ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
February 6, 2019
3:30 p.m.

MEMBERS PRESENT

Senator Chris Birch, Chair
Senator John Coghill, Vice Chair
Senator Cathy Giessel
Senator Lora Reinbold
Senator Click Bishop
Senator Scott Kawasaki
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

PRESENTATION: STATEHOOD LAND ENTITLEMENT AND PUBLIC ACCESS PROJECTS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

BRENT GOODRUM, Deputy Commissioner
Alaska Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: Provided an overview of statehood land entitlement and obstacles.

JESSIE ALLOWAY, Assistant Attorney General
Natural Resources Section
Alaska Department of Law
Juneau, Alaska
POSITION STATEMENT: Provided an overview of the state's efforts to protect and defend state title to submerged lands and navigable waters.

JAMES H. WALKER, Manager
Public Access Assertion and Defense Unit
Division of Mining, Land and Water
Alaska Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: Provided an overview of the state's efforts to protect and defend state title to submerged lands and navigable waters.

ACTION NARRATIVE

3:30:07 PM
CHAIR CHRIS BIRCH called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Kiehl, Kawasaki, Giessel, Coghill, Bishop, and Chair Birch.

PRESENTATION: Statehood Land Entitlement and Public Access Projects

3:30:40 PM
CHAIR BIRCH announced that the committee will hear from the Department of Natural Resources on two issues: number one, the state's efforts to assert and preserve public access on roads, trails, and waterways; secondly, an update on the transfer of federal lands under the statehood act.

3:31:32 PM
BRENT GOODRUM, Deputy Commissioner, Alaska Department of Natural Resources, Anchorage, Alaska, said the statehood land entitlement and public access projects are a team effort between departments, the Legislature, and the Administration. He affirmed that statehood land entitlement and public access are critically important to the state for today and years to come. Land and resource access are core to what Alaska is and does.

He addressed the presentation's topics as follows:

- Statehood land entitlement and obstacles.
- Public Land Order 5150.
    - Trans Alaska Pipeline System (TAPS) corridor.
- Efforts to enforce the lawful western boundary of Arctic National Wildlife Refuge (ANWR) and the controversy involving the Canning and Staines rivers.

- Efforts to protect and defend Alaska's title to its submerged lands and navigable waters.
- Efforts to protect and defend Alaska's RS 2477 and other trail networks.

3:33:22 PM
SENATOR REINBOLD joined the committee meeting.

3:33:29 PM
At ease.

3:43:35 PM
CHAIR BIRCH called the committee back to order.

DEPUTY COMMISSIONER GOODRUM addressed "Statehood land entitlement" as follows:

- Alaska Statehood Entitlement:
    - 105,775,500 acres:
        - Patented: 68,070,100 acres (64 percent):
            - Survey work is done.
        - Tentative approved: 32,438,100 acres (31 percent):
            - State has management authority, but survey work is not done for acreage confirmation;
            - Survey corrections adds to the state's entitlement.
        - Remaining entitlement: 5,267,300 (5 percent).

He said Alaska is generally the exception to most any rule. For land entitlement the state was granted 105.8 million acres through the Statehood Land Entitlement Act as well as other authorizations. Alaska's land entitlement includes both surface and mineral estate.

He said the Statehood Act also made the provisions for the Submerged Lands Act of 1953 and the equal footing doctrine applicable to Alaska. An additional 30 million to 40 million acres of tidelands and submerged lands were added to the state's land estate as well as 3 million to 6 million acres of shorelands underlying the state's navigable waterbodies.

He said the Alaska National Interest Lands Conservation Act was another important piece of legislation that established the state's ability to "topfile" the state's selections of lands that were not available for selection.

3:46:05 PM
DEPUTY COMMISSIONER GOODRUM addressed "Obstacles to statehood land entitlement: TAPS withdrawal, Public Land Order 5150 (PLO 5150)," encompassing 1.74 million acres of Topfile Priority I acres and part of the Central Yukon Resource Management Plan that the Bureau of Land Management (BLM) is working on. BLM is working on two plans: Bering Sea-Western Interior Plan, anticipated to be the first plan that the federal government will release; and the Central Yukon Resource Management Plan.

He said one of the recent challenges with plans is the use of the "areas of critical environmental concern" (ACEC) where certain provisions are put upon areas to restrict activities. ACEC has become larger in scope and more problematic for the state's intended use or access. The use of ACEC, particularly in the eastern interior, was excessive but there is potential for recrudescence.

SENATOR COGHILL pointed out that Deputy Commissioner Goodrum did not reference "wilderness characteristics" as it bumps up against the "no more" clause in the Alaska National Interest Lands Conservation Act (ANILCA) guarantees.

3:48:20 PM
DEPUTY COMMISSIONER GOODRUM continued to address "Obstacles to statehood land entitlement: Public Land Orders (PLO) and military withdrawals." He said PLO 5150 is the most obvious and critical land order. If BLM were to choose in their alternatives to lift the PLO, the state could look to bring in close to one-million acres of high priority lands that provides access to the North Slope, Ambler Road, Chandalar Mining District, and other areas. The state should see the PLO lifted within the near term.

He said to Senator Coghill's point, the presence of PLOs and military withdrawals quite often pull lands out of the public domain and are quite often viewed as "small 'W' wilderness" because they restrict other activities; when public landowners are on, they prevent mining activities or the location of minerals. The state has encouraged the federal government to life PLOs that no longer serve the purpose for which they were originally established, many have been in place for decades.

3:50:07 PM
He addressed "Obstacles to statehood land entitlement: Alaska Native Claims Settlement Act (ANSCA) selections" and the "17(d)(I) withdrawals." The withdrawals were intended for

studying classification and are still present throughout the state and are one of the major reasons that some of the highest priority lands are unavailable to the state for selection.

DEPUTY COMMISSIONER GOODRUM referenced "Public land order 5150" as follows:

- Established in 1971 to create a utility and transportation corridor along the general route of the Trans-Alaska Pipeline System (TAPS) from the North Slope to Valdez.
- Approximately 1.5 million acres in the central Yukon region including the TAPS pipeline.
- Vital transportation and access corridor.
- Vital for liquid natural gas (LNG) pipeline.
- Important access to highly mineralized areas; e.g., Ambler Road.

He said in reference to a PLO, 709 acres were lifted during the past year that was located adjacent to the Fort Knox Mine, a parcel that was known as the "Gilmore Parcel." The additional land could mean an extended operating life of the Fort Knox Mine for another decade. The Alaska Mental Health Trust Authority benefits from the lifted parcel and will realize $24 million.

He summarized that there is 5.3 million or more acres left and the best use of the land is to continue to identify resources that will allow the state to continue to build jobs and the economy.

3:52:44 PM
SENATOR BISHOP asked how much of the 5 million acres may be encumbered, awaiting approval.

DEPUTY COMMISSIONER GOODRUM answered that BLM only conveys state land when the state asks for. The turnaround time when a request is given is generally quite fast for a high priory land conveyance.

SENATOR BISHOP asked how many applications does DNR have from Alaskans wanting to transfer federal mining claims into state mining claims.

DEPUTY COMMISSIONER GOODRUM answered that he will follow up and provide Senator Bishop with the number.

3:56:02 PM

DEPUTY COMMISSIONER GOODRUM referenced the "ANWR boundary dispute" as follows:

- 20,000 acres of uplands on the western boundary of ANWR.
- 3,000 acres of tidal and submerged lands along the Beaufort Sea coastline in proximity to Point Thomson.
- New importance with the passing of the Tax Cuts and Jobs Act of 2017.

He detailed that pre-statehood, the U.S. Fish and Wildlife Service submitted an application in 1957 to create the Arctic Wildlife Range, now known as ANWR. In 1960 the federal government published the federal register notice for PLO 2214 which described what the range would look like. In the 1960s BLM started to do survey work in the area; around that same time the state had put a general grant selection on the same lands, an initial decision was made by BLM that tentatively approved lands to the state immediately to the west of the Canning River. The state asked the federal government to clarify where exactly the boundary was, but BLM corrected its answer and took some of the acreage back when it referenced their survey work. He provided the committee with details on the continued boundary dispute and noted that as of May 2018, the state and BLM made their final briefings to the Interior Board of Land Appeals (IBLA) for resolution with a possible ruling expected within the next 18 to 24 months.

He explained that the ruling on the ANWR boundary dispute is important due to the Tax Cuts and Jobs Act of 2017 that modified the revenue sharing agreement within the coastal plain from a 90:10 split from state to federal to a 50:50 split. There is potential that the federal government may not choose to lease areas that are in contention with the state, the aspect is if the state were to rightfully own the contended boundary area, the state would have full management authority and the ability to generate all the revenues that come from that land.

4:01:55 PM
CHAIR BIRCH asked if the boundary dispute will hold up the ANWR lease sale.

DEPUTY COMMISSIONER GOODRUM opined that the federal government will decide to de-risk any decision they have going forward. Potentially the federal government may choose to not make any definitive determination with the ANWR land.

DEPUTY COMMISSIONER GOODRUM referenced that Tax Cuts and Jobs Act of 2017 and noted there was a limitation of 2,000 acres of disturbance for production or support facilities on federal land. Whether the land is federal, or state land is also important to future development of the coastal plain area.

4:03:26 PM
JESSIE ALLOWAY, Assistant Attorney General, Natural Resources Section, Alaska Department of Law, Juneau, explained that the state owns all submerged lands underlying navigable in fact or tidally influenced waterways. Navigable in fact is a federal test. Four things are focused on when trying to prove navigability:

1. The waterway must be capable or susceptible to use as a highway for commerce:
    a. Whether people or goods can be transferred on the riverway.
    b. The Ninth Circuit Court of Appeals in the 1980s told the state in the Gulkana River case that the transportation of people as commercial guides was sufficient transportation for the purpose of commerce.
2. Whether the waterway must be usable for transportation conducted in customary modes of trade and travel on water:
    a. Type of watercraft that is used.
    b. Navigability for fact the focus is on the date of statehood.
    c. Supreme Court has told the state that evidence of current-day travel may be used on the waterway if the watercraft being used today are materially similar to the watercraft that existed at the time of statehood:
        i. Alaska has an advantage to other states because the state's statehood is 1959.
        ii. Some of the litigation involves canoes, but the state has evidence of airboat usage prior to 1959.
        iii. The disagreement with BLM is generally over jetboats, but the state has evidence of jetboat use both in Anchorage and Fairbanks prior to 1959 so the state says jetboat use is relevant, BLM says jetboat use is not relevant.
3. Whether the waterway is in its natural and ordinary condition, it must be navigable in its natural or ordinary conditions:
    a. Under the federal test regarding a navigable waterway, the federal government can go in and dredge a waterway making it navigable and then they can reach in and

regulate the waterway via their commerce clause powers, the state cannot do that; that gets back to whether the present-day use is relevant.

b. If a waterway has been dredged and made more navigable, then the state cannot necessarily just focus on present-day use as easily as if it had not been dredged, for example:

i. The Mosquito Fork litigation was in its natural and ordinary condition so an argument can easily be made to the court that DNR navigated Mosquito Fork in 2012 in an inflatable raft carrying 1,000 pounds because the waterway was in the same condition as it was in 1959, that means the same thing could have been done in 1959.

4. Whether the river was navigable at the time of statehood.

4:07:04 PM

MS. ALLOWAY referenced "Methods to clear state title to submerged lands under navigable waters" as follows:

- Federal quiet title litigation:
  - State is generally litigating against the United States.
- Recordable Disclaimers of Interest (RDI):
  - Ligation against the United States.
  - RDI is an administrative process that the United States has where they can disclaim their interest.
  - DNR will file an application and say, "We think this is a state-owned waterway because it is a navigable waterway."
  - BLM does their research and will either agree with the state and issue an RDI or not agree with the state.
- State court litigation.

She addressed "Recent examples of federal quiet-title litigation" as follows:

- Mosquito Fork River:
  - Litigation closed.
  - First case the state recently filed in its recent push to quiet-title the submerged lands.
  - State litigated for three years.
  - United States ultimately disclaimed their interest.
  - The state received a court decision saying that the United States had acted in bad faith by pursing frivolous legal arguments.
  - State received a $600,000 award in attorney's fees.

    - Important case because the ligation was a springboard for most of the state's recent success.
- Stikine River:
    - Litigation closed.
- Knik River:
    - Ongoing litigation.
    - BLM purported to convey portions of the bed to Eklutna.
    - State asked BLM to reconsider.
    - BLM did not want to reconsider in a timely fashion.
    - State filed a litigation.
    - The United States did disclaim their interest in the Knik River.
- Delta River:
    - State followed up with a 180-day notice.
    - Before the state files a litigation against the United States, the state must give the United States 180 days of notice.
    - 180-day notice allows the United States to consider whether they will defend their title or disclaim their interest.
    - United States recognized the state's ownership before litigation was filed.
- Fortymile River:
    - West Fork and Dennison Fork.
    - 180-day notice was filed on four rivers:
        - West Fork,
        - Dennison Fork,
        - Middle Fork of the Fortymile River,
        - North Fork of the Fortymile River.
    - Prior to the expiration of the 180-day notice, BLM issued revised navigability determinations finding the West Fork and Dennison Fork navigable.
    - BLM has not addressed the state's claims to the North Fork and the Middle Fork of the Fortymile River:
        - October 2018 the state filed a quiet-title action to clear title to the North Fork and Middle Fork rivers.
        - State has not received an answer back from the United States, delay was due to the recent government shutdown. Answer is due by the end of February 2019.
- Kisaralik River:
    - State of Alaska followed up with a 180-day notice.
    - United States recognized the state's ownership before litigation was filed.

    - Kisaralik was unique because the state had filed an application for an RDI, BLM denied the RDI, BLM was asked to reconsider, BLM said they were going to reconsider but was asked by the state to do their reconsideration within 180 days or a litigation would be filed.
    - BLM reconsidered their decision within 180 days and granted DNR's RDI application.

MS. ALLOWAY referenced "Pending and intended navigability litigation" as follows:

- DNR recently filed quiet title action (QTA) litigation against the federal government on the North Fork and Middle Fork of the Fortymile River.
- DNR filed 180-day notice of intended litigation to clear its title to the submerged lands underneath the Koyukuk River (South Fork), Koyukuk River (Middle Fork), Bettles River, Dietrich River, Birch Creek and Beaver Creek that will expire soon:
    - State is waiting to hear back whether BLM intends to go forth with their claim of ownership or potentially issue a new revised navigable determinations.
- DNR intends to file additional 180-day notices on more rivers and lakes soon.

4:11:47 PM

JAMES H. WALKER, Manager, Public Access Assertion and Defense Unit, Division of Mining, Land and Water, Alaska Department of Natural Resources, Anchorage, Alaska, addressed "We still have a long way to go," in his presentation as follows:

- Alaska has cleared title to only a small fraction of its submerged lands under navigable waters statewide with its combined efforts to date:
    - Approximately 14 percent of submerged lands under navigable lakes.
    - Approximately 6 percent of submerged lands under navigable rivers.
- Find ways to speed up clearing title:
    - Negotiations and agreements with the U.S. Department of the Interior (DOI) and BLM.
    - Moving away from "historical" evidence of navigability and more towards a "susceptibility" model.

MR. WALKER said DNR is working on a way to do "basin wide" or "watershed wide" determinations of navigable waters based upon sound science and sound law in the hope that the department can use the information to effectively clear title more quickly.

4:13:29 PM
He addressed "Recordable Disclaimer of Interest (RDI)" as follows:

- Congress provided a "quick and easy" way to clear title where the United States does not claim title.
- Secretary of DOI (BLM is delegee) is authorized by Federal Land Policy and Management Act (FLPMA) to an RDI.
- BLM has the authority to disclaim the United States' interest in submerged lands under navigable waters where there is no pre-statehood reservation.
- RDI is BLM's preferred method of handling titles.

He explained that the RDI process is allowed pursuant of the FLPMA that works as a quick-claim deed. When there has not been a valid pre-statehood withdrawal, the state applies to BLM to get a quick-claim deed to say that BLM has no interest in the specified submerged lands with an agreement that the water above the submerged lands are navigable. He said BLM prefers the RDI process because the process is administrative rather than a lawsuit confrontation. RDI has been successful over the years; however, the process has been "painfully" slow and expensive.

He addressed "Some recent successful RDI applications" as follows:

- Kanektok River;
- Kagati Lake;
- Pagati Lake;
- George River System;
- Kisaralik River;
- Lake Minchumina;
- Kantishna River;
- Taku River;
- Lake Becharof and Egegik River:
    - Lake Becharof:
        - The state's second largest lake after Iliamna:
        - Covers a surface area of over 450 square miles.
        - Average depth of 100 feet.
        - Deepest depth is over 400 feet.

- Alaska had to wait several years and pay $10,000 for BLM to tell the state that the lake was navigable.

MR. WALKER reiterated that the RDI process can be a frustrating process that is slow and involves "A lot of red tape." The department is proceeding with the RDI process and Ms. Alloway will address possibilities for improvement.

He addressed "Possible light at the end of the tunnel" and noted the "Knik River litigation" with DOJ and BLM for improvements to the RDI process.

4:16:27 PM
MS. ALLOWAY addressed the "Knik River mediation case" as follows:

- United States disclaimed their interest.
- Ms. Alloway filed a motion to establish the state's status of a "prevailing party:"
  - A quirky legal theory that allowed the state to get the attorneys' fee in the Mosquito Fork case.
- Litigation resulted in the state receiving $400 in costs.
- United States appealed to the Ninth Circuit Court of Appeals regarding the state's prevailing-party status and $400 in costs.
- The state's ownership is not at issue.
- During mediation the United States reached out and asked to work with DNR to find ways to improve the RDI process to make it more likely that the state will file an RDI rather than filing litigation.
- The case commenced a year ago and remains in the courts.
- The state is waiting for the United States to provide a proposal in writing so that the new administration can be briefed.

She affirmed Mr. Walker's assessment that the RDI process has problems and detailed as follows:

- When the state previously filed an RDI application, the state would have to pay BLM to engage in their own research to determine whether the United States is going to claim their interest.
- The state opined that its payment was unreasonably high.

- The RDI application process had no timeline which BLM had to act; some applications had no decisions for five to ten years after filing.

MS. ALLOWAY explained that the state uses litigation to speed the title process as follows:

- The state files a complaint and then the United States must figure out whether to claim or disclaim an interest on their "own dime."
- The court imposes a deadline.
- The state can decide whether to grant an extension or if the process is taking too long the state can go to the judge and say a decision is needed.

She explained that the RDI application cost is being discussed in the mediation as well as whether the state can have an agreement with BLM on some of the legal issues; for example, what is a "customary boat" and does two-way traffic need to be shown. The United States will take a position that it must be a highway with two-way traffic, the state contends that "floating down" is suffice with reference to "log drives" that the Ninth Circuit had already decided on as being sufficient evidence. She noted saying to the United States that, "Logs don't float upstream, so it's one-way traffic and that's sufficient."

4:20:02 PM
MR. WALKER explained that if a "new going forward" with BLM is achieved regarding the RDI program, the state will ramp up its applications. An RDI list was provided to BLM for the immediate future. The state is looking for a commitment from BLM that possibly leads to costs being waived. The state would have to pay application fees and necessary statutory notice costs such as publishing in newspapers; however, the state would not be taxed for all of BLM's processing and administrative fees.

He said the state is also asking BLM to devote necessary capacity to processing RDI applications so that the state can get results in a timely fashion. BLM once had 13 dedicated staff working on navigability issues, currently there is 1 person who is working on applications as part of his duties.

He summarized that the Knik mediation is about capacity, cost, and what legal standards are going to be applied pertaining to the navigability question.

MR. WALKER said the state will continue with its efforts on the RDI program and referenced the "New Batch of RDI Applications" as follows:

- Johnson River System,
- Unuk River,
- Alsek River,
- Kwethluk River,
- Tuluksak River,
- Fog River,
- Kanuti River,
- Andrefsky River,
- Anvik River,
- Hogatza River,
- Kateel River,
- Tozitna River,
- Takslesluk-Kayigyalik Lake System.

He said the new batch of applications goes to Senator Coghill's question about various land planning on what the federal government is doing. The department will ask colleagues in state government what rivers are important to have a clear definition of state title to or what rivers have not had a title cleared and whether the department proceeds with an RDI to provide title clarity to assist state efforts in the planning process. Many of the rivers being looked at by the department are within the terms of litigation as being within the Public Land Order 5150 corridor and elsewhere within the Central Yukon Resource Management Plan that Deputy Commissioner Goodrum addressed.

4:22:49 PM
He addressed the third way to attempt to clear state title to submerged lands is through the "state navigability determinations" as follows:

- Historically made by DNR primarily for intergovernmental purposes.
- A recent affirmative example is the Middle Fork of the Koyukuk River.
- A recent negative example is Kongiganak Lake.
- The state plans to expand the navigability program to clear state title.
- Determinations will include painstaking scientific and legal analysis.

- State navigability determinations will be used as a predicate for active state management of state property, to act "like owners."
- "Susceptibility" and "Physical Characteristics" vs. historical proof.
- Allows the State of Alaska to change the narrative and assert ownership.

MR. WALKER noted that the state navigability determinations process is within the state's control and is an administrative matter. The state has increasingly sought to apply its thinking, approach, efforts, and views for making the state navigability determinations in the hopes that the process will start a new narrative with its colleagues on the federal side that the state in fact owns the submerged lands.

4:24:43 PM
SENATOR KIEHL asked if the state navigability determinations process was an initial step to filing an RDI or towards litigation.

MR. WALKER replied, "kind of all of the above." He explained that if the state issued a state navigability determination and the federal government objected and sued, validity in the courts would be on the terms set by the state. Also, the state navigability determination could also be used as a predicate for an RDI application and could also be used in federal quiet title litigation as well.

SENATOR KIEHL replied that he may follow up later whether the state navigability determination puts the permit holder, when a permit is issued, at greater risk.

MR. WALKER addressed the "Navigability Metrics Classification Project" and explained that the intent is to speed the title clearing process by assessing a basin in its entirety rather than a river segment-by-segment. He detailed "The Challenge" as follows:

> We need to establish a scientific and authoritative manner to demonstrate reliably which rivers, lakes and other waters within a particular basin are "boatable" using data and other factors available remotely that minimizes reliance upon the historical record and avoids in-depth, multi-year analysis of the actual segment at issue.

4:28:02 PM
MR. WALKER referenced "The factors influencing 'boatability'" as follows:

- Catchment size,
- Length/duration of the open-water season,
- Strahler Stream Order Classification,
- Precipitation,
- Hydrography,
- Flow rate,
- Width,
- Gradient,
- Channel pattern,
- Substrate,
- Dimensions of the watercraft,
- Reasonableness of portage.

He addressed "Scholarship upon which to build" as follows:

- Fish passage studies;
- Hydrological exceedance modelling for bridges, culverts, etcetera;
- Efforts of other states to categorize and inventory rivers and lakes;
- Principles of hydraulic geometry.

He summarized that the intent is to come up with a way that the state can reliably say that the rivers within a particular basin are, are not, or may be navigable.

He addressed the "Strahler Stream Order Hierarchical Network" that identifies a river through "orders" from its headwater stream, "first order," down to a river's higher stream order, the "tenth order." The modeling, which is true anywhere, can classify rivers throughout the United States.

He addressed the "Steam Order Classification in the Lower 48 States" and noted a map that identified the "Strahler Order" for major rivers such as the Mississippi, Ohio, Tennessee, Rio Grande, etcetera. The "Strahler Order" application has not been done throughout Alaska and that is what the state is currently doing.

4:30:36 PM

MR. WALKER addressed applying the "Strahler Order" to the "Yukon River Basin," the "Fortymile River Basin," the "Mosquito Fork of the Fortymile River Basin," the "Dennison Fork of the Fortymile River," and the "Kandik Nation Rivers" as compared to other basins throughout the Lower 48:

- The Yukon River drains 330,000 square miles (fourth largest in North America).
- The Yukon River is a less than a third of the Mississippi drainage area but has more than 40 percent of the annual flow of the Mississippi.
- Numerous smaller drainages of the Yukon River contain large river systems that are navigable.

He explained that the previously mentioned "Strahler Order" rivers with certain "orders" had navigability declared by courts that could be applied to other rivers.

He addressed "How to use" the navigability metrics as follows:

- The State of Alaska intends to use its work with the Navigability Metrics Project in two ways:
  - Seek federal partnerships (USGS, etcetera) to apply the system statewide and thereby establish navigability for title purposes basin-by-basin, watershed-by-watershed, drainage-by-drainage.
  - Utilize the system in state navigability determinations and in peer-reviewed papers to establish the scientific benchmark for establishing navigability.

4:33:45 PM
CHAIR BIRCH asked if the determination is strictly centered on navigability or is there latitude to look at other historic and purposeful use of the same waterway.

MS. ALLOWAY explained that the courts have said to focus on navigability like a boat or water-driven craft.

SENATOR KAWASAKI asked what the impact on navigability determination will be due to increased glacial melting.

MS. ALLOWAY replied that the focus would have to be on "natural and ordinary conditions." She noted that in the Knik River litigation that high water levels were addressed, and the same subject would have to be used with a hydrologist regarding glacial-fed streams prior to and after statehood as well as the

melting's impact on navigability. An argument could be made on both sides whether glacial melting is a manmade change. The legal question is whether glacial melting is the "natural and ordinary condition" as the world changes.

4:36:43 PM
SENATOR GIESSEL offered that streams and rivers are not ditches and noted that significant water contributions often come from ground water. She asked how ground water contribution for rivers is identified by the Strahler classification.

MR. WALKER replied that ground water would be included in the "precipitation factor." He concurred that subsurface waters are going to affect the flow of any given river and would also be considered.

He added that the department intends to publish a series of articles in scientific journals for its work on the navigability metrics methodology to receive support from scientists and hydrologists through a peer-reviewed process. Scientific papers will include subjects such as a comprehensive listing of all types of boats that were used at the time of statehood within the state to establish whether current watercraft are substantially similar, the methodologies the state is using, and other topics.

He noted that disclaimers have been continually used after the decision on the Mosquito Fork decision, the result frustrates the state's ability to establish good-case law, binding precedent that can be used. In the absence of binding precedent, the state will seek to establish a precedent in the scientific literature rather than receiving precedent through a court opinion.

4:39:46 PM
MS. ALLOWAY clarified in the Mosquito Fork litigation that the state did not receive a decision from the court that the United States recognized navigability or disclaimed their interest.

She referenced Senator Kiehl's question on navigability determinations and noted a recent situation where DNR issued a state navigability determination to allow mooring-buoy permits for public users to access submerged lands in a lake for float plane tie-ups. She noted that she argued in litigation as to whether DNR has the authority to exercise their management authority when there is no court decision saying that a lake is navigable in fact. The court agreed with the argument made that

DNR is responsible for managing state land and the state cannot be put into a situation where everything must be quiet titled, especially when managing public-user conflicts. The court did not want to go so far as to quiet title in an administrative appeal, but the court said the DNR's decision was not arbitrary, it was reasonable and followed the law; because of that the court upheld commissioner's decision to issue the mooring-buoy permits for public access to the lake.

MS. ALLOWAY addressed "Protecting and defending Alaska's RS 2477 and other trail network" litigation issues as follows:

- The Dickson case,
- The Klutina Lake Road case,
- Eklutna partnership for 17(b) easement access in Knik River Public Use Area,
- The Chicken RS 2477 federal litigation.

She explained that an "RS 2477" is a federal land grant that the state could accept in two ways: an affirmative state act through the territory or through the state, or by public use. Public users or the state would accept a right-of-way over federal public lands that are unappropriated.

4:42:10 PM
MR. WALKER addressed "The Dickson Case" as follows:

- An iconic RS 2477 right-of-way for the Iditarod National Historic Trail transportation corridor that traverses much of Alaska.
- Out-of-state landowners attempted to block the trail that crosses their property and then sued to quiet title.
- The State of Alaska won on all issues after a multi-week trial in the Superior Court and recovered a significant portion of its attorney’s fees and costs.
- Alaska Supreme Court affirmed the Superior Court’s judgment.
- This favorable opinion will be useful precedent in future cases.

He summarized that the Alaska Supreme Court affirmed all substantive areas. The state was awarded approximately $250,000 in attorneys' fees that the court remanded for clarification.

4:43:38 PM
MS. ALLOWAY addressed the "Klutina Lake Road Case" as follows:

- Highly contested litigation against Ahtna, Inc:
  - Filed in 2008.
  - Important case that touches on all the important issues in an RS 2477 litigation:
    - State is arguing that acceptance occurred by public use by "gold rush" users in 1898-1899 and use throughout the early 20th century.
    - State is arguing that the state affirmatively accepted by entering into a contract to build the Brenwick-Craig Road from the Richardson Highway to Klutina Lake in the 1960s.
- Important victories for the State of Alaska on aboriginal title, the width of the right-of-way, etcetera:
  - State has tried to settle the litigation with Ahtna, most recent in 2016 that Ahtna's board ultimately rejected.
  - Since 2016 there have been a couple of important decisions in favor of the state:
    - Court ruled that if the state can establish the existence of an RS 2477, it will be 100 feet wide as a matter of law via state statute.
    - Court rejected Ahtna's claim of aboriginal title:
      - Ahtna argued that the right-of-way grant was not unappropriated federal land because of their claim of aboriginal title, so the RS 2477 could never attach:
        - The counter to the argument is the Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal title and the RS 2477 attached.
      - The court agreed with the state's argument and rejected Ahtna's motion for a partial summary judgement.
- Pending motion for summary judgment on the existence of RS 2477 from Richardson Highway to state land on the north shore of Klutina Lake:
  - Court has issued a decision, a partial motion for summary judgement ruling in favor of Ahtna that said an RS 2477 is only for ingress or egress where camping or engaging in any activities are not allowed in an RS 2477; however, there is a potential appeal point for the state:
    - Klutina Lake Road can access the Klutina River, the river is a transportation corridor.

            - Does not make sense for the court to say that someone would have to get on the Richardson Highway and drive to Valdez without having an opportunity to access the other transportation corridor via boat launch.
- Trial date for remaining issues in April of 2019:
    - Trial is starting April 15, 2019.
    - State has filed a motion for summary judgement to establish the existence of the RS 2477; that has been briefed with oral argument scheduled on February 21, 2019.
    - State is making an alternative argument where the judge could rule:
        - The state has the entire RS 2477 based on the "gold rush."
        - Partial motion could be granted for summary judgement that the state has an RS 2477 for the Richardson Highway to Klutina Lake based upon the 1964 contract.
            - State would have to litigate after that point would be from Klutina Lake around the north shore to state-owned land, the north shore access.

4:48:32 PM

MS. ALLOWAY addressed "Chicken RS 2477 Litigation" as follows:

- Historic litigation to preserve the State of Alaska's RS 2477 right-of-way network on federal lands (Fortymile River Wild and Scenic Corridor):
    - Litigation has been hung-up with appeals and part of the issue was that the RS 2477 leaves Chicken and travels north through a "native allotment." The court said it did not have jurisdiction over the quiet title action in the native allotment.
- State of Alaska seeking important federal caselaw regarding the existence and validity of state transportation corridors on federal lands:
    - Over the last two years the state has been proceeding condemnation action to ensure or perfect the public access via the native allotment so that the state can proceed against the federal government.
    - In September 2018, the state received a favorable decision in the condemnation proceedings where the judge said that there was an authority and necessity for a just compensation award of $8,400.

    - The case has been appealed to the Ninth Circuit Court of Appeals.
    - The state has filed a motion to lift the stay on the part of the case against the federal government, the court granted the motion.
    - The state will proceed against the federal government to try the quiet title to the RS 2477s.

SENATOR COGHILL asked if the court saw the "native allotment" as private property or federal holding property.

MS. ALLOWAY answered private property. She detailed that the "native allotment" is private property but the federal government has an interest that results in a "legal quirk" that deprives the federal court of jurisdiction. The state has not given up its claims to the RS 2477 across the native allotment; however, the state cannot quiet title to them. To make sure that there was no conflict with public users and public users were not being put into risk, the state bought the RS 2477s that the state already had in order to pursue the rest of the case against the federal government.

4:51:12 PM
MR. WALKER address "Knik River Public Use Area Friday Creek 17(B) Easements" as follows:

- Highly popular Knik River Public Use Area.
- Controversy dating to 1980s.
- Historic agreement between the State of Alaska and the Native Corporation (Eklutna, Inc.) concerning 17(b) access.
- Important concessions to the State of Alaska include dual crossings of Friday Creek and agreement that submerged lands belong to the State of Alaska:
    - Two crossings of Friday Creek were agreed upon due to the creek's unpredictability.
- Vital public access preserved in perpetuity.
- A blueprint for the future:
    - Hope is to work with user groups addressing the native corporations directly in a spirit of compromise going forward to balance private property rights and public access.

4:54:53 PM
He addressed "Non-binding RS 2477 determinations for routes across federal lands" as follows:

- State of Alaska is working with the federal government to preserve RS 2477s across federal lands.
- State of Alaska believes having RS 2477s recognized is in the best interest of the state so that users know where to go and how to get there.
- There has been, as seen in the "Chicken litigation," a historic resistance on the federal government's part to recognize RS 2477s.
- The hope is that with the new leadership in the U.S. Department of Interior will issue, through appeal, non-binding RS 2477 determinations across federal land to preserve them.
- No new RS 2477s can be created.

SENATOR REINBOLD commented that her hope is that the federal government fights as hard for rights in the Arctic as it fights the State of Alaska. She encouraged Ms. Alloway and Mr. Walker to fight for the traditional use in the winter as well because Alaskans move around year-round. She commended Ms. Alloway and Mr. Walker for their presentation and said the State of Alaska has an "amazing team."

4:57:47 PM
SENATOR COGHILL addressed areas of environmental concern and opined that the Federal Land Policy and Management Act is trumping what was agreed to in the Alaska National Interest Lands Conservation Act (ANILCA). He asked if the state has any legal action and if there is anything that the Legislature can do to assist in asserting the "no more" clause found in ANILCA.

MS. ALLOWAY replied that she is not aware of any legal action. The Department of Law has someone within the department that focuses on ANILCA to make sure timely comments are submitted to federal agencies.

SENATOR COGHILL remarked that the Public Access Assertion and Defense Unit will be leaned on to, "Make sure good background is brought to bear." The Federal Land Policy and Management Act has a lot of impact on both recordable disclaimers and RS 2477s.

SENATOR GIESSEL opined that the committee's hearing is valuable because Senator Bishop is chair of the Senate Finance subcommittee for DNR and the Public Access Assertion and Defense Unit along with the Department of Law is the kind of team the Legislature needs to keep in place and funded to continue the fight for statehood rights.

CHAIR BIRCH thanked the department for an informative presentation and "fighting the good fight" on behalf of all Alaskans and defending and asserting the state's public access rights, something that is very important.

5:00:28 PM
There being no further business to come before the committee, Chair Birch adjourned the Senate Resource Standing Committee meeting at 5:00 p.m.