ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
March 27, 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

SENATE BILL NO. 51
"An Act requiring the designation of state water as outstanding national resource water to occur by law; relating to the authority of the Department of Environmental Conservation, the Department of Fish and Game, and the Department of Natural Resources to nominate water for designation as outstanding national resource water; relating to management of outstanding national resource water by the Department of Environmental Conservation; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 42
"An Act requiring the state to quitclaim to the federal government land or an interest in land after a determination that the land or interest was wrongfully or erroneously conveyed to the state."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 51
SHORT TITLE: NATL. RES. WATER NOMINATION/DESIGNATION
SPONSOR(s): RESOURCES

02/11/19	(S)	READ THE FIRST TIME - REFERRALS
02/11/19	(S)	RES, FIN
03/15/19	(S)	RES AT 3:30 PM BUTROVICH 205
03/15/19	(S)	Heard & Held
03/15/19	(S)	MINUTE(RES)
03/20/19	(S)	RES AT 3:30 PM BUTROVICH 205
03/20/19	(S)	Heard & Held
03/20/19	(S)	MINUTE(RES)
03/27/19	(S)	RES AT 3:30 PM BUTROVICH 205

BILL: SB 42
SHORT TITLE: QUITCLAIM LAND TO UNITED STATES
SPONSOR(s): COGHILL

02/01/19	(S)	READ THE FIRST TIME - REFERRALS
02/01/19	(S)	RES
03/27/19	(S)	RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

TREVOR FULTON, Staff
Senator Birch
Alaska State Legislature
POSITION STATEMENT: Provided an overview of changes from Version K to Version R committee substitutes for SB 51.

EMILY NAUMAN, Legislative Counsel
Division of Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding SB 51.

JENNIFER CURRIE, Assistant Attorney General
Alaska Department of Law
Juneau, Alaska
POSITION STATEMENT: Addressed questions regarding SB 51.

ANDREW SAYERS-FAY, Director
Division of Water
Alaska Department of Environmental Conservation
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding SB 51.

RYNNIEVA MOSS, Staff
Senator Coghill

Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided an overview of SB 42.

DESIREE DUNCAN, Native Lands Manager
Central Council Tlingit and Haida Indian Tribes of Alaska
Juneau, Alaska
POSITION STATEMENT: Testified in support of SB 42.

SHEILA NEKETA, Staff
Land Management Services
Bristol Bay Native Association
Dillingham, Alaska
POSITION STATEMENT: Testified in support of SB 42.

ROBERT BREAN, Allotment Claimant
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 42.

MITCHELL ALLAN, Allotment Claimant
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of SB 42.

MURRAY CLAYTON, Allotment Claimant
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of SB 42.

MARTY PARSONS, Director
Division of Mining, Land and Water
Alaska Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: Discussed the division's work pertaining to SB 42.

ACTION NARRATIVE

3:30:30 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 Kawasaki, Coghill, Giessel, Kiehl, Reinbold, and Chair Birch.

SB 51-NATL. RES. WATER NOMINATION/DESIGNATION

3:31:16 PM

CHAIR BIRCH announced the consideration of Senate Bill 51 (SB 51). He said his intent is to adopt a committee substitute (CS) and report the bill on to the next committee of referral.

3:31:51 PM
SENATOR COGHILL moved to adopt the proposed CS for SB 51, labeled 31-LS0375\R, as the working document of the committee.

SENATOR GIESSEL objected for discussion purposes.

3:32:14 PM
TREVOR FULTON, Staff, Senator Birch, Alaska State Legislature, Juneau, Alaska, explained that there are two changes in the Version R CS for SB 51. He said the first change is cleanup recommended by Legislative Legal. On page 1, line 11, delete "and this section," which was a vestige from a previous draft of the bill.

He explained that the second, more substantive, change begins on page 1, line 12, and encompasses the entire subsection (b). The change was in response to concern that the old subsection (b) may have diluted the sponsor's intent that the legislature has the final decision as to whether to designate an outstanding national resource water. The old subsection (b) required the Alaska Department of Environmental Conservation (DEC), Alaska Department of Natural Resources (DNR), and the Alaska Department of Fish and Game (ADFG) to unanimously agree on a nomination prior to forwarding it to the legislature; however, a decision by the departments not to forward a nomination could be construed as precluding a decision by the legislature which was not the intent of the bill. The new subsection (b) requires that all nominations be forwarded, not just those recommendations by the departments, in an annual report to the legislature. The annual report does not constitute an appealable, final agency decision.

3:32:36 PM
SENATOR BISHOP joined the committee meeting.

MR. FULTON summarized that the intent of the CS is to maintain the benefit of having the three resource departments lend a minimum level of scientific review and subject matter expertise to Tier 3 water nominations while reinforcing the final authority for Tier 3 designation lies in the hands of the legislature.

CHAIR BIRCH asked Senator Giessel if she maintains her objection.

3:34:14 PM
SENATOR GIESSEL removed her objection.

CHAIR BIRCH announced that that the Version R CS for SB 51 is adopted.

SENATOR GIESSEL said she had requested that the Legislative Legal bill drafter and the Department of Law be available during the committee meeting. She explained that she has four areas of questions.

She asked Emily Nauman with Legal Services to address the CS for SB 51. She said the CS does not reference the legislature as the body that would make the determination. The CS only says on page 1, line 11, "only by law." She said her understanding of "by law" would mean a bill passed by the legislature and signed by the governor or it could mean "by initiative." She added that her understanding is the Alaska Constitution disallows initiatives that appropriate. She said she believes SB 51 is appropriating a resource of the state. She asked if a designation of water constitutes an appropriation per the constitution and therefore would be ineligible to be made by initiative.

3:36:03 PM
EMILY NAUMAN, Legislative Counsel, Legal Services, Division of Legal and Research Services, Legislative Affairs Agency, Alaska State Legislature, Juneau, Alaska, answered that Senator Giessel is correct; by law the designation encompasses both an act passed by the legislature, signed by the governor and an initiative. She said she will follow up, but her initial reaction is the bill is not an appropriation because the legislature is not giving the land to someone or making an allocation of an asset. The legislature is just submitting to more stringent water quality standards.

SENATOR GIESSEL countered that the designation of the water changes the ability of the land that is adjacent to that water body to be utilized in certain ways, thereby appropriating the land.

MS. NAUMAN replied that she does not see the bill as an appropriation but will look further into the issue.

SENATOR GIESSEL asked to hear from the Department of Law on the subject.

3:38:01 PM
JENNIFER CURRIE, Assistant Attorney General, Alaska Department of Law, Juneau, Alaska, said she will have to do some additional research to make a determination because she is not sure.

SENATOR GIESSEL emphasized that the committee needs to be aware of the appropriation issue.

She asked Ms. Nauman to address on line 11 in the bill, the word "law" within the phrase "only by law". She noted that regulations have the force of law and asked if the phrase could be interpreted to mean the Department of Environmental Conservation (DEC) could pass regulations that would put in place a designation of Tier 3 waters and thereby have a force of law.

MS. NAUMAN responded that she would have to take a moment to process the question prior to answering.

SENATOR COGHILL suggested that the committee look at art. XII, sec. 11 of the Alaska Constitution because an initiative is allowed. He added that there was also a court case where the intent was to give land to the university, but the land was an appropriation which barred the transaction.

MS. NAUMAN answered that Senator Giessel is correct that regulations commonly are described as law and she will get back to the committee on the effect of "only by law" and whether the section could be interpreted as the department adopting regulations.

3:40:17 PM
SENATOR GIESSEL directed attention to page 1, line 12 that says, "The department may accept an application for a nomination." She said the original version of SB 51 said the department shall accept nominations, whereas the CS says the department is accepting applications for nominations. She asked Ms. Nauman what the difference is between the application and the nomination because it sounds like another step.

MS. NAUMAN replied that she does not see the application for nomination as another step other than to possibly differentiate the fact that there might need to be some paperwork filled out

or some minimum requirement for a nomination to become complete and therefore that would become sort of an application.

SENATOR GIESSEL asked if the department would therefore have to approve an application for a designation to become a nomination.

MS. NAUMAN replied that inquiry is not specified in the bill.

SENATOR GIESSEL remarked that there was a gap. She said the CS requires the department to make a recommendation about the nominations. Page 2, line 3 says, "The report must provide a recommendation regarding whether each nominated water should be designated as outstanding national resource water." She asked if "no recommendation" is among the options for the department.

MS. NAUMAN answered that the bill states that the report must provide a recommendation so the department could provide "no recommendation" and not be in a substantial violation of the section; that response would be based on the department's interpretation that they must provide a recommendation and whether or not no recommendation was actually some sort of form of not having an opinion either way.

3:42:46 PM
SENATOR GIESSEL asked what the legal significance of a recommendation is and if it is appealable. She inquired what would happen if the department recommend" and the legislature takes an opposite action.

MS. NAUMAN answered that the recommendation she envisions is the department provides a possible supported, researched opinion about whether the water qualifies for the Tier 3 designation or whether it is worthy of the Tier 3 designation. The legislature is free to disregard a recommendation or follow a recommendation. The recommendation by the department does not bind the legislature in any way. In fact, the legislature could consider any body of water for a Tier 3 designation regardless of whether a recommendation was passed on from the department.

She said regarding the question about whether the recommendation is a final decision, the language on page 2, lines 7-10 says, "The preparation and delivery of a report under this subsection does not constitute a final agency decision or action, and the recommendation is not subject to appeal, including appeal or review under AS 44.62 (Administrative Procedure Act)." attempted to foreclose that. It clarifies that it is not the opinion of the legislature that the recommendation is the final action on a

decision whether to designate a body of water as outstanding national resource water. That decision is actually being taken up by the legislature.

3:44:22 PM
SENATOR GIESSEL read the language on page 2, line 9, "the recommendation is not subject to appeal, including appeal or review under AS 44.62 (Administrative Procedure Act)." She said the question is what is the legal significance of "recommendation." She inquired if someone can protest or sue if the legislature were to refuse to take up the bill or to reach a conclusion that was different than the report's recommendation.

MS. NAUMAN replied that people sue all of time about almost everything, it's why most of the world's lawyers are employed, but to the extent that the legislature takes up or does not take up any matter is a matter of the legislature's prerogative and that argument can be made about any action of the legislature. The legislative powers are a constitutional one that is inherent in the body's ability to pass or not pass any piece of legislation. She opined that she does not see a successful lawsuit of someone suing over the legislature's decision on the department's recommendation.

SENATOR GIESSEL asked Ms. Currie for her thoughts on the legal significance of a recommendation.

MS. CURRIE answered that she agreed with Ms. Nauman that a recommendation is merely the opinion given by the different resource agencies and that the legislature is free to use or not use the departmental recommendations to make its decision.

3:46:23 PM
SENATOR GIESSEL asked Ms. Currie to confirm that the recommendation would not hold legal binding status.

MS. CURRIE answered no, especially with the wording regarding it not being an appealable decision. She noted that the original legislation stated that if the resource agencies had a negative recommendation that it would not go any further; however, the goal was to make sure the legislature makes that decision and not the resource agencies, so that language was taken out so that all recommendations have to be forwarded to the legislative body.

SENATOR GIESSEL said her fourth topic has to do with the permanence of the designation. A similar bill was heard in 2016

and at that time the Senate Resources Committee questioned DEC as to the question of "permanence." She said she inquired if the declaration of Tier 3 waters is a permanent designation in perpetuity. She noted the committee's letter back from the commissioner stated that he did not think the designation is permanent and yet at the same time the EPA itself could not give a clear answer on the designation. She asked if the legislature could repeal the designation by repealing the law and what would the options be for the EPA in the future if they were to contest the state's decision and even go so far as repealing Alaska's primacy over waters. She inquired if the Department of Law has experience with the EPA regarding the declaration of Tier 3 waters and its permanency.

MS. CURRIE replied that the Department of Law is aware of two states that currently have regulations that allow a de-designation of a Tier 3 water; however, the department does not know whether the de-designation has ever been attempted. She said she does not think that categorially the EPA has said there is no process for de-designation because they would have had to approve those regulations. She deferred to Andrew Sayers-Fay with DEC to talk about EPA's role in de-designating if the state were to designate a water.

3:49:50 PM
ANDREW SAYERS-FAY, Director, Division of Water, Alaska Department of Environmental Conservation, Juneau, Alaska, explained that since 2016, the division has had some follow-up conversations with the EPA about the ability to de-designate a Tier 3 or an outstanding national resource water body. The EPA conveyed that they do not see anything that prohibits a state from taking the de-designation action. The division has not gotten into the nuances of how the de-designation process would work or what role the EPA may or may not play if the state took a de-designation action.

SENATOR GIESSEL asked Mr. Sayers-Fay if the communication with the EPA is in writing.

MR. SAYERS-FAY replied that there is one email that he has received from a staff member at EPA Region 10 about the de-designation topic. He explained that the EPA staff member referenced what other states have done. He said he does not have the follow-up email to verify that the division has received further information.

SENATOR GIESSEL said she appreciates the fact that the committee has an email from a staffer at DEC, but she is not consoled by the email. She stated that she would be interested to know if DEC could get a letter from the head person from the EPA indicating whether the designation was in fact revocable.

3:51:35 PM
SENATOR BISHOP said he would have more comfort with a law passed by Congress that addressed a designation's revocability. He remarked that he does not care what the EPA director says because of the changes a new administration can make with a new director and a new directive.

SENATOR GIESSEL said she has concern about the cost associated with the bill. She assumed that the three resource departments would have to do some analysis before a recommendation is made. She inquired if DEC has any estimate on what an analysis would cost before the department would make a recommendation.

MR. SAYERS-FAY replied that the bill, as written, envisions the departments' analysis is done for the benefit of the legislature to make a decision about a nomination and so the depth and direction of what is being asked for by the legislature would determine the level of cost and if there was an actual bill that raised Tier 3 issue, the legislature could provide further direction on what issues needed to be looked at or to what degree.

3:54:03 PM
SENATOR GIESSEL asked him to confirm that DEC would make a recommendation not knowing the degree of pristineness, not knowing what kind of work is going on upstream, what kind of uses of the water. She inquired if the work she previously noted would have to be done before DEC makes a recommendation to establish a Tier 3 water.

MR. SAYERS-FAY replied that there is more than one path to answer the recommendation process. In a previous version of proposed regulation, DEC enumerated several things the department thought worthy of consideration. If SB 51 were to pass, DEC would look into whether or not there is a need to establish regulations again and the department would probably answer those types of questions because those issues were raised due to the impact that Tier 3 designation has for water quality and then for any discharges to that water body and the potential to impact tributaries flowing into that water body, there are a number of questions that would naturally exist about what are

the uses and what are the potential impacts, DEC would definitely start down that path. He said he previously addressed in a previously proposed bill that the possibility that the legislature could also provide additional direction for DEC to look at specific issues.

MR. FULTON addressed Senator Giessel's question on the sponsor's intent as far as who bears the cost of application or nomination. He specified that the sponsor's intent in drafting the bill is that the applicant will bear most of the cost as clearly reflected in the department's zero fiscal note. Most of the departmental costs would probably be associated with collecting a certain level of water quality data proving there is stakeholder and community support for the Tier 3 nomination, and then whatever else is needed to prove.

3:57:05 PM
At ease.

3:57:20 PM
CHAIR BIRCH called the committee back to order.

MR. FULTON continued that the departmental costs will include anything else required to prove that a water body is ecologically and or recreationally significant, which is the definition of a Tier 3 water body by the EPA. He reiterated that the costs will be borne by the applicant as reflected in the zero fiscal note presented by the department.

SENATOR GIESSEL remarked that one of the things that Congress has realized is the fact that they abdicate their responsibility when they write something very broadly and then expect the departments to write regulations. She admitted that often the Alaska Legislature has also written regulations that do not reflect a bill's intent by not being specific. She said her concern is leaving the decision to a departmental commissioner or whoever happens to be the regulation writer at the time.

SENATOR KAWASAKI noted that the bill changed a lot between the Version K and the version R. He pointed out that the original fiscal note says, "The department shall accept nominations and the department may forward those nominations to the legislature." Version R says, "The department may accept an application, that they shall prepare a report." He opined that the two versions are very different, and the fiscal note ought to reflect the change. He asked for an explanation of the change.

3:59:55 PM
MR. SAYERS-FAY answered that the original language was the department shall accept a nomination. The only significance in the change in language is that if there was further direction from the legislature or regulations that indicated a minimum amount of information that was needed and that was not submitted with the nomination, that that might provide a basis with the new language for the department to not accept that nomination; but, absent that the language is fairly similar in its intent for the department to receive a nomination, reviews it, and provides a report.

MR. FULTON addressed Senator Kawasaki and said as to the question regarding "may" versus "shall," he noted that he had a conversation with the legislature's attorney about the exact subject regarding when the department "shall" accept a nomination, that "shall" leaves the form of a nomination to be very broadly interpreted, but "may" gives a department some level of discretion as to whether or not the package fulfills a certain criteria that the sponsor is looking for in a proper nomination.

SENATOR COGHILL asked if the first thing that would be looked at is the federal register on what the requirements of Tier 3.

MR. FULTON deferred the question to the department. He noted that the federal register is vague in terms of what constitutes an outstanding national resource water and his thought is the register just says the water must be recreationally and ecologically significant.

4:02:40 PM
SENATOR COGHILL remarked that looking at the register first might make a difference to the legislature. He noted in a footnote under are. XI, sec. 7 of the Alaska constitution that says, "If it infringes on the legislature's ability to allocate resources among competing uses, then it fails to ensure that the legislature and only the legislature retains control over the allocation." He opined that there is some case law that is beginning to show that if the state restricts uses there may be a significant issue between Alaska and the federal government. He said the legislature needs to make sure that the tension is properly described.

CHAIR BIRCH noted that there was testimony earlier in the regarding the fact that DEC has adopted water quality standards

that relate to how the proposed legislation will be executed. The regulatory package speaks to the Tier 3 analysis process for the protection of water quality and outstanding natural resource water.

SENATOR BISHOP noted that Senator Kawasaki addressed the fiscal notes for the Version K and the Version R. He said common sense dictates that there is an application process where nomination is set at a high bar that is backed with science. He opined that even though the study is paid for by the applicant, there needs to be a number associated with the fiscal notes.

4:05:02 PM
SENATOR KIEHL said the phrase that reoccurs in statute when talking about the quality of an application is "shall accept" as opposed to "may accept." He asked why the sponsor settled on "may accept" instead of letting the department say what quality standards need to be met in the application.

MR. FULTON replied that the discussion did not go beyond what has already been explained.

SENATOR KIEHL said he is still not clear on what standards the department will use to evaluate the recommendations. He said he appreciates the proposed anti-degradation regulation but continues to question what standards the legislature will use to tell the three commissioners to apply when they make a recommendation to the legislature for designation.

MR. FULTON answered that that the regulation package does not describe those standards and that is something the legislature may not want to prescribe in law because the department would be fully capable of doing so in regulation. He explained that part of the reason why the sponsor wants the three departments involved in the designation process is for a certain level of scientific review in subject matter expertise. He said the sponsor is more comfortable deferring review to the departments for recommendation only, not for the final decision which will continue to be made by the legislature.

4:08:01 PM
CHAIR BIRCH read the following:

> We did not receive amendments prior to yesterday's deadline, I would remind members as per the discussion any amendments, sponsor substitutes, blank committee substitutes, handouts or other documents you list,

placed before the committee need to be delivered no less than 24 hours prior to the scheduled hearing discussed in advance.

He said he did not see any additional amendments, questions or comments and asked if the committee is ready for a motion.

SENATOR KAWASAKI asked if the committee will have discussion time. He pointed out that the previously noted amendment policy says amendments "should be submitted" and questioned the limited time for offering amendments based on the recent bill revision. He said he has lots of concerns with the legislation and noted that the Senate Resources Committee is the substantive policy committee versus the Senate Finance Committee. He remarked that he feels uncomfortable moving the bill without having more discussions on some of the concerns addressed during the hearing. He noted that he has an amendment packet for the bill.

4:10:35 PM
SENATOR GIESSEL said she had questions for the Department of Law, DEC, and the drafter. She noted that questions about the cost to apply the regulations that have been drafted have not been answered. Also, some attorneys do not think there is an allocation issue but earlier testimony indicated this is similar to designating parks, which removes land from use. She said she understands that the goal of the legislation is to put a process in place to satisfy the EPA. She said she would argue that the EPA is out of line in commandeering the state and requiring something, but that is another issue. She said she believes that a much simpler version of the bill would meet the EPA's requirement that the state have a policy in place.

4:11:54 PM
SENATOR GIESSEL offered Conceptual Amendment 1 as follows:

My conceptual amendment is simple, it would take on page 1, line 11, it would cross out the word "law" and it would substitute two words, "the legislature." The line would read, "regulation, only by the legislature."

Then, my conceptual amendment would go forward to delete, page 1 lines 12-13, and page 2 lines 1-10, leaving in place only subsection (c), "Water of the state may not be managed as outstanding national resource waster unless the water has been designated

as outstanding national resource way under (a) of this section." and leaving in place section 2.

The conceptual amendment would clearly define that the process will go through the legislature, but all the other details, we need a more substantive discussion and more legal information.

4:13:01 PM
At ease.

4:13:30 PM
CHAIR BIRCH called the committee back to order.

SENATOR COGHILL objected to Conceptual Amendment 1. He explained that the amendment is substantive and should be introduced in writing for further debate. He said he tended to agree with the amendment, but the committee needs the written version as well as giving other amendments a chance to come up for debate.

CHAIR BIRCH concurred with Senator Coghill.

SENATOR GIESSEL requested a written opinion from both the Department of Law and Legislative Legal regarding whether the bill is an allocation of state resources, an allocation of land, and whether the process could be in fact done by regulation. She asked that in addition to the written opinion that the ramification from a "no recommendation" or a negative action from the legislature saying no be explained as well.

4:14:38 PM
SENATOR GIESSEL withdrew Conceptual Amendment 1.

CHAIR BIRCH added that the committee will have an opportunity to look at how the current water quality regulations are to be integrated with the legislation.

SENATOR REINBOLD concurred with Senator Giessel that the legislation is an appropriation.

4:15:16 PM
CHAIR BIRCH held SB 51 in committee.

SB 42-QUITCLAIM LAND TO UNITED STATES

4:15:30 PM

CHAIR BIRCH announced the consideration of Senate Bill 42 (SB 42).

4:15:53 PM
SENATOR COGHILL, sponsor of SB 42, provided an overview of the bill. He opined that Native allotments have been a significant issue for about 100 years and he considers it unfinished business. He said unfortunately, the federal government has conveyed land to Alaska that had a prior claim on it. The intent of the legislation is to address the prior claim.

He said committee members will probably hear from the Department of Natural Resources (DNR) that following the reconveyance requirement exactly is hard. However, the requirement must be addressed and if following the process cannot be done then what is the first next step.

He explained that the bill starts with the fact that there was a prior right supported by court cases. He noted that his staff, Rynnieva Moss, will provide committee members with additional details. He said the allotment issue came to him mainly because he started researching the Homestead Act as a means of getting more land into private hands. He continued as follows:

> Many people got homesteads in Alaska and we tried to say, "We should also do it as a state," they got 160 acres or whatever it was and at the same time we had Native allotments; funny thing about that was Native allotments were based on "already usage" in an area and the Homestead Act was you've got to go "prove up" in that area. All the Homestead Acts got approved and very few of the Native allotments got approved, and it was a BLM issue but then along comes the state. We get statehood, we get selected lands, we selected, they transferred them, and then oops, we've got a Native allotment of a prior right on it. That's kind of where we are at, that doesn't describe all the Native allotments, but this is trying to right that the best we know how, that's the general reason why.

4:18:11 PM
RYNNIEVA MOSS, Staff, Senator Coghill, Alaska State Legislature, Juneau, Alaska, provided the sectional analysis for SB 42 as follows:

- **Section 1:**

Powers and duties of the director of the Division of Lands by mandating he or she quitclaim deeds "land or an interest in land to the federal government after a determination that the land or the interest in land was wrongfully or erroneously conveyed by the federal government to the state." Currently that director has permissive authority to do so when land was wrongfully or erroneously conveyed to the state.

- **Section 2:**
  Exempts lands quitclaimed under Section 1 from AS 38.05.125, reservation of subsurface resource rights to the State of Alaska. This would allow for mineral rights to titled owners of Native allotments.

- **Section 3:**
  Exempts the new provision pertaining to quitclaim deed to the federal government from AS 38.05.125, restriction on sale, lease or other disposals of agricultural land. This eliminates the limitation on use of such land to agricultural use.

- **Section 4:**
  AS 38.05.035 makes quitclaim deeds to the federal government when the land was wrongfully or erroneously conveyed to the state a permissive actions. This statute is repealed, and the quitclaim deed becomes mandatory under Section 1.

MS. MOSS summarized that Section 1 requires the DNR to give a quitclaim deed to the Bureau of Land Management (BLM) for lands that were selected as Native allotments so that BLM can deed that land to the rightful owner. The reason for the provision in Section 1 is for the DNR to keep track of the fact that the state is losing land selections amounting to 103 million acres; so, the legislation would subtract those entitlements from the 103 million acres. She added that the state has actually over selected by 25 percent and that allows for the changes proposed by the legislation.

She detailed that section 2 reserves subsurface rights to the original owner, the Native entitlement.

She explained that section 3 makes sure that the land from the quitclaim deed is not used as agricultural land, that it is fee simple land with all rights reserved.

She said section 4 repeals the current statute that says that the department "may" and will be changed to "shall."

4:19:41 PM
She explained that the federal court decision in Aguilar v. United States basically said that there was already a preexisting title or right to that land when the BLM gave it to the state under state selections. She said BLM should recover and give that land to the rightful owner and if it takes adjudication, BLM should sue the state to get that land back. The federal court decision is very plain.

She said the committee will hear from DNR that there are exceptions because some of the allotments are in the Trans Alaska Pipeline System (TAPS) right-of-way. She noted that BLM and DNR have signed a memorandum of understanding (MOU) that would allow for land swaps with the allotment owners upon the approval of the owner. However, in 1971 when the Alaska Native Claims Settlement Act (ANCSA) was passed that repealed the 1906 Native Land Allotment Act there were 10,000 applicants with 16,000 parcels ranging from 40 to 160 acres. Currently, about 300 allotments are still pending.

MS. MOSS said DNR currently is transferring six to eight parcels a year and the sponsor feels that the state can do a lot better.

4:21:21 PM
SENATOR COGHILL emphasized that the legislation is not to pick on DNR; the intent is to "put the heat" under an issue because the process has taken over 100 years. As a result, progeny from 15 different family groups have a claim on an allotment and the members have a hard time even agreeing among themselves. He said the state should facilitate an immediate allocation for the family groups that can agree. He conceded that there are subsurface rights on some allotments, but the rights would be retained to those who would have it. He noted that there is concern that the allotment involves Indian country. However, the process is really a private land allotment that belongs to the owners.

SENATOR KIEHL asked how the subsurface rights piece works in the bill.

MS. MOSS explained that when the people claimed the land, they had subsurface rights, whereas the state retains subsurface rights when it owns the land. The bill lays out a process that would allow the state to quitclaim deed the property back to the

federal government with subsurface rights. That acreage gets written off the 103 million acres and BLM would title the land to the original owner with all subsurface rights.

4:23:27 PM
SENATOR BISHOP asked her to clarify that the state's 103 million acres stays whole and the allotment comes out of the government's acreage.

MS. MOSS answered that is correct.

SENATOR KAWASAKI asked why the bill is needed. He opined that the allotment should have already been done by DNR.

MS. MOSS answered that the law says that the allotment is permissive, not mandatory. The bill says the allotment is mandatory.

SENATOR KAWASAKI said the bill instructs DNR to do the allotment, but he was unclear about the directive to the BLM.

MS. MOSS explained that the Aguilar court case said, "Not only do you need to give this land back to the original owner, if you can't get the state to do it you should go to court and sue the state; they ruled that they should adjudicate this."

4:24:36 PM
CHAIR BIRCH opened invited testimony.

4:24:57 PM
DESIREE DUNCAN, Native Lands Manager, Central Council Tlingit and Haida Indian Tribes of Alaska, Juneau, Alaska, testified in support of SB 42. She detailed that Tlingit and Haida provides Native Alaska trust services to 11 communities in Southeast Alaska. They currently have approximately 20 title recovery cases which includes villages that are not served by the Central Council. The Native Alaskan applicants have been waiting for over 50 years to get title to their land and most are deceased, and their heirs are now waiting for what is rightfully theirs. Right away the Homestead Act gave the land to non-Natives. SB 42 is a very important bill that will allow Native allotment applicants to get the land that their ancestors applied for many years ago.

4:27:02 PM
SHEILA NEKETA, Staff, Land Management Services, Bristol Bay Native Association, Dillingham, Alaska, testified in support of

SB 42. She detailed that the Bristol Bay Native Association is working on 36 pending Native allotments located on state selected land, allotments that were determined valid by the BLM but were erroneously and wrongfully conveyed to the state. She asserted that the state refuses to reconvey the identified lands back to BLM. She noted previous public testimony for similar legislation from Bristol Bay participants in 2014 and asked that the testimonies be included in support of SB 42. She said SB 42 is very important to the people in the Bristol Bay service-provider area for what it means to themselves, their relatives, and their subsistence lifestyle.

4:30:51 PM
ROBERT BREAN, Allotment Claimant, Anchorage, Alaska, testified in support of SB 42. He explained that his mother is a recipient of authorization from the federal government for a Native allotment that she applied for in the mid-1960s. He opined that a lot of the land was expedited in the interest of developing the oil fields and getting a pipeline built. He said what the federal government did not do was actively pursue surveying of Native allotment parcels and finalizing the paperwork to transfer Native allotment parcels to individuals. He summarized that SB 42 will provide DNR with the leverage and legality to do the right thing for Native allotments.

4:36:08 PM
MITCHELL ALLAN, Allotment Claimant, Fairbanks, Alaska, testified in support of SB 42. He quoted a Native rights booklet that leaned towards a positive action on Native allotments by saying, "There is an immediate need for a fair and just settlement of all claims by Natives and Native groups in Alaska." He added that the booklet also says, "The settlement should be accomplished rapidly with certainty without litigation." He disclosed that he has been dealing with his Native allotment claim since 1971, shortly before the law was repealed. He said SB 42 will resolve his Native allotment issue.

SENATOR COGHILL commented that he hopes Mr. Allan ultimately receives his allotment.

4:39:12 PM
MURRAY CLAYTON, Allotment Claimant, Fairbanks, Alaska, testified in support of SB 42. He disclosed that BLM has determined that his allotment application is valid, and BLM has asked the state to reconvey his allotment to him. He said after 48 years his hope is that for his allotment to come to a satisfactory conclusion.

4:41:20 PM
MARTY PARSONS, Director, Division of Mining, Land and Water, Alaska Department of Natural Resources, Anchorage, Alaska, stated that the division is making a sincere effort to reconvey lands to BLM for the purposes of certificating lands to the noted Native allottees. He said previous testimony has made it clear that reconveyance is important to the Native community of Alaska. The division understands how important reconveyance is, and the division takes the matter extremely seriously. The division has taken some important steps to resolve the conveyance transfers. The division recently entered into a cooperative agreement with BLM to hire a dedicated staff whose sole purpose is to focus on working on reviewing the conveyance requests from BLM to reconvey lands and to help fulfill the state's obligation under the federal program.

MR. PARSONS explained that the division is actively reviewing 12 files to see if they can be reconveyed. The division has 70 files where the division is waiting for additional information from BLM before the division can continue its review. The division has already reconveyed 282 parcels to the BLM for certification to the allottees.

He said to provide the best opportunity for allottees to receive the land that they have historically used, the division has reopened over 100 cases that were previously closed or denied for reconveyance. Many of the allotment files have been closed because they were for lands that were affected by state pipeline projects or because the lands were located within legislatively designated areas (LDA). Earlier decisions were based on the position that lands inside the LDAs were removed from the public domain and cannot be made subject to the allotment application. Through further and more detailed review of the enabling language, the division found that such a strict interpretation of LDAs may have been an error, so if the division reapplies what is known as the "Relates Back Doctrine" which means if the allottee had claimed the land prior to the LDA being put into place, that provides the division with an opportunity to remove the noted obstacles for reconveyance so that many of the previously denied allotment applications are currently under review for potential reconveyance. Similarly, a better definition of the Alaska Natural Gas Pipeline Project also allowed the division to remove other obstacles for reconveyance. He disclosed that all reconveyances are subject to the public process for the disposal of the state interest as indicated under Article 8, Section 10 of the Alaska Constitution.

4:44:51 PM
He said the division has reviewed the current language of SB 42 and has prepared an indeterminate fiscal note. When the division considers whether to approved BLM's request to reconvey parcels, the division does a thorough review to see if there are any third-party interest in the land, if it contains constructed state infrastructure, or if it provides access to mineral or oil and gas deposits.

He explained that an outcome of the Supreme Court's 1979 decision in Aguilar v. United States, currently the state can enter into a settlement release agreement with the allottees to make the conveyance subject to these interests. As written, SB 42 would change the law so that the only criteria necessary for mandating that the state must reconvey parcels of land is whether the conveyance to the state was made in error. Parcels reconveyed under such criteria cannot be made subject to roads, pipelines, transmission lines, historic access routes, or recreational facilities constructed by the state, or other easements required by law; if this infrastructure cannot be protected, the state would have to provide a lease or right-of-way from the allottee or the state would have to get the land back from the allottee either by buying it or condemning it through an eminent domain process. In addition, land sold through auction or conveyed to the University of Alaska, Mental Health Trust, or municipalities would need to be reacquired in order to fulfill the request for conveyance. Under the current SB 42, if a parcel was found to have been conveyed in error then not only would the land itself but the subsurface mineral estate would also be reconveyed back to the federal government. If the mineral estate was found to contain "leaseables" or "locatables," things like gold, coal, or oil and gas, the estate would be split between the allottee and the federal government, and the federal government would retain the mineral rights; this would deprive the state with an opportunity for revenues that would otherwise be retained by working with the surface landowner under the current statute.

4:47:13 PM
MR. PARSONS explained that in addition to potential fiscal concerns with HB 42 as written, there are concerns that the passage of the bill will not significantly increase the speed of which allottees receive their allotment certifications. BLM is currently processing only five or six quitclaim deeds a year due in large part because all the allotments require to have a field inspection before BLM accepts the quitclaim deed. If the field

inspection shows that the parcel is contaminated, then regardless of source, whether it is from the allottee or someone trespassing on the allotment, BLM will reject the quitclaim deed and the allotment will not be certificated. At the current rate of five to six certifications a year, certification would take more than three decades based on BLM's current inventory of allotments to the allottees. He emphasized that the state of Alaska and the division consider the reconveyance of the Native allotments as a serious and important undertaking.

He summarized that the division has attained agreement with BLM to provide funding for a position within the division's realty services section that is dedicated to the review of active and previously closed allotment cases as well as to reinterpret previous impediments to the reconveyance of allotment parcels. The division's staff is largely engaged with multiple service providers to discuss difficult cases with the intent to find resolutions that includes reconfiguring a parcel, to remove a parcel from a potential piece of state infrastructure like the Alaska Highway, or help identify a substitute parcel from the state's selected lands. The division believes its allotment work is a clear indication that the state is actively seeking to increase the number of parcels to be conveyed and to fulfill the federal commitment.

MR. PARSONS said another way the division can help to complete conveyances of Native allotments is for the state to continue to increase the land available for selections as substitute parcels. As the ANCSA corporations complete their land entitlement, more land identified by the state converts from what's known as "top filing" or "future interest of the state," to "selected status" that becomes available for the state to receive under its entitlement. Lands which are not identified for the final 5.5 million acres of state land entitlement can be made available for Native allottees to select as a substitute parcel if the original parcels cannot be conveyed.

4:50:03 PM
He explained that there is 7.8 million acres of substitute parcel land that the division has identified. The division realizes that some of the substitute land is less than desirable due to topography or lack of infrastructure, but as more lands are converted into "selected status," the division is seeing an increase in the pool of land that is desirable for the allottees.

He reiterated that the state takes completion of the allotment program very seriously and the division looks forward to working with the sponsor to craft a path forward with respect to the rights of the Alaska Natives so they can obtain their allotments and to fulfill the federal allotment program as well as to protect the state's interest.

SENATOR COGHILL thanked Mr. Parsons for providing the committee with a clear idea of what is happening as well as detailing some of the complexities of how the state must deal with reconveyance. He said Aguilar v. United States probably came up with a clear criteria and asked Mr. Parsons if the bill should mirror the court decision's criteria.

MR. PARSONS answered that Aguilar v. United States provides a process as well as a "thick book" that provides all the steps necessary. He said the bill can mirror the case; however, the division is actively working under the "may" language for reconveyance to the federal government where the division has no control over allotment cases reconveyed to the federal government where cases may take years to certificate to the allottees.

SENATOR COGHILL agreed that the state cannot make the federal government do anything. He said he will work with the division to find a better pathway forward with the bill's language. He specified that his intent was to show the committee the complexity with allotment as well as honoring the "prior right."

4:53:19 PM
SENATOR BISHOP asked if Mr. Parsons said it could take BLM 30 years to reconvey.

MR. PARSONS answered yes, at BLM's current rate of certifying five to six allotments a year. He detailed that the division is waiting for additional information on 70 parcels. He added that the 12 parcels the division is actively reconveying will take a couple of years. He said unfortunately because of the work required by BLM before they can accept the state's quitclaim deed, field research and time is required before land can be reconveyed to the allottees.

SENATOR BISHOP said he will talk to Senator Coghill to address the reconveyance.

SENATOR KIEHL asked how unresolved Native allotment land could have ended up with state infrastructure and state easements. He

said his experience is that DNR does not let anybody do anything on state land with a question mark on it.

MR. PARSONS answered that when ANCSA was passed, the allotment program was closed, and many applications were passed to the Bureau of Indian Affairs (BIA) or other agencies and then lost. Lands continued to be conveyed to the state between the time that the allotment program was closed, and Aguilar v. United States was adjudicated. The allotments the division is working on came to light, in many cases, after the state had already received title but before the state knew that there was an underlying allotment claim on the land.

4:56:38 PM
SENATOR GIESSEL referenced an allotment spreadsheet that Ms. Moss provided to the committee. She noted that many of the allotments are in national parks, national forests, and national wildlife refuges. She asked Ms. Moss if the allotments in federal park land makes the process more complicated.

MS. MOSS answered that she did not know. She opined there could be an issue and noted that Congress just passed a Vietnam veterans' allotment that listed exceptions to where lands could not be selected that included the Arctic National Wildlife Refuge (ANWR), national forest system land designated as wilderness by Congress, military land, and inner-outer corridors of right-of-ways such as TAPS.

SENATOR COGHILL opined that what the federal government said and what Aguilar v. United States says, might give the state instruction on how to create a way forward for the allottees who may never be able to get the land based on some of the criteria, but the allottees should get the opportunity to get some land. He admitted that some of the allottees that he has spoken with have indicated that they are not interested in a swap at the beginning; however, if the allotment cannot be physically done, there must be a pathway forward.

He summarized that he will work with DNR and some of the legal teams that have talked about the legal structure under Aguilar v. United States to figure out how allotments can be transferred and creating a pathway with BLM to separate allotments that there is no practical way to process.

MS. MOSS noted that Mr. Parsons described about 100 parcels that have been denied in the past that would fall under the public lands that are currently being reviewed for possible approval.

4:59:03 PM
CHAIR BIRCH held SB 42 in committee.

4:59:35 PM
There being no further business to come before the committee, Chair Birch adjourned the Senate Resources Standing Committee meeting at 4:59 p.m.