest in the Mosquito Fork case and then came back to the Stikine and there was still no decision. Her reasoning was the U.S. has only two mechanisms to disclaim their interest. Either they can do it in response to litigation or they can do it through the recordable disclaimer of interest (RDI) process. So, she filed a quiet title action in the federal court and the U.S. disclaimed its interest within a couple of months never actually filing an answer.

A couple of things were going on there illustrating the difficulty DNR has in getting BLM to take action. The state is paying BLM to process its RDI applications. So, DNR was spending a lot of money and not getting any action. In filing for quite title, the DOL actually initiated court-imposed deadlines. When that was in place, BLM actually recognized the state's ownership and disclaimed interest.

3:43:06 PM
SENATOR STEDMAN asked her to explain in layman's terms what the state actually has title to in the Stikine River system, because the Stikine is a big trade corridor.

MS. ALLOWAY explained that right now the state has title to the entire Stikine from the ordinary highwater mark to the ordinary highwater mark. So, everything under the water of the Stikine River now belongs to Alaska except for a small portion near the border where there is a boundary issue. In recent litigation the State of Alaska got title to the non-tidal portion. Previously in other litigation the federal government recognized Alaska's ownership in the tidal portion, so whatever is subject to the ebb and flow of the tide.

3:44:14 PM
SENATOR STEDMAN asked Ms. Alloway to address the interest in how upland zoning is applicable to tide lands and potential submerged lands. In the Stikine River area there is always concern about the state citizens' use of the tidelands versus the Forest Service in how they are managing the timbered area above high tide line.

3:45:21 PM
MS. ALLOWAY concurred that the Stikine River is an important issue and elaborated that they think the federal government is essentially recognizing that the Tongass withdrawal was not sufficient to defeat the state's interest. So, DNR's plan moving forward is to try to seek additional disclaimers for other rivers within the Tongass National Forest.

She said the next important navigability case that she wants to talk about is the Knik River. This became an issue in 2005, when BLM issued a decision to convey certain lands to the Eklutna Native Corporation and those lands were within the Knik Public Use area. DNR was concerned about preserving public access through the Eklutna lands to the Knik Public Use area. That case has two parts: the easement part where public access is preserved over the road, and two, whether the federal government

was actually telling Eklutna they were conveying them submerged lands below the Knik River, because obviously the state believes the Knik River is navigable.

Andrew Naylor, DOL's Natural Resources Attorney, appealed the easement issue to the IBLA and an agreement was worked out to preserve the public's access through their conveyance area. That agreement was then presented to BLM and a final settlement has been reached.

MS. ALLOWAY said she handled the navigability part and DNR did additional field work using the same experts from the Mosquito Fork case, and she then wrote to BLM asking them to reconsider since the state had additional evidence that she would give them now. She didn't get a response back until the Attorney General followed up. They weren't able to reach an agreement simply because BLM wanted the State of Alaska to file an RDI, and that would require DNR to pay for it. Not being able to force BLM to take action within a certain timeframe, the DNR decided if it was going to spend money to spend it on litigation to get a quick answer or get the answers they were talking about in the navigability context. DNR filed a quiet title action in April 2017 and received a disclaimer of interest in September 2017. So, the Knik case has also been resolved and they are beginning to see some movement on the federal government's part to act more quickly on issues of navigability.

3:48:37 PM
SENATOR BISHOP asked the definition for "navigable waterway."

MS. ALLOWAY answered that navigable waterway is defined as whether the river could be used as a highway for commerce in its natural and ordinary condition at the time of statehood by relevant water craft (a boat of the time carrying a commercial load of about 1,000 pounds).

3:49:48 PM
ATTORNEY GENERAL LINDEMUTH turned to the Izembek King Cove road issue saying the Department of Interior (DOI) just announced that they reached an agreement with King Cove to provide that road through the Izembek. The agreement is based on certain provisions of ANILCA that the parties all agree allow a road to be built through Izembek Refuge. The state is pleased.

She said this issue started 30 years ago and the history is tortuous. More recently, Congress had already approved a land exchange when Department of Interior Secretary Jewell denied the

application for the land exchange. Under that land exchange the state would have to provide a number of acres in exchange for the federal land that would be used to create the road. Under the current agreement, the state doesn't have to give up any land, so it is not a land exchange. In summary, a road is being created through the refuge based on provisions in ANILCA that allow that kind of access when appropriate.

The most recent update on that is that environmentalist groups including Trustees of Alaska filed suit on that decision on January 31. The federal government has 60 days to answer. The state will follow that to see what role it should play in that litigation.

3:52:19 PM
MS. ALLOWAY said she has been handed two R.S. 2477 rights-of-way cases: the Klutina Lake Road matter and the Fortymile case for which she has two "very capable" trial teams. In the federal litigation, the state is seeking two systems of RS-2477s that originate in Chicken and go north. One provides access to Hutchinson Creek and the other provides access to Franklin Creek. The intent of this lawsuit is to set precedent against the federal government and try to establish RS-2477s in CSUs. The problem with that is there are two Native allotments north of Chicken that the RS-2477s go through. When the lawsuit was filed, they thought the case law was pretty clear that one could file a quiet title action against the Native allotments to confirm the RS-2477s. The ninth circuit disagreed, but it did say if the state really wants these trails, it could seek to condemn them against the Native allottees. That is why their spreadsheet has two different proceedings.

She said they are currently in the condemnation part of the case trying to confirm the RS-2477s through the two Native allottees. They anticipate that process will be over by the end of the year and once that case is done, they will proceed with the rest of the case against the federal government to confirm the RS-2477s.

3:54:25 PM
SETH BEAUSANG, Chief Assistant Attorney General, Alaska Department of Law, Juneau, Alaska, said he would talk first about the roadless rule litigation that also has quite a long history. The first time the state sued it was successful in effectuating a settlement that resulted in a temporary exemption of the Tongass National Forest from the roadless rule with a commitment to permanently exempt it. Unfortunately, that was challenged by environmental groups and ultimately in 2014, the

ninth circuit reversed that rule and found that the Forest Service didn't provide a reasoned explanation for its change in position. The roadless rule is now back in effect, but the state challenged it again in 2011. It took a while to reach the point where the district judge made a decision and there were some appeals on whether it was time-barred or not, but the state was successful in keeping that litigation alive.

Now the State of Alaska is challenging the roadless rule in federal court in Washington, D.C. on a number of grounds including that the Forest Service didn't make the proper disclosures when it enacted it, that it violates the Tongass Timber Reform Act for not providing for timber and it is in violation of ANILCA. The district court ruled against the state on that challenge and it has been appealed. They are now awaiting a briefing schedule from the Court of Appeals.

3:56:30 PM
SENATOR STEDMAN said they have talked about how turning over the easements to the state is a never-ending battle and recalled that the state had upheld its side of the bargain in turning over its ATF areas. He asked how that process is going forward in clearing up those easements.

3:57:05 PM
MR. BEAUSANG said he refers to those as the Section 44.07 easements. Their status plays into the Shelter Cove Road matter. In short, the federal government is still reluctant to turn over its end of the bargain despite two federal acts directing the DOI secretary to do that. The state is in litigation seeking to compel the federal government to turn over the easement for the Shelter Cove Road project and is getting ready to brief summary judgement in that case. He said the Shelter Cover Road is in construction pursuant to an entry permit, but the federal government has decided not to grant the easement the road needs.

3:58:05 PM
SENATOR STEDMAN recalled the legislature funded that road several years ago with several appropriations and it should be about 98 percent complete. As mentioned twice, the Alaska delegation has put specific language in federal law to require them to act and they still don't act. He hoped that maybe the new administration in Washington and pressure from the Department of Law will help clear this up. He thanked the department for pushing back.

3:59:19 PM

MR. BEAUSANG replied they are hoping the Shelter Cove road has a favorable outcome, because it will also set a precedent for the other easements the state is owed.

SENATOR STEDMAN said these road corridors have been identified for 50 years or so.

4:00:16 PM
SENATOR BISHOP said it amazes him that Congress can pass a law and then, so.... "Where is the justice in that?"

SENATOR STEDMAN agreed.

CHAIR GIESSEL said they all agree.

4:00:47 PM
MR. BEAUSANG said the state got a decision in the Shelter Cove road matter that the federal government had moved to dismiss their action. The judge wrote a short opinion, which in the state's view, telegraphed that he might be thinking like the committee.

4:01:11 PM
SENATOR BISHOP asked what if the judge rules in the state's favor. "Will they listen to that?"

MR. BEAUSANG said he expects they will listen. He added that sometimes lawyers can get creative when they are trying to decipher acts of Congress, but they often don't get so creative when they have an order from a federal district judge directing them to do something.

4:01:45 PM
MR. BEAUSANG said the DOL was successful in defending the Big Thorne timber sale that was approved by the Forest Service on Prince of Wales Island. Environmental groups challenged it claiming that this sale would harm the habitat of a wolf population that lives on the island. They were arguing that the National Forest Management Act required that there be a sustainable population of wolves. The state intervened in the matter and said it needed to be a viable population. The judge agreed with the state but said he wasn't sure what the difference was. Nevertheless, he upheld the sale and on the appeal. That case is closed out.

4:02:49 PM

SENATOR STEDMAN commented that this is good news and one can see the settlement in the mood of community on Prince of Wales Island that now has a glimmer of hope that they will be able to survive economically.

4:03:24 PM
MR. BEAUSANG next talked about the 2016 amendment to the Tongass Land Resources Management Plan (TLRMP). The state challenged it through a "protest." The amendment did two things that concerned the state: one is that it incorporated the roadless rule within the management plan, so that the effect of the rule will remain no matter what else happens as long as the plan is in effect. Their concern is that it provides for a rapid transition in the timber industry from old growth harvest to young growth harvest, which is a problem for the timber industry.

The state filed a protest to the plan and it was denied. Now they are considering various options. This could be overturned due to the Congressional Review Act and they have asked the secretary to direct that this plan gets revised. They have also petitioned the DOI secretary to exempt the Tongass from the roadless rule. There is also the possibility of litigation over the plan.

4:05:17 PM
MR. BEAUSANG turned to the Eastern Interior Resource Management Plan (EIRMP) that was adopted in 2017. The state protested this one and was denied. It did two things that concerned him: one is that the plan applies to an area that has the potential and is subject to mineral development; placer miners are in the area. The plan designates fairly large areas as "areas of critical environmental concerns," which are managed almost like wilderness areas. It also suspends the termination of D-1 withdrawals in the Alaska Native Claims Settlement Act (ANCSA). These withdrawals are supposed to be temporary and other management plans provide for their termination. This one does not and in their view, almost creates new conservation system units that are not authorized by ANILCA. He is considering his options among which that it could be overturned through the Congressional Review Act or the plan could be revised; there is always the possibility of litigation, as well.

4:06:55 PM
SENATOR BISHOP asked what the timeline is on the Congressional Review Act (CRA).

MR. BEAUSANG surmised that the timeline is flexible and depends on when Congress has official notice of the rules.

ATTORNEY GENERAL LINDEMUTH added that it would be 60 legislative days from that time.

MR. BEAUSANG said they are still within the possibility of this plan being reversed by the CRA.

4:07:58 PM
ATTORNEY GENERAL LINDEMUTH touched briefly on lands into trust. Indian tribes had challenged the federal government's decision not to take lands into trust in Alaska and lost in district court. Then the federal government changed its mind and issued regulations allowing it. Since that decision there have been six applications to take lands into trust in Alaska and only one of those, in Craig, has been granted so far. The other areas are for a number of parcels in Juneau for Tlingit Haida, Ninilchik, in the Fort Yukon area. All are less than 10 acres.

4:09:14 PM
SENATOR COGHILL explained that the issue would take land into federal management for tribal groups, creating a kind of Indian country potential, which takes them off the tax rolls. It's a one-way street: once you go in you can't come out. He thought the Alaska Natives saw this as an opportunity, but then realized the cost gets pretty high, too. Once it goes into effect, Alaska probably has less to say about everything for zoning to taxing. It has caused the people of Alaska, Native and non-Native, to seriously sit down and consider it.

4:10:14 PM
CHAIR GIESSEL commented that the parcels are small right now, but it does set a precedent and there is no limit.

4:10:30 PM
ATTORNEY GENERAL LINDEMUTH responded that keeping perspective in mind, out of the lands in Alaska about 60 percent are owned by the federal government; 28 percent by the state; about 12 percent by ANCSA corporations, which are not tribes, and less than 1 percent is in private ownership, which includes tribes. In order for lands to be taken into trust, an Indian tribe has to own them in fee. So, it's a very small amount of lands in Alaska that would be eligible to be taken into trust.

4:11:11 PM

ATTORNEY GENERAL LINDEMUTH next addressed the Arctic National Wildlife Refuge (ANWR) boundary dispute. The state has been in a dispute with the federal government over where the boundary lays and 20,000 acres are at play. The briefing is currently under way before the IBLA. They have stayed briefing in order to see if an agreement could be worked out with the federal government on this issue. If they don't reach agreement in a couple weeks, the federal government's brief on that matter is due in mid-March.

4:11:59 PM
ATTORNEY GENERAL LINDEMUTH said there has now been federal legislation opening the 1002 area of ANWR to oil and gas development. In order for that to change, there would have to be another Congressional act.

4:12:39 PM
CHAIR GIESSEL said the U.S. has an ongoing border dispute with Canada and asked if she had anything to do with that.

ATTORNEY GENERAL LINDEMUTH replied that she is not aware of it, so it's not in her shop. If she gets corrected on that, she would get back to her.

4:13:18 PM
MR. BEAUSANG said he would next talk about a few Endangered Species Act (ESA) cases. ESA litigation has had great success in the district court only to not have it in the Ninth Circuit Court of Appeals. That was the case for the two bearded seal listings in 2012. They successfully challenged that listing in district court only to be reversed by the ninth circuit, and just two weeks ago, the U.S. Supreme Court denied Alaska's petition for certiorari in that case. That case and the ringed seal case involve the National Marine Fishery Service (NMFS) doing something that it hasn't done so much before in two respects: one is that everyone agrees that both of those populations are not in trouble numbers-wise now, but they are being listed because of projections of what is going to happen to their populations as a result of climate change. Also unusual, is the timeframe that the service is using for its projections. It used to be comfortable projecting about 50 years out, and now it feels comfortable going 100 years out.

4:15:47 PM
MR. BEAUSANG said their challenges have tried to make the point that perhaps it might be better to wait and see what is happening, since the populations are robust now. They have also

pointed out that there isn't any science in the record for either case about what the effects of climate change will be on their populations and if the species adapt or not.

They were successful in overturning the listing of the ringed seal in district court; it's on appeal to the ninth circuit and has been fully briefed and argued. The ninth circuit was holding off on issuing a decision until it saw what happened to the Supreme Court petition and he expects they will decide soon.

Polar bears were listed as threatened in 2008. The next step was for the NMFS is compelled to identify what is called critical habitat for the species. This is significant because what is classified as critical habitat has substantive and procedural hurdles to any kind of activity that would harm it. The DOL challenged the designation of critical habitat in the polar bear case, because they thought it was not supported by science and it covered too much area. Their justification for it being suitable habitat for polar bears was that as a result of climate change, perhaps these areas might become suitable for habitat. The state was successful in the district court, and once again in the ninth circuit they were not, and their petition for certiorari was denied by the U.S. Supreme Court.

4:17:11 PM
MR. BEAUSANG said there is good news in the Alabama v. NMFS case in which the state is a co-plaintiff. That case challenges rules on critical habitat that speak to some of the same issues that they have been litigating in the polar bear case about whether it's proper under the ESA to designate as critical habitat areas where the species is not found and that is not even presently suitable for habitat, based on speculation that the habitat might become suitable in the future.

That case was filed under the previous federal administration and has since been stayed while the new administration figures out what they want to do with it. Perhaps it might come to a different conclusion without having to go through the entire litigation.

4:18:03 PM
MR. BEAUSANG reported that the Supreme Court granted certiorari a few weeks ago in a case out of the fifth circuit dealing with some of these same issues about whether it's proper to designate critical habitat when the species is not found there and based on projections that it might become critical habitat some time in the future.

4:18:34 PM
SENATOR BISHOP asked if he argued the polar bear case.

4:18:46 PM
MR. BEAUSANG answered no, and he didn't recall who did.

4:18:55 PM
SENATOR VON IMHOF said part of the argument in the upcoming salmon initiative is what might be a salmon stream in the future. She asked if he was familiar with that.

4:19:21 PM
MR. BEAUSANG replied that he is familiar with the initiative, but not with that particular issue.

4:19:42 PM
ATTORNEY GENERAL LINDEMUTH turned to the Clean Air Act and two water cases on the bottom of page 7 and on page 8 and said this new administration is taking a different approach. These cases are being resolved either through the Congressional Review Act (CRA) or rule making.

4:20:07 PM
ATTORNEY GENERAL LINDEMUTH said although Alaska was excluded from the Clean Power Plan issue, the EPA had indicated that Alaska may in the future be subject to it. So, the DOL is concerned. EPA under the new administration has proposed to repeal the Clean Power Plan. The decision will be made soon, but she doesn't expect it to stand.

4:20:36 PM
ATTORNEY GENERAL LINDEMUTH said Alaska had joined 12 other states in challenging the Waters of the U.S. issue. It is a nation-wide standard that didn't take Alaska's unique nature and what that would do to resource development into account. The U.S. Supreme Court just recently ruled in the state's favor on the proper venue for challenging that case, which is the district court. Alaska is already party to a case in North Dakota with 12 other states and that district court had already issued a stay. Alaska is covered by that court's order and so, that rule won't go into effect in Alaska.

The EPA has also proposed that rule not go into effect for another two years while they go through a new rule-making process and she expects that to be successful for the state.

4:21:52 PM
ATTORNEY GENERAL LINDEMUTH said the Stream Protection Rule was overturned by the Congressional Review Act, and there has been no direct challenge to that case. But Ms. Alloway would talk about another case where the use of the Congressional Review Act has itself been challenged in these kinds of cases and that could impact this issue in the future.

4:22:20 PM
MS. ALLOWAY said there are two wildlife cases (page 9) and towards the end of the Obama administration regulations were passed that prohibited certain state-authorized hunting methods and means (bear baiting and a season for taking wolves and coyotes) on Fish and Wildlife Service and Park Service lands. They would call it predator control and Alaska does not. This is not what the Alaska Department of Fish and Game uses as predator control. The state filed a complaint last year that challenged both sets of those rules. Congress did use the Congressional Review Act to revoke the Fish and Wildlife Service rule. The National Park Service rule was outside of the 60 legislative days (to use the CRA) and depends on when Congress is session. So, the state still has litigation challenging that set of rules. DOL hasn't briefed, yet, and is in a "little disagreement" with the federal government over what should be included in the administrative record. In these types of cases one can only cite what is in the administrative record, which is prepared by the National Parks Service that is saying the Board of Game implemented regulations that it deemed to be predator control, and the state is saying "No, we did not." The department thinks that the Board of Game's record where their rules are explained should be in the administrative record. The NPS says it should not. They are working out that disagreement and once the judge issues that decision, the case will be briefed.

He said the second part of what the Attorney General was referring to is the second case that sprung up from Congress's use of the CRA. Environmental groups are challenging Congress's revocation of the Fish and Wildlife Service regulations. They are basically saying that Congress passed a rule that prohibits Fish and Wildlife Service from implementing its statutory mandates under ANILCA. The state is aligned with the federal government in this situation, because they are both protecting Congress's use of the CRA. The federal government's response to that is this was a piece of legislation passed by both the House and Senate and signed by the President, and to the extent they were controlling the agency's use of ANILCA, they were basically

confirming their legislative intent or even amending ANILCA to make it clear that ANILCA was not meant to prohibit the state from exercising its authority to implement these sorts of regulations on federal lands. Right now, the state is aligned with the federal government and this case could impact other situations where the Trump administration used the CRA. For that reason, other states are participating in this litigation as amicus. Wisconsin is taking the lead on that.

4:26:24 PM
MR. BEAUSANG said the Salmon Fishery Management Plan litigation was filed in 2013 by the United Cook Inlet Drift Association (UCIDA). It challenges amendment 12 to the Fishery Management Plan for Alaska salmon fisheries. The Fishery Management Plan applies to federal waters and most salmon fishing in the state takes place in state waters. At least three areas of the state have substantial commercial salmon fishing: Cook Inlet, Prince William Sound, and False Pass.

Historically, since statehood the state has always managed those salmon fisheries, and that continued even after the enactment of the Magnuson Stevens Act of 1976, which provided for federal management of fisheries beyond three miles. UCIDA has been a frequent participant at the Board of Fisheries over issues dealing with Cook Inlet salmon and they have long advocated for more federal oversight of that fishery. Therefore, they challenged the amendment in federal court. The state intervened on the side of the National Marine Fisheries Service (NMFS) to defend the amendment and weren't surprised when the federal district court upheld the amendment. However, they were surprised when the ninth circuit reversed that decision. After that decision was made, the NMFS did request rehearing and petitioned the U.S. Supreme Court to review it. Unfortunately, the U.S. Supreme Court did not accept that petition.

The district court has now entered an order calling for a new amendment to the Fishery Management Plan that is going to mean federal management for these fisheries. The North Pacific Fisheries Management Council (NPFMC) will take these plans up in steps and the Cook Inlet will go first. The state will participate in that process and see what happens. There is talk of the NPFMC eventually delegating management back to the state, which the state supports. However, there are going to be changes, and it will be managed under the Magnuson Stevens Act.

4:28:57 PM

MR. BEAUSANG said the Federal Subsistence Board matter dates to 2015 when it authorized a subsistence gillnet opening in the Kenai River in an area where King salmon spawn and some of the best trophy rainbow trout in the state exist. The state and federal scientists thought this was a terrible idea and testified as such before the Federal Subsistence Board. Nevertheless, the board approved the proposal and the state filed a request for reconsideration of that decision, as did hundreds of Alaskans. All those requests are still pending. But since then, the gillnet has been used in the Kenai River pursuant to the new rule; the Fish and Wildlife manager has put "pretty stringent" controls on the gillnet fishermen and some of the worst fears about what that would mean for these fish populations have not come about.

4:30:19 PM
MR. BEAUSANG said the state is involved in two mining matters that are outlined on page 11. He didn't have an update but would be happy to answer questions.

4:30:36 PM
SENATOR BISHOP asked for more detail on Earthworks versus the Department of Interior.

MR. BEAUSANG replied the state is intervening in that case on the side of the U.S. Department of Interior to defend two rules that are being challenged, only one of which has impact in the state. The claim in that case is that the federal government is not collecting appropriate fees for mining on federal lands where there are no federal mining claims in effect. In that case, the federal government does collect fees. The environmental groups are asserting that the federal statute requires that the federal government collect whatever would be fair market value for these lands, which are probably much greater than what is being collected now.

4:31:47 PM
ATTORNEY GENERAL LINDEMUTH turned to the final matter on the last page, offshore development. She explained that as President Obama was leaving office last year, he issued a ban in certain offshore areas including the Chukchi and Beaufort Seas. President Trump issued an executive order rescinding the ban, and environmental groups have challenged that. The Bureau of Ocean Energy Management (BOEM) is gathering comments on a new proposed five-year lease program from 2019 to 2024. The state intervened in the lawsuit to support and defend the president's executive order. At the district court level, the defendant

brought a motion to dismiss. Oral argument was held on November 8, 2017, and they are awaiting a decision.

4:33:53 PM
CHAIR GIESSEL thanked the presenters and their obvious very hard work, saying that the news is good this year.

4:34:23 PM
SENATOR MEYER asked if any litigation is going on in the National Petroleum Reserve-Alaska.

4:34:43 PM
ATTORNEY GENERAL LINDEMUTH said she wasn't aware of any but would follow up if she heard different.

4:35:21 PM
There being no further business to come before the committee, Chair Giessel adjourned the Senate Resources Standing Committee at 4:35 p.m.