

**ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE**

March 11, 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

OVERVIEW: ALASKA DEPARTMENT OF LAW OVERVIEW OF STATE LITIGATION
ON FEDERAL ISSUES

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

SETH BEAUSANG, Chief Assistant Attorney General
Natural Resources Section
Alaska Department of Law
Juneau, Alaska

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

TOM LENHART, Assistant Attorney General
Natural Resources Section
Alaska Department of Law
Juneau, Alaska

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

EMMA POKON, Assistant Attorney General
Environmental Section
Alaska Department of Law
Juneau, Alaska

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

ACTION NARRATIVE

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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 Coghill, Kawasaki, Giessel, Kiehl, Bishop, Reinbold, and Chair Birch.

OVERVIEW: Alaska Department of Law Overview of State Litigation on Federal Issues

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CHAIR BIRCH announced that the committee will hear an overview from the Alaska Department of Law regarding federal issues and conflicts. He noted that the federal government owns more 60 percent of all land in Alaska, approximately 224 million acres; this fact combined with the problem of federal overreach on state, local, tribal, and private lands set the stage for disagreement between Alaska and the federal government on a range of issues related to land access, fish and game management, and the development of the state's mineral, oil and gas resources.

He said thankfully the state has the attorney general and the Alaska Department of Law whose duty it is to assert and defend Alaska's interest in issues with the federal government, issues that matter deeply to Alaskans and that effect the state's ability to manage its destiny.

He noted that committee members have received copies of the current Alaska Department of Law list of federal issues and conflicts dated January 21, 2019. He announced that attending the committee to brief members on the 25 cases on the department's list are Seth Beausang, Chief Assistant Attorney General; Tom Lenhart, Assistant Attorney General; and Emma Pokon, Assistant Attorney General.

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SETH BEAUSANG, Chief Assistant Attorney General, Natural Resources Section, Alaska Department of Law, Juneau, Alaska, said the department will update the committee on federal litigation matters. He referenced a list of cases that the department will address during their overview. He said the group will skip cases that were reviewed in earlier committee meetings, noting that the previously addressed cases dealt with navigability issues that the state is handling, one case is the Sturgeon case that is before the U.S. Supreme Court.

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TOM LENHART, Assistant Attorney General, Natural Resources Section, Alaska Department of Law, Juneau, Alaska, explained that for the last 12 years he has been counsel for the State on the Roadless Rule and most things related to the Tongass. He specified that he would review the topic, "access and land" regarding federal issues and conflicts cases or matters.

He said the first case he will address is the Roadless Rule and the Tongass Land Management Plan because talking about roadless litigation without talking about the management plan is impossible.

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He addressed the Roadless Rule case as follows:

- Roadless Rule:
 - State of Alaska v. U.S. Department of Agriculture:
 - D.C. Circuit Court;
 - 17-5260.
 - Assistant Attorney Generals:
 - T. Lenhart,
 - S. Lynch.
 - Alignment with Feds:
 - Not aligned.
 - Brief Description:
 - State challenged the application of the Roadless Rule in Alaska. The Roadless Rule prohibits the building of roads in wilderness areas, which essentially shuts down resource development in many areas of the Tongass. On a parallel track, the State is pursuing a regulatory fix for Alaska.
 - Status:
 - On the regulatory fix, the State recently entered into an MOU for cooperating agency status with the U.S. Department of Agriculture to work on a

Tongass state specific rule to replace the Roadless Rule. The rulemaking process is anticipated to take 18 months. In the litigation, the district court upheld the Roadless Rule, and the State appealed. Briefing has been completed, but the appellate court granted intervenor's request to put the case on hold until the rulemaking is done.

MR. LENHART explained that in 2001 during the last week of the Clinton Administration, the USDA promulgated the Roadless Rule, it effectively withdrew from future development 60 million acres of national forest nationwide, equivalent to 2 percent of all land in the U.S. In Alaska, in addition to the Chugach, road construction and timber harvest was prohibited on 9-million acres of the Tongass National Forest which dramatically affected the Alaska timber industry and other activities as well.

He said in the 18 years since the USDA promulgation, the State has remained very busy in seeking relief from the Roadless Rule. The approach has been a three-pronged effort and all branches of the federal government. The State has been in federal court almost nonstop. The State has worked closely with USDA in rulemakings to try and obtain some relief. The State's delegation in Washington, D.C. has also been active and on numerous occasions they have introduced federal legislation to exempt the Tongass National Forest, but the attempts have not been successful to date.

He addressed where the State currently is in the courts regarding the Roadless Rule in the Tongass, noting that the rule was not in effect from 2001 to 2011 due to successful litigation and USDA rulemaking exemptions; however, an "en banc" decision in 2011 by the U.S. Court of Appeals for the Ninth Circuit invalidated the "exemption rule" that applied to the Tongass. The state filed new litigation challenging the underlying Roadless Rule in the U.S. District Court for the District of Columbia and eight years later the State is still fighting the battle in the courts.

He detailed that the State has been through court battles on venue standings and statute of limitations, noting that the State received a dismissal on a statute of limitations where the ruling was taken up to the D.C. Circuit Court where it was successfully reinstated. Finally, several years ago the district court ruled against the State on the merits, the State immediately appealed to the D.C. Circuit; the case has been

fully briefed for some time, was on the docket for oral arguments the fall of 2018, but the environmental interveners in the case moved to hold the case in abeyance pending the final outcome of the USDA's rulemaking. The State is looking at ways to get the abeyance lifted. If the abeyance is lifted and the case is moved to a final decision the remedy could result in invalidation of the entire Roadless Rule either nationwide, in Alaska, or just the Tongass.

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MR. LENHART addressed the matter of an amendment to the Tongass Land Resources Management Plan as follows:

- 2016 Amendment to the Tongass Land Resources Management Plan (TLMP):
 - Assistant Attorney Generals:
 - T. Lenhart,
 - S. Lynch.
 - Alignment with Feds:
 - Uncertain.
 - Brief Description:
 - The 2016 TLMP amendment fully incorporated both the Roadless Rule and the Secretary of Agriculture's directive to rapidly transition timber harvest from old growth to young growth. The result would effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry would likely be forced out of business while utilities, mining and other industries would be substantially harmed.
 - Status:
 - The Secretary of Agriculture granted the State's petition for a rulemaking to amend the TLMP, along with the State's petition for a rulemaking on the Roadless Rule. USDA published a Notice of Intent to commence the rulemaking on August 30, 2018. A final rule is expected by summer of 2020.

He detailed that in January 2018 the State petitioned Secretary of Agriculture Sonny Perdue to seek both a new rulemaking to exempt the Tongass and to revise the 2018 Tongass Land Management Plan. In August 2018, Secretary Perdue granted the State's petition, not in quite the way the State would have liked, but there is rulemaking that is well underway with one alternative to completely exempt the Tongass. The State is actively involved in the rulemaking because the State is a

cooperating agency in committees with the USDA. A draft Environmental Impact Statement (EIS) is expected to be issued in July 2019 and a new rule to be in place within one year of the EIS. The alternatives will probably range from "no action" up through "full exemption" for the Tongass.

MR. LENHART explained that even if the State gets a new exemption rule or wins the court decision, the 2016 Land Management Plan would come in. Under the National Forest Management Act it's required that every national forest have a written management plan and that the U.S. Forest Service take all actions in compliance with the plan; in effect, the forest plan has the effect of law because a violation of the plan by the U.S. Forest Service is automatically a violation of the National Forest Management Act and fully enforceable in the federal courts. The 2016 Land Management Plan effectively, not technically but effectively, is law. When the Land Management Plan was revised in 2016 the U.S. Forest Service took most of the important restrictions in the Roadless Rule and put them into the Land Management Plan; however, the Roadless Rule was not just referenced so that if the Roadless Rule is revised the restrictions are revised, the restrictions were actually lifted substantively so that even if the Roadless Rule goes away, even if there is a new exemption rule, the Land Management Plan would have to be amended or the independent restrictions would still be enforceable prohibiting tree cutting and road building. The State petition asked that both be done, but the decision was made to first do the rulemaking and then amend the Land Management Plan if necessary.

He summarized that the finish line is not quite in sight yet, after 18 years there is a little while to go.

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SENATOR COGHILL asked that Mr. Lenhart address how the management areas under Roadless Rule impacts neighboring properties.

MR. LENHART specified that the Roadless Rule does not apply outside of its boundaries; however, the rule may limit access to properties that are next door. He conceded that Southeast Alaska is a patchwork of federal and state lands.

SENATOR COGHILL asked if there has been litigation on the Roadless Rule's impact on neighboring properties.

MR. LENHART replied not directly because there is no legal context.

SENATOR COGHILL conceded that his argument is economically related. He remarked that the inability to standup an industry because of the Roadless Rule has been significant.

MR. LENHART replied that the impact has been huge. He conceded that state timber sales are not going to support a sawmill and federal timber sales are needed to maintain the timber industry.

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He addressed the "Shelter Cove Road" case as follows:

- Shelter Cove Road:
 - State v. U.S. Forest Service:
 - 1:16-cv-00018;
 - Greater Southeast Alaska Conservation Community v. Stewart:
 - State intervened in support of defendant;
 - 1:16-cv-0009.
 - Assistant Attorney General S. Lynch.
 - Alignment with Feds:
 - Aligned on the end result and not on justification.
 - Brief Description:
 - The State intervened to defend the building of Shelter Cove Road in Ketchikan. Contrary to the federal government's position, the State asserted that it has a Section 4407 easement for the road. This would mean no environmental review is needed. To ensure the 4407 issue is addressed, State brought a separate lawsuit on that issue. The lawsuits have been consolidated and, in an effort to end both cases, the USFS issued the 4407 easement just prior to the State's motion for summary judgment on all remaining issues.
 - Status:
 - In the environmental group's challenge to the State's road project, the court issued partial summary judgment in the State's favor on all environmental permitting issues and dismissed all 4407 issues with prejudice on a finding of no NEPA or NFMA requirements for these easements. In the State's companion suit against the USFS, on November 9, 2018 the State filed a motion for summary judgment seeking declaratory judgment on

the scope and requirements for the 4407 easements. The USFS response is due after the federal government shutdown. Construction on the road continues while the case proceeds.

MR. LENHART detailed that "Shelter Cove" was a road construction project and the federal government was first sued by environmental plaintiffs trying to stop the project. The State intervened as a codefendant on the side of the federal government. The environmental case has been resolved in the favor of the federal government and the road is being built; however, one of the arguments that was brought by the environmental groups was regarding the State's "4407 easements" that were granted to Alaska from Congress. The argument from the environmental plaintiffs is that road construction on the easements required a full National Environmental Policy Act (NEPA) process and an Environmental Impact Study (EIS). The State contended that any impact statement was not needed but the federal government agreed with the environment plaintiffs. The court has dealt with the case in terms of the plaintiffs, finding in favor of the federal government on all counts; however, because of the State's disagreement with the federal government on "440 easements," the State filed a cross-action on the federal government that was decided in the State's favor but continued action was taken for a declaratory judgement in an attempt to permanently put to rest the remaining questions on all of the other "4407 easements."

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He addressed the "4407 easements" and explained that in 2005 in the federal highway bills, there were 19 transportation and utility easements granted by Congress to the state of Alaska that were not contingent on anything. The problem has come in because in 2005 the easements were not well surveyed legal descriptions, they were red-lines on a map. The work was not properly done to locate for roadbuilding purposes. When refined, the easements were found to go through lakes, over cliffs, so most of the red-lines were not accurate for road building. The issue is the federal government's position has been if you move outside of the red-line to relocate the easement, even if the move is feasible with less environmental impact, the change is a new federal decision subject to NEPA, an EIS, fully reviewable, and subject to court action. The State's argument has been the easement shows a right to go from "point A to point B" and there is flexibility for the State to figure out where the best alignment. Once the alignment and the permitting process with the Army Corps of Engineers and other needed federal permits are

attained, all the U.S. Forest Service has a right to do is the administrative act of issuing an easement and there is no decision process. Congress did go back to the bill to clarify the intent for the easements; that is the issue remaining before the federal district court in Alaska and the State is hoping for a favorable ruling where the 15 remaining "4407 easements" become a "done deal."

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SENATOR COGHILL asked what the timeline is for the ruling on the easements.

MR. LENHART answered that the briefing should be done within 30 days. He said once the briefing is done, he doubts the judge will hear arguments and suspected that the case will be ripe for a decision within two years.

CHAIR BIRCH asked what an example is of a "4407 easement." He inquired if "Shelter Cove Road" is a "4407 easement."

MR. LENHART answered yes. He detailed that the title "4407" simply is the section in the 2005 Highway Bill that provided the easements.

SENATOR COGHILL noted U.S. Congressman Don Young can comment on the "4407 easements" as well.

MR. LENHART referenced the "King Cove Road" matter as follows:

- King Cove Road:
 - Assistant Attorney General T. Lenhart.
 - Alignment with Feds:
 - Not aligned.
 - Brief description:
 - After attempts under the previous federal administration to complete a land exchange, King Cove and the U.S. Department of Interior entered into a 2017 land exchange which has been challenged by environmental groups. The purpose of the land exchange is to build a road between the community of King Cove and Cold Bay Airport, specifically for emergency purposes. The State is not a party to the litigation but will monitor the case closely.
 - Status:
 - On August 24, 2018, the State filed an amicus brief in support of the briefs filed by the U.S.

Department of Interior and the King Cove Group, seeking to uphold the land exchange. The case has been fully briefed, and the parties are awaiting a decision from the court.

MR. LENHART detailed that the State has been litigating the King Cove to Cold Bay road through the Izembek National Wildlife Refuge for many years. The 2009 land exchange between state and federal lands was only subject to the U.S. Secretary of Interior's approval based on an EIS, but former Secretary Jewel was against the road. An appeal to the decision was withdrawn because of the change in federal administrations and a new land exchange was worked out between the U.S. Department of Interior and the King Cove Corporation in 2017. Under the National Environmental Policy Act (NEPA), there is a special provision that exempts native corporations from an EIS for federal land exchanges, but a lawsuit challenged the land exchange. The State was not party to the 2017 land exchange, but the State filed an amicus brief supporting the land exchange; that case has been briefed, is ripe for a decision, and awaits U.S. District Judge Gleason's ruling. Based on Judge Gleason's ruling, there is the possibility of a circuit court action.

He explained that the land exchange itself does not authorize a road, noting that the process is strictly a real estate transaction. Once the land exchange is completed there would have to be construction permits requested through the U.S. Army Corps of Engineers. The Alaska Department of Transportation and Public Facilities has been involved in identifying the best route and lands sought in the land exchange. Should approvals be granted, Alaska will play a key role in designing and constructing the road which will ultimately be turned over to the borough.

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SENATOR KAWASAKI asked what the "decision tree" is regarding whether to be party to litigation.

MR. LENHART replied that his experience has been to have discussions with the active litigants, generally the State gets invited. The decision ultimately goes to the lieutenant governor or the governor.

MR. BEAUSANG added that requirements must be met to intervein in a case where a certain legal standing is needed whereas appearing as an "amicus" is easier to weigh in. Possible consideration to not being a party is when participation causes

a disruption or complication to the party being supported. If the State intervenes as a party then the State would have certain legal rights to weigh in substantively, rights that are not available when an amicus brief is filed.

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SENATOR KAWASAKI asked if there are other states with Roadless Rule problems that have come forward with amicus brief filings to help a position or precedent.

MR. LENHART answered that Wyoming has been a lead state for some time in challenging the Roadless Rule. Wyoming had an injunction against the Roadless Rule that the State filed an "amicus" in their state. Colorado has a state-specific Roadless Rule which is what the State is now engaged in doing; however, the State has never had an amicus filing by other attorney generals.

MR. BEAUSANG addressed the "Eastern Interior Resource Management Plan" as follows:

- Eastern Interior Resource Management Plan (EIRMP) Adopted by the Bureau of Land Management (BLM):
 - Assistant Attorney General A. Nelson.
 - Alignment with Feds:
 - Not aligned.
 - Brief description:
 - The EIRMP, adopted January 6, 2017, recommends unjustified mineral closures and conservation designations that are inconsistent with Alaska National Interest Lands Conservation Act (ANILCA) and Federal Land Policy Management Act's multiple use mandate. The EIRMP also fails to provide for lifting outdated Alaska Native Claims Settlement Act (ANCSA) "d-1" withdrawals unless new conservation withdrawals are implemented.
 - Status:
 - The Government Accountability Office determined in November 2017 that the EIRMP is a rule under the Congressional Review Act (CRA), which means Congress has 60 session days to repeal it; however, BLM has not submitted the Plan to Congress as required by the Act and it's unclear whether the 60-day period has already run or has yet to begin. The State continues to monitor congressional and agency action on the issue and evaluate options, including administrative

action, litigation, or working with Congress to repeal it.

MR. BEAUSANG said BLM's EIRMP covers an area in eastern Alaska, specifically the Fortymile River region that is high in mineral potential. The State will watch BLM's recommendations from the EIRMP and consider taking litigation action.

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SENATOR COGHILL asked him to confirm that within the EIRMP there are areas of environmental concern that if the "d-1" restrictions are not lifted the outcome is a de facto wilderness taking.

MR. BEAUSANG answered that Senator Coghill is exactly right. He emphasized that the plan is a recommendation at this point. He opined that what the BLM is trying to do is rather than lifting the withdrawals they are almost creating a "super conservation system" that would really impact development or natural resource management.

He addressed "Lands into Trust" as follows:

- Lands into Trust:
 - Assistant Attorney General A. Nelson.
 - Alignment with Feds:
 - Uncertain.
 - Brief description:
 - After the district court in Akiachak v. Department of Interior (DOI) found in favor of plaintiffs, DOI changed its regulations to permit lands in Alaska to be taken into trust. In the summer of 2018, the Department of Justice rescinded the Solicitor's Opinion on which the DOI relied to change its regulations. DOI has stated it will not process any new applications, but federal representatives have stated that pending applications would continue to be processed.
 - Status:
 - The State commented on six applications before the DOI embarked on the new rulemaking process-- one from the Craig Tribal Association, three from the Central Council Tlingit and Haida Indian Tribes of Alaska, one from the Ninilchik Traditional Council, and one from the Native Village of Fort Yukon. The Bureau of Indian

Affairs (BIA) has granted the Craig application, but has not acted on the other applications. The BIA held public meetings and consultations with tribes throughout the State. Written comments were due by January 25, 2019.

MR. BEAUSANG explained that for a long time, until the "Akiachak litigation," the position of DOI in regulation was that there was an Alaska exemption for taking lands into trust, that's not the course that was chosen for Alaska through the Alaska Native Claims Settlement Act (ANCSA). The course was not to follow the reservation system that was adopted in the Lower 48 and that seemed clear to everyone until the district court took a different view in the "Akiachak litigation" and subsequently the DOI then adopted that view, adopted regulations, and adopted the Solicitor's Opinion which justified the district court's legal reasoning that taking lands into trust was allowed in Alaska.

He detailed that the DOI rescinded the Solicitor's Opinion in the 2018 and invited comment on the next steps for taking lands into trust in Alaska. In January 2019 the State submitted its comment letter that urged the DOI to revert to its position which the State thinks is clearly the obvious result under ANCSA that lands should not be taken into trust, there should not be Indian country with one exception under ANCSA. The State is waiting to see what the DOI is going to do and that will determine the State's next steps.

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SENATOR COGHILL noted that DOI made a proposal and asked what their expected timeline will be for comment and what their expected decision points are.

MR. BEAUSANG replied that the comment deadline ends later in March and there is no set deadline for DOI to make its decision.

SENATOR COGHILL opined that he finds the process troublesome where the DOI puts a deadline on the State, but the DOI's decision-making process has "no cap."

SENATOR KIEHL opined that ANCSA was the last gasp of the "termination era" in federal Indian law and asked if the State's executive branch's position is that nothing in federal Indian law has changed applicably to Alaska since then.

MR. BEAUSANG specified that the State's position is that ANCSA settled native claims and charted a new course to not have the

reservation system, to not have Indian country as was followed in the Lower 48; however, the district court in "Akiachak" determined that ANCSA did not resolve that issue and that lands could still be taken into trust that results in Indian country. The State's position is that taking lands into trust was settled with ANCSA.

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SENATOR KIEHL opined that the question of the reservation system versus whether tribes may have land they own taken into trust is a different question.

CHAIR BIRCH asked him to explain the consequences and meaning of "taking lands into trust."

MR. BEAUSANG explained that there are 229 native tribes in Alaska with land holdings that are often not contiguous. Taking lands into trust would create Indian country which would impact the state's ability to have control over natural resource management and environmental regulation.

SENATOR BISHOP opined that for a native tribe to convert land into trust is a "high bar."

MR. BEAUSANG answered that there are several applications pending with one that may have been accepted by DOI. He conceded that he is not familiar with the process for making the land conversion decisions.

[4:07:51 PM](#)

He addressed the "ANWR Boundary IBLA Appeal" as follows:

- Arctic National Wildlife Refuge (ANWR) Boundary Interior Board of Land Appeals (IBLA) Appeal:
 - Assistant Attorney Generals:
 - M. Schechter,
 - A. Brown.
 - Alignment with Feds:
 - Not aligned.
 - Brief description:
 - BLM denied the State's request for conveyance of 20,000 acres, based on dispute over western boundary of ANWR. The State also objected to a survey plat of the area directly south of the area requested for conveyance.
 - Status:

- IBLA denied BLM's motion to dismiss and has consolidated the State's two appeals. Briefing has been completed and the case is now pending with the IBLA, which has a significant case backlog and is unlikely to issue a decision before late 2019 at the earliest.

MR. BEAUSANG said ANWR's northwestern boundary has been a longstanding dispute between Alaska and the federal government. The boundary in question is the western bank of the Canning River, a position that the state agrees with. BLM's view is that the river moved, and that the boundary line runs through many miles of open tundra. The land in question is 20,000 acres, land that has the potential for oil and gas development and staging. The case has been briefed before the IBLA, but the board has a track record of not issuing prompt decisions.

CHAIR BIRCH noted that the Senate passed a resolution earlier in the day encouraging an ANWR lease sale. He asked if the litigation is tied to the ANWR lease sale.

MR. BEAUSANG answered that he does believe there is a relationship. He opined that however the litigation is resolved the outcome will not impact the lease sale.

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He addressed the "ANWR Section 1002" matter as follow:

- ANWR Section 1002:
 - Assistant Attorney General M. Schechter.
 - Alignment with Feds:
 - Aligned.
 - Brief description:
 - The Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, opened the ANWR 1002 area to oil and gas exploration and leasing.
 - Status:
 - The Draft EIS is out for public comment. State agencies are to submit comments on the Draft EIS to the state Office of Project Management and Permitting (OPMP) by January 24. OPMP will submit the State's comment letter to BLM by Monday, Feb. 11 on behalf of the State.

He explained that "Section 1002" was something talked about in the Senate resolution. Section 1002 is the area of ANWR that is open for leasing out of the Tax Cuts and Jobs Act of 2017. The

Draft EIS is necessary before leases can go forward. Under the Act, the federal government is required to have the two lease sales within ten years and 50 percent of the revenues will go to the state of Alaska.

CHAIR BIRCH specified that the deadline for public comment is 9:59 p.m. on Wednesday, March 13.

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EMMA POKON, Assistant Attorney General, Environmental Section, Alaska Department of Law, Juneau, Alaska, said the three cases she will address applies to nationally applicable Environmental Protection Agency (EPA) regulations, noting the rules applying to Alaska are being reevaluated due to prompting from a presidential executive order. Alignment with the federal government is dependent on the outcome of the rulemakings.

She addressed the "2017 Regional Haze State Implementation Plan Rule" as follows:

- 2017 Regional Haze State Implementation Plan Rule:
 - State v. EPA; Texas v. EPA (D.C. Dir., 17-1074).
 - Assistant Attorney General S. Mulder.
 - Alignment with Feds:
 - Uncertain.
 - Brief description:
 - The State, along with North Dakota, Texas, and Arkansas, challenged the 2017 Regional Haze State Implementation Plan Rule, which imposed quantification requirements on international air emission contributions to regional haze affecting national parks and wilderness areas. The State is concerned about having international contributions to haze, that are beyond the State's control, count against Alaska and other states. The State also objects to the EPA shifting its modeling responsibilities and modeling costs to Alaska.
 - Status:
 - At the appellate court level. Briefing is currently on hold, while EPA revisits aspects of the rule and engages in a new rulemaking process.

She specified that the 2017 rule was a requirement change in how visibility is improved around Class I areas. Alaska has four Class I areas, three are in remote islands and the fourth is Denali National Park. Regional haze sources can be from natural

and human sources; for example, the 2012 Consent Decree between Golden Valley Electric Association (GVEA) and the federal government required pollution controls to be put on GVEA's Healy power plant or to shut down Healy Unit 1 by 2024 due to concerns over contributions to regional haze close to Denali Nation Park. Alaska also has concerns over haze contributions from "Arctic haze" that originates from smelter plants in Siberia and dust storms from the Mongolia and China deserts. The EPA traditionally did not expect Alaska to address "Arctic haze," but the 2017 rule caused the EPA to require Alaska to use a scientifically valid methodology with data to prove and quantify the "Arctic haze" contribution in order for the state to not reduce haze sources within the state. The State thinks that international modeling of air currents is an EPA responsibility under the statute, so the state challenged the 2017 rule. The briefing on the case is on hold due to a reevaluation of the 2017 rule by the EPA. The State expects additional guidance from the EPA by spring 2019, including a modeling platform and a revised rule.

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MS. POKON addressed the "Clean Power Plan" as follows:

- Clean Power Plan:
 - 40 C.F.R. 60.5700-.5820.
 - Assistant Attorney General S. Mulder.
 - Alignment with Feds:
 - Uncertain.
 - Brief description:
 - The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. The EPA excluded Alaska and Hawaii from the final rule, but the EPA indicated that they would likely include Alaska in the future after accruing more evidence.
 - Status:
 - Other states sued challenging the rule. President Trump signed an executive order calling on the EPA to review the Clean Power Plan and end the moratorium on coal mining on federal lands. The EPA proposed to repeal the Clean Power Plan in October 2017 and the EPA has not made a final decision. On August 21, 2018, the EPA announced it is proposing a new rule, the Affordable Clean Energy rule ("ACE"), to replace the Clean Power Plan. The comment period closed on October 30,

2018. The State is awaiting the EPA's decision on the rulemaking.

MS. POKON detailed that the EPA based their plan on the ability to access the "interstate interconnected transmission grid" for reducing carbon emissions by accessing renewables and natural gas sources rather than from coal generation. The State pointed out that Alaska was not connected to the interstate transmission grid but noted that Alaska has an instate transmission grid with constraints. The EPA rule effectively assumed that Alaska would be able to replace Healy generation with Bradley Lake hydropower; however, challenges exist with transmission and reliability. The EPA ultimately exempted Alaska from the rule, but the agency indicated that the issue may be revisited. Several states challenged the rule in court, but the State did not join in the litigation because Alaska was not involved in the final rule. The State is watching the case because the EPA said they might come back and the rule exhibits a broader approach by the agency regarding the Clean Air Act where winners and losers are chosen within the industry, a dramatic departure in how the agency exercises its authority.

SENATOR COGHILL noted that he had read briefs that showed constitutional questions on the EPA's "Clean Power Plan" and their new method of management rather than addressing air quality issues.

MS. POKON explained that the case is being held in abeyance pending the outcome of a new rulemaking. The EPA has proposed a new rule called, "The Affordable Clean Energy Rule." The proposed rule takes a more traditional approach in using current power generation more efficiently, including coal plants. The comment period on the proposed plan closed in October 2018 and the State is waiting to see what comes out as a final rule.

[4:19:32 PM](#)

She addressed the "Waters of the U.S. Rule" as follows:

- Waters of the U.S. (WOTUS) Rule:
 - North Dakota v. EPA:
 - North Dakota District Court;
 - 3:15-cv-00059.
 - Assistant Attorney General E. Pokon.
 - Alignment with Feds:
 - Uncertain.
 - Brief description:

- State joined a coalition of 12 states challenging the 2015 "waters of the U.S." rule. Among other things, the 2015 rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within certain geographical limits to downstream waters already covered by federal law.
- o Status:
 - The district court action is currently proceeding in North Dakota Federal District Court. The WOTUS rule has been stayed by the court as to the states that are a party to this case, including Alaska. Summary judgment briefing is complete. The federal government is no longer defending the merits of the 2015 rule, though intervening environmental groups are. Oral argument has not been scheduled.

On August 16, 2018, a federal judge in South Carolina enjoined the Trump administration's order suspending the rule; that court decision resulted in the WOTUS rule going into effect for 26 states but does not affect the North Dakota court's stay.

Meanwhile the federal rulemaking process proceeds to withdraw or replace the rule. EPA and the U.S. Army Corps of Engineers released a prepublication version of a revised rule in December 2018. A 60-day public comment period will run from the date the formal notice is published in the federal register.

MS. POKON explained that the Clean Water Act applies its regulatory programs to navigable waters and the statute defines "navigable waters" as, "Waters of the United States including the territorial seas." The "navigable waters" definition is notoriously ambiguous with a long history of the EPA and the U.S. Army Corps of Engineers defining the term and issuing various regulations for providing further guidance. The rule is important for Alaska because it determines where a project is subject to federal or state permitting in terms of impacting water. The rule reflected an even broader approach than what the EPA was taking historically; for example, the federal government could assert its jurisdiction over an isolated water body after a single rainstorm or if a fixed setback in within a certain number of feet. The summary judgement briefing has been

completed in the lawsuit and the State is waiting for an oral argument date; however, the situation is peculiar because the environmental interveners are defending the case, not the federal government.

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CHAIR BIRCH noted that in January several legislators including himself, Senator Giessel, and Senator Coghill signed a letter to Attorney General Clarkson questioning the EPA's authority to force the state of Alaska to adopt a process for designating "Tier 3 Waters" which is deemed to be a restrictive designation that gave rise to concerns about what is actually in the state's best interest. He asked if there has been an assessment of the "Tier 3" designation.

MS. POKON explained that the Tier 3 Waters program is another Clean Water Act issue. Another assistant attorney general is actively looking at the Tier 3 designation. There is pending legislation that will clarify what the state of Alaska's process would or would not be and the pending result will dictate where the department proceeds.

SENATOR COGHILL remarked that the designation is, "basically anything that is wet."

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MR. BEAUSANG said he will address the "fish and game" matter, starting with the "NPS and USFWS Rules on Management of Fish and Game" as follows:

- NPS and USFWS Rules on Management of Fish and Game:
 - State v. Zinke:
 - 3:17-cv-00013.
 - Assistant Attorney Generals:
 - C. Brooking,
 - J. Alloway.
 - Alignment with Feds:
 - Not aligned.
 - Brief description:
 - The State is challenging regulations adopted by the National Park Service (NPS) affecting hunting on preserve lands throughout Alaska and regulations adopted by the U.S. Fish and Wildlife Service (USFWS) restricting hunting on the Kenai National Wildlife Refuge (NWR). Three cases were filed and consolidated. The NPS regulations preempted state management of wildlife,

prohibited several means of take for predators, and changed public participation procedures for hunting and fishing closures. The USFWS regulations prohibit certain activities within the Kenai NWR and the State is objecting to the prohibition on taking brown bears at black bear baiting stations, a practice that is allowed under state regulations.

o Status:

- In July 2017, NPS and USFWS were directed by the Acting Assistant Secretary for Fish and Wildlife and Parks to initiate rulemaking procedures to reconsider their rules. In June 2018, NPS published a proposed rule that would reverse much of the 2015 rule challenged in the litigation, and the comment period closed October 5, 2018. USFWS has not published a proposed new rule. The litigation has been stayed for several months pending possible rulemaking that might moot portions of the lawsuit. The case is stayed for 30 days as a result of the federal government shutdown. A status report was scheduled to be filed on February 6, 2019.

MR. BEAUSANG summarized that the federal government was trying to, under the Alaska National Interest Lands Conservation Act (ANILCA), take over primary game management which is not what ANILCA is about at all. The new federal administration seems to be agreeing with the State's argument because they have been backtracking quite a bit. The litigation is on hold, the NPS has proposed a new rule which reverses their previous proposal and the State is waiting for the USFWS to take a similar approach with a new rule as well by taking back the federal overreach adopted by the prior administration.

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He addressed "Congressional Review Act Resolution on USFWS Rules" as follows:

- Congressional Review Act Resolution on USFWS Rules:
 - o Center for Biological Diversity v. Zinke:
 - 3:17-cv-00091.
 - o Assistant Attorney Generals:
 - C. Brooking,
 - J. Alloway.
 - o Alignment with Feds:
 - Generally aligned.

- o Brief description:
 - The Center for Biological Diversity filed a lawsuit to challenge Pub. L. 115-20 which was adopted under the rules established in the Congressional Review Act (CRA). Pub. L. 115-20 revoked a rule adopted by the USFWS that would have restricted hunting and affected refuge closure procedures on all refuges throughout Alaska. The State and other groups intervened on behalf of the federal defendants. Because the plaintiffs are challenging the constitutionality of the CRA, this case could impact prior actions taken by Congress and the President under the CRA.
- o Status:
 - The district court dismissed the litigation in June 2018. In August 2018, plaintiff appealed to the Ninth Circuit. Appellant's opening brief was filed. Briefing by federal defendants and intervenors has been extended as a result of the federal government shutdown. Oral argument has not yet been scheduled.

SENATOR KAWASAKI asked why the State filed as an intervener versus filing an amicus brief.

MR. BEAUSANG replied that he was not privy to the decision but could provide some guesses. He explained that case disruption or doing something that is not in the interest of the side that the State is intervening on would not be an issue. The State has a very important point to make that probably would not have been made by the federal government and that is that Alaska is the primary manager of game in the state and the federal government has not always expressed it as clearly and plainly as the State thinks it should. The State wanted to be a party and to make sure that the court was aware that Alaska has a stake in the case as the primary manager of game where the state's rights are being impacted substantively in addition to the federal government defending its statute. The decision probably was that it is much better to be a party to the case with the previously noted interest as opposed to just expressing a view through an amicus brief.

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He addressed the "Salmon Fishery Management Plan" as follows:

- Salmon Fishery Management Plan:

- o United Cook Inlet Drift Association v. National Marine Fisheries Service:
 - Alaska intervened in support of defendants;
 - 3:13-cv-0104.
- o Assistant Attorney General B. Meyen.
- o Alignment with Feds:
 - Aligned.
- o Brief description:
 - United Cook Inlet Drift Association (UCIDA) challenged Amendment 12 to the Salmon Fishery Management Plan in Alaska that ensured Alaska retained full authority over salmon management in three historical areas beyond the three-mile limit, as it has since statehood.
- o Status:
 - The court of appeals found in favor of the plaintiffs, reversing the district court's decision. The U.S. Supreme Court denied the State's request for review of the Ninth Circuit's decision. The district court has retained jurisdiction to oversee adoption of a new plan, and there continues to be litigation over attorneys' fees. The North Pacific Fishery Management Council continues to work through the issues and will likely take a while for adoption of any final management measures.

MR. BEAUSANG summarized that the State was on the side of the federal government. The case was brought up by commercial fisherman who were unhappy that the fishery management plan for salmon fisheries in Alaska did not include the federal waters of Cook Inlet. The fisheries within federal waters of the Cook Inlet have always been managed exclusively by the state since statehood. The commercial fishermen in the case believed that the fisheries should be managed by the federal government under the Magnuson-Stevens Act, even though that had never been done. The Ninth Circuit Court's decision required a new fishery management plan include Cook Inlet as well as two other historical fisheries near the Copper River and False Pass, fisheries that have always been managed by the state. The North Pacific Fishery Management Council decided to proceed with Cook Inlet first, a committee was formed that included the plaintiffs in the case as well as other stakeholders to make recommendations to the council. A draft plan by the council is not expected for a year or more.

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SENATOR REINBOLD remarked that the action goes against a lot of the normal bane a lot of Alaskans have for federal control of state resources. She asked why the commercial fishermen would want federal control.

MR. BEAUSANG presumed that the fishermen believed that the Board of Fisheries was not managing the resource as it would be managed under the Magnuson-Stevens Act.

He addressed the "Critical Habitat" case as follows:

- Critical Habitat:
 - Alabama v. National Marine Fisheries Service:
 - Alabama District Court;
 - 1:16-CV-00593.
 - Assistant Attorney General B. Meyen.
 - Alignment with Feds:
 - Uncertain.
 - Brief description:
 - The State joined 17 other states to challenge two new rules regarding the designation of critical habitat. The new rules greatly expand the types of areas that can be designated, without much, if any, connection to the presence of the protected species. The Attorney General also joined a letter with several other attorneys general asking the new federal administration to review and withdraw these rules.
 - Status:
 - On March 14, 2018, settlement was reached whereby plaintiff states dismissed the case without prejudice and the federal government agreed to submit revised rules. Revised rules have now been proposed, and the comment period closed in December. We are now awaiting a decision on the proposed rule.

He detailed that the State filed the case with 17 other states challenging rules under the Endangered Species Act that expanded the ability of the National Marine Fisheries Service (NMFS) to designate critical habitat even if a species did not live in a specified area and the land in the specified area did not possess the features that would enable the species to live. Alaska has been down the road before regarding endangered species with the federal government where huge areas were designated as critical habitat. In 2018 a settlement was reached where the federal government agreed to submit revised rules, the

comment period has closed, and the State is waiting for the rules to be finalized.

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MR. BEAUSANG addressed the "Comprehensive Environmental Response, Compensation, and Liability Act Hard Rock Mining" as follows:

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Hard Rock Mining:
 - Idaho Conservation League v. Pruitt:
 - D.C. Circuit Court;
 - 18-1141.
 - Assistant Attorney General A. Brown.
 - Alignment with Feds:
 - Aligned.
 - Brief description:
 - The State intervened with 13 other states in a lawsuit concerning the EPA decision not to impose a federal requirement for financial assurances under the CERCLA on hard rock mines. The EPA recognized that states, such as Alaska, have robust financial bonding and regulatory requirements in place to protect the environment, making a federal requirement unnecessary. Environmental groups sued the EPA, asserting that it must adopt regulations imposing financial assurances on hard rock mines.
 - Status:
 - The State's intervention was accepted at the appellate court level. Briefing was completed in December 2018. Oral argument has not yet been scheduled.

He summarized that the EPA was compelled through litigation to adopt rules for financial responsibility for hazardous substances through CERCLA. Hard rock mining was the first industry class chosen to adopt the new rules and states like Alaska were concerned that the rules would be duplicative, burdensome, and "one sized" that would preempt unique and adaptive state rules that have been working successfully for some time. In December 2017 the EPA withdrew its proposed rule and was subsequently sued, Alaska and 13 other states intervened to defend the EPA's decision.

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MR. BEAUSANG addressed the "Reversal of Ban on Offshore Development" case as follows:

- Reversal of Ban on Offshore Development:
 - League of Conservation Voters v. Trump:
 - 3:17-cv-00101.
 - Assistant Attorney General J. Douglas.
 - Alignment with Feds:
 - Aligned.
 - Brief description:
 - Before leaving office, former President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all leases in certain off-shore areas, including large portions of the Chukchi and Beaufort Seas. President Trump issued an executive order rescinding the ban, and environmental groups have challenged the plan. The Bureau of Ocean Energy Management (BOEM) is gathering comments on a new proposed five-year National Offshore Oil and Gas Leasing Program, for years 2019-2024. The State intervened in a lawsuit to support and defend the President's executive order.
 - Status:
 - At the district court level. The plaintiffs filed a motion for summary judgment on June 8, 2018, and the State filed its own motion for summary judgment and an opposition to plaintiff's motion. Briefing was completed, and oral argument was held on November 9, 2018. The State is awaiting the court's decision.

He summarized that the case occurred on the twilight of the Obama Administration where President Obama issued an executive order withdrawing large portions of the Chukchi and Beaufort seas from oil and gas leasing; shortly after, President Trump issued an executive order reversing President Obama's decision. The League of Conservation Voters sued and argued that under the Outer Continental Shelf Lands Act when a president acts to withdraw the areas from leasing, the decision can only be reversed by an act of Congress. The Outer Continental Shelf Lands Act allows land withdrawals from leasing, "from time to time" and the State believes the language in the Outer Continental Shelf Lands Act allows for decisions to be revisited.

CHAIR BIRCH asked if the argument on equity with the continental shelf leasing in the Gulf of Mexico "holds water."

MR. BEAUSANG specified that the case defends President Trump's reversal decision, but the argument for equal footing with other states might have been made if the situation was still under the "Obama ban."

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SENATOR KIEHL asked him to confirm that the that the legal argument for the language, "from time to time" means reinstatement can occur even though it does specifically not say that.

MR. BEAUSANG answered that the language, "from time to time," is used in other federal statutes and other courts have determined that what that means is that it can be revisited. In the State's view it's unusual to have a situation whereby presidential proclamation a decision can never be reversed by a subsequent president and that Congress would give one president the authority to make a decision that can only be reversed by an act of Congress. The State's argument is "from time to time" means that the decision can be revisited by a subsequent president can be revisited.

SENATOR COGHILL asked him to address the Revised Statute (R.S.) 2477 access issues with the federal government on right-of-ways.

MR. BEAUSANG answered that the Department of Law has a robust program on asserting the state's right to R.S. 2477 right-of-ways. He noted that the department is currently litigating two cases. He conceded that it would be nice if the State did not have to fight the federal government on the right-of-way issues.

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SENATOR COGHILL commented on the noted R.S. 2477 right-of-way cases and said his hope is the state can address the issue with the federal government on whole areas of access via setting a precedent.

MR. BEAUSANG concurred with Senator Coghill.

SENATOR GIESSEL thanked the Department of Law for their overview, noting that the Senate Resources Committee established the tradition of having the Department of Law update the committee on cases four years ago. She remarked that the update

makes her proud that the department is following issues on behalf of Alaska's rights.

CHAIR BIRCH said he echoed Senator Giessel's comments and thanked the department for their presentation and the work they do to protect Alaskans' interests. He added that he is amazed by the depth and breadth of the department's engagement.

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There being no further business to come before the committee, Chair Birch adjourned the Senate Resources Standing Committee meeting at 4:44 p.m.