ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
February 24, 2021
3:31 p.m.

MEMBERS PRESENT

Senator Joshua Revak, Chair
Senator Peter Micciche, Vice Chair
Senator Gary Stevens
Senator Natasha von Imhof
Senator Jesse Kiehl
Senator Scott Kawasaki

MEMBERS ABSENT

Senator Click Bishop

COMMITTEE CALENDAR

OVERVIEW: DEPARTMENT OF LAW-FEDERAL ISSUES AND CONFLICTS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

CORI MILLS, Deputy Attorney General
Civil Division
Department of Law
Juneau, Alaska
POSITION STATEMENT: Provided an overview of federal litigation issues and conflicts.

JESSIE ALLOWAY, Assistant Attorney General
Opinions, Appeals, and Ethics Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Participated in the overview of federal litigation issues and conflicts.

MARY HUNTER GRAMLING, Assistant Attorney General

Oil and Gas Section
Civil Division
Department of Law
Juneau, Alaska
POSITION STATEMENT: Participated in the overview of federal litigation issues and conflicts.

RON OPSAHL, Assistant Attorney General
Natural Resources Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Participated in the overview of federal litigation issues and conflicts.

ACTION NARRATIVE

3:31:42 PM
CHAIR JOSHUA REVAK called the Senate Resources Standing Committee meeting to order at 3:31 p.m. Present at the call to order were Senators Kiehl, Kawasaki, Stevens, von Imhof, and Chair Revak. Senator Micciche arrived during the course of the meeting.

OVERVIEW: Department of Law-Federal Issues and Conflicts

3:32:29 PM
CHAIR REVAK announced the committee would hear an overview from the Department of Law (DOL) regarding a list of federal issues and conflicts pertaining to navigable waterways, access to land and lands, Clean Air Act, water, mining, and oil and gas.

3:33:51 PM
CORI MILLS, Deputy Attorney General, Civil Division, Department of Law, Juneau, Alaska, said she will highlight some of the good work DOL is doing on statehood defense and revenue projection.

She noted the DOL list provided to committee members represents 35-federal-issue cases that are currently active. The cases include state alignment with the federal government or not in alignment with the federal government. Attorneys within DOL are handling all the noted cases—the cases do not involve outside counsel.

MS. MILLS said to put the 35 cases into context, the Natural Resources Section within DOL worked on approximately 700-active-legal matters during FY2020. Although the 35 cases are

important, they are a small fraction of what the section does within the department.

MS. MILLS stated DOL refers to the 35 cases as "statehood defense" because they are helping to defend what the [federal government] promised Alaska at statehood—the right to manage its resources based on the sustained yield principle to become self-sufficient, rights embodied in Article XIII of the Alaska Constitution.

3:36:07 PM
MS. MILLS explained that defending [the 35 cases] has 2 main purposes. The first purpose is to ensure the state can responsibly and sustainably develop its resources that results in the money the legislature appropriates for government—includes money to the general fund, permanent fund, and the constitutional budget reserve. The second purpose is the ability for the state to manage its resources for the benefit of all Alaskans—referenced in Article XIII of the Alaska Constitution.

She said DOL anticipates based on the recent policies and executive orders that have come out of the federal government that the workload in the [statehood defense] area is going to increase. DOL anticipates having more cases that are averse to Alaska in determining how to best represent the state's interests. DOL will need to advise on the legal ramifications of the [federal government's] actions, resolution options short of litigation—the department's goal—but ultimately to instigate lawsuits if necessary.

MS. MILLS detailed there have been several executive orders, the one talked about the most is the [30x30 executive order] (30x30). The initiative calls for federal agencies to essentially lockup 30 percent of the land in the United States and 30 percent of the United States' oceans by 2030. For the initiative to get to its 30-percent-land number, the federal government will need to lockup more than 440 million acres on top of what is already in conservation status—roughly twice the size of Texas.

She pointed out 30x30 applies to the entire nation. However, DOL does not know what the initiative potentially means to Alaska. DOL said the state could potentially see the federal agencies using their land management plans to create more restrictions and essentially turn land into conservation use only—something seen in the past that could happen again. The state could see a reversal of things like the Roadless Rule exemption—the state

has finally achieved getting an exemption and is currently in litigation. The state has been in alignment with the federal government on the Roadless Rule, but the federal government could reverse that decision.

MS. MILLS said the state has also seen in the past that the federal government does not want to work with Alaska on submerged land, navigable waterways, [Revised Statute] (RS) 2477s, as well as the state's land selections; instead, the state must litigate at ever inch to get those lands that belong to the state. Other avenues—if the federal government were open to it—would be getting a Recordable Disclaimer of Interest (RDI) from the federal government, but that depends on how willing they are to work with the state.

She noted other areas of increased activity [by the federal government] includes placing more species on the ESA list, establishing huge areas of critical habitat, and tightening down on the stringent mitigation measures that possibly is hard for anyone to meet—based on 50-to-100-year projections versus current or near-future circumstances. Alaska has already seen a halting of oil and gas leasing on federal lands which also impacts the state and its revenues. The case list could get longer should DOL come before the committee next year.

3:40:48 PM
MS. MILLS explained she wanted to build on why the [federal issue] cases are important because there sometimes are feelings that the state seems to lose more than it wins. The federal-issue cases can be hard cases, but they are important and building successes and picking your cases is important. The committee will see a lot of successes as DOL talks about the federal-issue cases.

She said she will start by giving the example of the Sturgeon case—which everyone in the state is familiar with. Mr. Sturgeon had a hard fight with the federal government on his case. The U.S. Supreme Court's decision was a huge win for Mr. Sturgeon and others, allowing them to continue to use—in Mr. Sturgeon's case, his hovercraft on the Nation River—and for the Alaskans to use that river.

MS. MILLS noted the Sturgeon case was also a big win for Alaska and its citizens and that is why the state was also so involved in that case and worked so closely with Mr. Sturgeon. The Sturgeon case clarified who has management authority over navigable waterways within federally owned Conservation System

Units (CSUs). Generally, CSUs are units of the National Park System, the Refuge System, or [Wild and Scenic River Corridors] created by the [Alaska National Interest Lands Conservation Act] (ANILCA). Many CSUs encompass state-owned land, including state-owned submerged lands that the state received as part of its statehood settlement—this goes back to what the federal government promised Alaska at statehood.

3:42:34 PM
MS. MILLS said the Sturgeon decision is important because it verified that Alaska is the exception and not the rule—Alaska now has U.S. Supreme Court precedent recognition for future cases—and the decision made clear that the federal government cannot manage state-owned navigable waterways within the ANILCA-created National Parks or Refuge Systems. The navigable waterways are separate and belong to the state for management.

She explained the Sturgeon decision goes way beyond the Nation River. The U.S. Supreme Court decision applies to any navigable water owned by the state that is within a CSU. The decision allows the state to take a more active role managing the use of its navigable waterways. The state can build on that success by reaching out to the federal government—which the state has done—to try and reach agreements to determine which waterways are navigable. If the state fails in determining navigable waterways via federal agreements, then the state might have to turn to litigation—an area where the state has had success as well.

MS. MILLS said taking the time on the Sturgeon case as well as some of the other cases—which committee members will hear about—can ultimately build on the Sturgeon case success and build a path forward with reduced difficulty for establishing [state's rights for its navigable waterways.]

She detailed costs associated with the Sturgeon case, noting Mr. Sturgeon had $1 million in attorney's fees. The state—using the state's billing rate—spent about $720,000 in attorney's fees and using an outside firm would have cost $1.1 million to $1.4 million. U.S. Supreme Court cases can be significant investments, but ultimately really pay dividends in the end.

3:44:51 PM
SENATOR STEVENS referenced her discussion of 30x30 and that the initiative locks up 30 percent of the land and 30 percent of the oceans. He noted not hearing her mention 30x30 litigation going on—assuming she means navigable waters when she talks about oceans. He said his concern has to do with fisheries and he

wonders if the 440 million acres she mentioned is just land or land and oceans.

MS. MILLS replied that is an important point. The state saw the ban of offshore drilling, for example, and how that affects the fisheries is an interesting question that DOL will need to watch.

She said she did not focus on oceans because the federal government has already locked up a lot of ocean, so to reach the 30 percent they do not have to lock up as much more ocean as they did lands. Nevertheless, it

is an important area because Alaska has the most coastline in the United States. Not only does Alaska have the most federal land, but also the most coastline. DOL will watch that as well but to get to the goal was not quite as difficult as to get to the 440 million acres.

SENATOR STEVENS asked if the federal government could take ocean territory within the three-mile limit.

MS. MILLS said she did not believe the federal government would take state waters, but it is talking about working with communities and working within states to lock things up through other means. However, Alaska is not going to give up its state waters.

3:47:41 PM
SENATOR STEVENS stated he appreciated her comments, and [30x30] is an important issue to know what the threats are.

SENATOR VON IMHOF noted her opening remarks were very poignant where she said states generally need to be able to pay for themselves. When Alaska statehood occurred in 1959, one of the big hurdles was Alaska's ability to responsibly develop its resources to be an ongoing concern without federal subsidy dependency—historically, this was a huge argument by Congress to make sure Alaska could pay for itself. The Swanson River [oil field] on the Kenai Peninsula was the first indicator that there was oil and there was resource extraction.

She asked her what the state's recourse is if the federal government does not allow states to develop their resources to finance their operations and if 30x30 goes against the Alaska Constitution when Congress voted for Alaska to be a state in 1959.

MS. MILLS replied the state has great dicta in the Sturgeon case and will utilize that to the best of its ability to show the "no more" clauses. Alaska did receive promises from the federal government and the state needs them.

She said the federal government actually working with Alaska would be great, but if not, at least the state has good case law from the U.S. Supreme Court saying Alaska is different. The federal government should treat Alaska differently and those are things DOL will cite in every brief.

3:50:36 PM

JESSIE ALLOWAY, Assistant Attorney General, Opinions, Appeals, and Ethics Section, Civil Division, Department of Law, Anchorage, Alaska, stated she would build on Ms. Mills' discussion of the Sturgeon case and start by talking about navigability and R.S. 2477.

She explained, in general, the state received all submerged lands under tidally influenced or navigable-in-fact waterways at the time of statehood. Again, it is part of Alaska's statehood entitlement. The [navigability] cases were important prior to the Sturgeon case, but the Sturgeon case made them even more important because the [decision] ties into the state's ability to manage the [submerged lands] to the extent they exist within CSUs designated by ANILCA.

MS. ALLOWAY detailed when the state has a dispute over the ownership of submerged lands, the dispute typically comes in two forms. One, the state could argue about whether the waterway was navigable-in-fact at the time of statehood—the gist of the federal test is whether a boat can float to the extent using that waterway as a highway of commerce. Two, was there a pre-statehood conveyance or withdrawal that defeated the state's interests.

She noted prior to statehood the federal government could have taken action to withdraw the federal submerged lands for itself or it could have conveyed that land away, but the federal government had to take specific action to do that. Over the last 10 years or so, DOL had good success in challenging the federal government's position on of those issues and further DOL testimony will address building on the challenge successes going forward.

3:52:25 PM

MS. ALLOWAY said regarding the navigability-in-fact dispute, the state brought a lawsuit to quiet title to the submerged lands under the Mosquito Fork of the Fortymile River—DOL brought the lawsuit when she first joined the department in 2012. DOL worked with the Department of Resources (DNR), the department got the litigation ready and was about two weeks away from trial when the federal government decided to disclaim its interest.

She explained the problem in the [Mosquito Fork] litigation and the problem the state has had all along in trying to deal with the federal government on the issue is the department's feeling that the federal government is bringing frivolous arguments to try to defeat the state's interests by trying to relitigate arguments that the U.S. Supreme Court or the U.S. Court of Appeals for the Ninth Circuit (The Ninth Circuit) already resolved in the state's favor.

MS. ALLOWAY detailed after the federal government disclaimed its interest, the state brought a motion for attorney's fees—arguing the federal government had taken frivolous positions to route that lawsuit and that they had acted in bad faith. The Ninth Circuit agreed with the state and said:

> The United States' position that recreational use in not relevant, or the United States' position that you had to have a wooden watercraft that carried two-thousand pounds.

MS. ALLOWAY said those were frivolous arguments and the Ninth Circuit awarded the state attorney's fee in the [Mosquito Fork] litigation.

She mentioned litigation costs and reported that, using outside rates, the state spent about $1 million to get the Mosquito Fork case ready for trial. The Ninth Circuit Judge Sharon Gleason awarded the state $600,000 in attorney's fees.

MS. ALLOWAY said that in the years after the Mosquito Fork case, the state was able to get the federal government to change its position on the Delta River, the Kisaralik River, and the West Fork of the Dennison Fork. Except for the Kisaralik, those rivers all go through Wild and Scenic River Corridors and they are important for the argument that Ms. Mills talked about on the Sturgeon case. She said she believes those were all successes triggered by what DOL accomplished in the Mosquito Fork litigation.

MS. ALLOWAY acknowledged that in recent years there is more tension with the federal government on other issues. The state asked the federal government to change its mind on the North Fork of the Fortymile River and the Middle Fork of the Fortymile River that go through [Bureau of Land Management] (BLM) managed Wild and Scenic River Corridors. The federal government declined and that is one of litigations that committee members will see on the DOL list. DOL is in the early stages with expert reports due and she anticipates a trial within the next year or so.

3:55:44 PM
MS. ALLOWAY said the second issue is pre-statehood withdrawal. After the Mosquito Fork litigation ended, DOL filed litigation on the Stikine River. The federal government recognized the Stikine River as navigable, but their position was the creation of the Tongass National Forest prior to statehood withdrew all the submerged lands within the boundaries of the Tongass to the federal government. The state disagreed and filed a lawsuit. Again, the federal government—before the court could resolve the issue—changed its mind and disclaimed its interest in the Stikine River.

She noted the state—wanting to build off its success to get the federal government to recognize the [Stikine River] decision applies to all waters within the Tongass—filed a Recordable Disclaimer of Interest (RDI) for the Taku River near Juneau. The RDI program is a way for the state to get the federal government to recognize the state's ownership without having to file litigation—the process is administrative. The federal government—following what it did in the Stikine case—did disclaim its interest in the Taku River.

MS. ALLOWAY said DOL has made progress on the [submerged lands and pre-statehood] cases and continues to do so. The department hopes—working with DNR and strategically choosing the rivers—to litigate and continue building the precedent to get the federal government to change its position on other rivers throughout Alaska.

She noted both in navigability and R.S. 2477 cases, DOL cannot do its job without the help of DNR; these cases require the assistance of DNR to float the rivers, engage in fieldwork, and building technology that allows DOL to make a better presentation to the court. DNR has done great work with drones to get new videos and [geographic information system] (GIS) work. DOL also seeks outside hydrology, geomorphology, and

history experts to create a team—with DNR—to pursue the [navigability and R.S. 2477] cases.

3:58:31 PM
She explained that R.S. 2477 cases are important because that was one of the ways that the public or the state could reserve rights of way over federal public land prior to that statute withdrawal. She noted she calls R.S. 2477 cases the "Chicken Litigation" where the state is seeking quiet title to several R.S. 2477s near Chicken, Alaska; these R.S. 2477s start in Chicken and end up going through Wild and Scenic River Corridors that are managed by BLM and provide access to hunting, state submerged lands, and mining claims.

She said the R.S. 2477 litigation has been going on for a number of years, but issues unrelated to the federal government have hung up the litigation, and those issues are resolved. DOL is in discovery, similar to the navigability case, and the department anticipates going to trial in 2022.

4:00:13 PM
MARY HUNTER GRAMLING, Assistant Attorney General, Oil and Gas Section, Civil Division, Department of Law, Juneau, Alaska, said she would speak about Roadless Rule matters and the state's involvement in the Izembek Road between King Cove and Cold Bay.

MS. HUNTER GRAMLING noted before she goes into the details of the Roadless Rule cases, she referenced her colleague's previous testimony on the two decisions in the Sturgeon case as being important to the state's efforts in Roadless Rule litigation and in the Izembek matter. The Sturgeon decisions have good dicta that says Alaska is different, and there is a lot of background and analysis of what the U.S. Supreme Court did in those decisions about the purposes of ANILCA and that it really is about the balance of national conservation interests, but also the economic and socio-economic opportunities for Alaska and its residents. The Sturgeon case arguments are important and something the state is trying to build off of in Roadless Rule litigation as well as the Izembek Road case.

She said a second general trend that DOL is seeing is that in the land management plans, and to a certain extent the Izembek Road, the federal government is trying to manage lands in ways to get around ANILCA. There are arguments on the application of the Roadless Rule and the treatment of certain areas as if they are CSUs. When DOL sees those land management plans or

regulations, that is when the state does take a particular interest in ANILCA's "no more" clause issues.

MS. HUNTER GRAMLING added that the third kind of general trend the department is seeing in the [Roadless Rule and Izembek] cases are that the state's alignment with the federal government really does change by presidential administrations. However, DOL does not see hardly any change via Alaska's executive branch. For example, there have been Democratic and Republican governors, but the department's position has been the same that the Roadless Rule should not apply in Alaska—particularly in the Tongass. The state has also been very consistent in its position that there really needs to be a road and reasonable access for King Cove, especially for medical help in emergencies.

She said the fourth general trend in the noted cases is that the state—whether with a plaintiff or defending—typically aligns with groups for intervention help or close coordination. For example, in the Roadless Rule litigation the state works with other aligned interveners that represent a number of municipalities in Southeast, Southeast Alaska power companies, chambers of commerce, and Alaska mining associations. In the Izembek litigation, the state is frequently aligned with the King Cove Corporation and the municipalities in that area.

4:04:20 PM

MS. HUNTER GRAMLING said her first case overview is the state's challenge to the 2001 Roadless Rule—a nationwide rule that applies, until recently, to 15 million acres of National Forest land in Alaska. The federal government recently exempted the Tongass National Forest from the Roadless Rule, but the state still has its Roadless Rule litigation in the [United States Court of Appeals for the District of Columbia Circuit] (DC Circuit Court) regarding the underlying 2001 Roadless Rule.

She detailed the state completed its briefing two years ago for the 2001 Roadless Rule case. However, the state requested the court to stay the case—which the court granted—because the state requested an exemption for the Tongass. Parties recently filed their positions about what should happen in the future of the case. The state's position is that the DC Circuit Court should hear the case for a decision that the 2001 Roadless Rule is not consistent with ANILCA, the Tongass Timber Reform Act, and the Administrative Procedure Act in the National Environmental Policy Act (NEPA). DOL is waiting to see how the court will rule on either the state's motion to have the case go to argument or

the defendant's and environmental group interveners' motions to dismiss the case.

4:06:06 PM
MS. HUNTER GRAMLING said the other Roadless Rule related case that the state currently has is that in October 2020 the U.S. Department of Agriculture (USDA) exempted the Tongass National Forest from the 2001 Roadless Rule. The state requested the rulemaking and granted cooperating agency status. The DOL, DNR, and other state agencies worked to combine the state's comments—the department spent a lot of time in that rulemaking process.

She noted in December 2020, environmental, native, fish, and tourism advocacy groups challenged the rule. That is a recent challenge and the federal government's answer was imminently due, but yesterday the federal government requested a stay for the case. She noted today, the state filed a notice to intervene and requested a hold on the stay until the state has an opportunity to intervene. She added she just found out that there is another large group that intends to also intervene in support of the rule and that makes up some of the same people that are supporting the state in the DC Circuit Court.

4:08:01 PM
SENATOR KIEHL recalled that the state was not successful at the district court level in challenging the Roadless Rule, but won the total exemption through the political route. He noted the change in the federal administration and questioned the wisdom of trying to turn around the first lawsuit.

MS. HUNTER GRAMLING replied the district court decision is a case currently in the DC Circuit Court and that is the case about the underlying rule. The state completed its briefing long before the 2020 Tongass exemption rule. Even though the new rulemaking does exempt the Tongass, the 2001 Roadless Rule restrictions on roadbuilding and timber harvest still applies in full force to 5.4 million acres of the Chugach National Forest—98 percent of the forest is under the Roadless Rule. The state still has a continuing interest in the litigation and is another case where the state would like a decision on Alaska's statutory claims.

4:10:09 PM
CHAIR REVAK asked if they are two separate things.

MS. HUNTER GRAMLING answered yes. Currently the state is involved in two cases and about to be involved in another case.

The first case in the DC Circuit Court is on the underlying 2001 Roadless Rule. The second case—which the state will intervene in—is a recent challenge to the Roadless Rule exemption granted to the Tongass National Forest.

SENATOR KIEHL commented that his general approach is to take your wins and defend them, and cut your losses.

MS. HUNTER GRAMLING addressed the King Cove Road case and noted the state is intervening in support of an agreement that the King Cove Corporation has with the U.S. Department of Interior (DOI) to grant them a land exchange so that they can have a corridor across the Izembek National Wildlife Refuge to build a permitted road with the required funding.

She noted the current case is the third round for the state. The district court found DOI did not adequately explain the agreement it entered into—under the [Administrative Procedure Act] (APA)—and that it violated ANILCA. This is a case where the state's briefing in the Ninth Circuit focuses on the purposes of ANILCA and how the district court decision did not acknowledge the balances of interests in the overall purpose of ANILCA to include opportunities for satisfaction and health of Alaska residents.

MS. HUNTER GRAMLING detailed DOI's reply brief was due earlier and they requested a 30-day extension. The reply briefs are due on March 8, 2021 for the state, DOI, and the King Cove Corporation. She said the Ninth Court looks to want to hear the case for argument either in June or August 2021.

She noted she will skip over the Chugach Land Management Plan and the Tongass Land Management Plan.

4:14:02 PM
SENATOR VON IMHOF commented that the military appears to have the ability to supersede the Roadless Rule since there is a new military road in the Stuckagain Heights and Basher Road area in the Chugach Mountains outside of Anchorage.

CHAIR REVAK asked her to address Senator von Imhof's point.

MS. HUNTER GRAMLING replied she is not familiar with the road Senator von Imhof referenced, but there are limited exceptions to the Roadless Rule; that road may have fit into one of those exceptions or there was some other issue. However, the state's concerns, particularly with a lack of roads in the Chugach, has

also diminished the ability of the state to respond to fire hazards and beetle issues in neighboring state forests.

4:16:02 PM
RON OPSAHL, Assistant Attorney General, Natural Resources Section, Department of Law, Juneau, Alaska, said he will touch more on the U.S. Bureau of Land Management's (BLM) resource management planning about the Eastern Interior Resource Management Plan (EIRMP).

He said a good example for other issues that he sees coming down the road include Kobuk-Seward, Bering Sea-Western Interior, and Central Yukon planning; these cases typically involve challenges to environmental analysis conducted by BLM. The state serves as a cooperating agency and provides input through that process, but once it hits litigation it becomes important for the state to intervene to defend in those cases where the state and the federal government are aligned.

MR. OPSAHL said the NEPA case can be very difficult to defend. Statistics will show resolution in more than 90 percent of NEPA cases in the favor of the federal government. However, that is not the case regarding major plans and issues that garners a lot of public interest. The reason that these cases often fail is not because the government had a flawed environmental analysis or was hiding the ball, the reason is usually because the "procedural deck" is really stacking in favor of a plan.

He explained the [plan] cases, he can—as a plaintiff—allege that a NEPA analysis failed to analyze any given topic, but it does not take long before the defense runs out of pages to respond to everything that a plaintiff reports. That is when it becomes vital for an intervener to step in the right case at the right time. Intervention can make a significant difference in these cases. Leaving the federal government alone to defend may result in a remanded case with defensible plans. When the state is involved, the outcome can be more favorable.

MR. OPSAHL said BLM—as a matter of convenience—has decided to use its planning process to evaluate the slew of 1970s era public land orders that it issued under the Alaska Native Claims Settlement Act (ANCSA). Recently, the Kobuk-Seward plan recommended revocation of a handful of [Public Land Orders] (PLO) covering nine million acres. The effect is to allow the state's selections under the Alaska Statehood Act to mature from top filings into full selections.

MR. OPSAHL added the [Kobuk-Seward] example may not be following with Bering Sea-Western Interior or Central Yukon [plans]. BLM has not decided on whether it is going to revoke the outdated PLOs. If BLM does not, the state may become averse to the federal government—as far as the PLO goes—but that does not mean the state should not intervene to defend the rest of the plan if the plan otherwise aligns with the state's interests.

4:21:19 PM
CHAIR REVAK addressed withdrawals for Kobuk-Seward and noted the federal government recently did an emergency Federal Register alteration—via executive order—to remove what BLM had already decided to make available in terms of the withdrawal revocation, the lands available for selection.

He said he has several concerns with the emergency federal Register alteration to the Kobuk-Seward, one of which is that Native Vietnam veterans have been waiting for over 60 years for their allotments, and would have been available for selection in the Kobuk-Seward agreement.

MR. OPSAHL explained the state's position is the revocation was effective when signed on January 19, 2021. The PLOs were revoked for those nine million acres and the lands became available. What the second half of that land order requires that within 30 days—February 18—those lands would then fallback under standard mining and leasing laws. The Federal Register noticed that last week, which effects that second part. He said he does not read it as affecting the first part at all but delays the reimplementation of mining laws and leasing laws to the lands where the withdrawals were revoked.

He detailed those lands do not fallback under the mining laws and the leasing laws for 60 more days, but the state's position is the revocation had effect immediately with no further action required and it is not revokable. He said DNR is moving forward with the standard selection process for the highest priority lands to get conveyance to the state under its selections.

CHAIR REVAK commented that the only reason they would delay it is to find a way to stop it.

4:24:41 PM
SENATOR MICCICHE joined the committee meeting.

MR. OPSAHL said DOL continues to monitor the PLO for Kobuk-Seward and if BLM does pull some shenanigans, DOL is evaluating

that to see if there is any legal recourse that would be available.

MR. OPSAHL said the next cases that he will discuss relate to the Arctic National Wildlife Refuge (ANWR). The first two cases are the boundary dispute and 1002 Lease Sale Litigation. In the ANWR boundary dispute, the case involves an interpretation of the establishment of ANWR and whether the western boundary was intended to be the Canning River or Staines River; that created 20,000 acres between those 2 rivers of disputed land, with the state wanting to assert its ownership on those acres and the BLM denied that. The state appealed to the Interior Board of Land Appeals (IBLA). In November 2020, IBLA upheld BLM's decision, so the state is evaluating judicial review options to take the case to federal court.

MR. OPSAHL explained the ANWR Boundary Dispute dovetails into the [ANWR Section 1002 Lease Sale]. The Tax Cuts and Jobs Act of 2017 opened up the ANWR coastal plain—Section 1002 area—to oil and gas leasing. To implement the proposed BLM lease sale, the bureau identified available acreages and put the lease sale out for comment. The state commented saying that Track 29—the area that contains the disputed strip of land between Canning and Staines rivers—should not be part of the lease sale. BLM denied the state's request and included Track 29. The lease sale occurred on January 6, 2021 and the [Alaska Industrial Development and Export Authority] (AIDEA) won the lease that includes the disputed ANWR acreage.

4:27:09 PM
CHAIR REVAK asked where the state is on the lease sale, noting there are executive orders related to those lease sales.

MR. OPSAHL replied that is the next case he would talk about.

He detailed there are four related cases, all challenging BLM's leasing program for the ANWR coastal plain. The cases include tribal group plaintiffs, non-governmental organizations (NGOs), and a coalition of states all alleging various violations of federal environmental natural resources laws including NEPA, ESA, ANILCA, and the Tax Cuts Act. The state intervened in all four of those lawsuits to defend the leasing program.

MR. OPSAHL said the case is now stayed for 60 days to allow the incoming administration to evaluate whether it wants to continue. If the administration chooses not to, that is going to raise a question of whether the state can continue without the

federal government. Arguing one way or the other would be premature.

MR. OPSAHL said he would not be surprised if the new administration tries to pullback the leasing program—at least temporarily—to either redo the environmental analysis, bolster some of it, or to remove some of the lands that were nominated and available for lease sale.

He said the last example of the state's recent intervention is the Ambler Road litigation. The state has two more related lawsuits challenging the approval of the Ambler Industrial Access Road—includes Tribal plaintiffs and NGOs—under the full panoply of environmental laws. Even though access to the Ambler District is guaranteed under ANILCA, the plaintiffs continue to challenge access. The state is intervening to defend the access road. The case has not been stayed, but a stay would not surprise him. However, the state is waiting for a briefing on that matter.

4:30:37 PM
SENATOR MICCICHE asked him what happens to the aligned cases, such as the Izembek Road, when an administration changes where the state and federal government are aligned.

MR. OPSAHL replied that situation often happens, and its occurrence raises issues. Sometimes the state and federal government are able to continue, sometimes the intervener is able to continue in defense. A lot of times when the federal government withdraws the challenged plan, there is nothing left to defend, but a cross claim becomes important to hopefully allow the parties to continue instead of being aligned with the government. The state is challenging the federal government's action to withdraw that plan, but there really is no good precedent that says 100 percent of time that allows or disallows a continuance. The decision is fact dependent and often the luck of a judge draw.

SENATOR MICCICHE commented that another column is needed for the likelihood of the case continuing with the Biden administration.

4:32:58 PM
MS. ALLOWAY said she will talk about a couple of Clean Water Act cases where the state is currently aligned with the federal government, but that very well may change going forward in the future.

MS. ALLOWAY detailed the first case is the Trout Unlimited case which is about the Pebble Project. In order to go forward with the Pebble Project, the project would need a Section 404 permit under the Clean Water Act and that involves two federal agencies: U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA).

She explained during the end of the Obama administration, EPA did something quite unusual in that they used their authority to issue a proposed decision under Section 404 to put a halt on the permitting process without actually having received a permit application to review and resulted in litigation that the state and other groups joined.

MS. ALLOWAY detailed in 2020, the EPA revoked their [authority] decision by actually getting a copy of that Pebble Project permit, worked with USACE, and learned new information to allow the process to proceed in the normal course. Trout Unlimited challenged the EPA's ability to pullback on that proposed determination, and the state intervened on the side of EPA. The federal government prevailed in the lower court on some procedural issues, and that is now on appeal to the Ninth Circuit. The case has been briefed and the state is awaiting a decision from the court.

4:35:06 PM
MS. ALLOWAY said the other cases that relate to the Clean Water Act must deal with the waters of the United States rule that she is sure all the committee members are aware with. To exercise its regulatory authority under the Clean Water Act, the federal government must decide if said water is of the United States, which results in how to define the water of the United States.

She noted in 2015, the Obama administration issued a rule that most states thought was quite broad and over extended the government's authority under the Clean Water Act. That rule was challenged and that is one of the litigations the committee members see on the DOL chart.

MS. ALLOWAY explained the federal government—via the Trump administration—also pulled back on the [water of the United States] regulation and issued a new water of the United States regulation and environmental groups are challenging that regulation. In that situation, the state is both aligned and not aligned with the federal government and the state has intervened in both of those cases—as well as numerous states—to protect their interests and their ability to participate in litigation

over how the government is going to define its external reaches of regulatory authority under the Clean Water Act.

SENATOR VON IMHOF commented that the people that the state or its entities sides with sometimes seems convoluted or backwards. She said by siding with the EPA, sometimes your enemies are your friends and vice versa.

4:37:18 PM
MS. ALLOWAY said she would address cases regarding the state's ability to regulate hunting and fishing on federal land.

She detailed the state is dealing with some Obama era regulations where the Obama administration promulgated various rules towards the end of its administration that limited state authorized hunting on federal lands. There is a National Park Service regulation that limited state authorized hunting on National Preserves. Also, there are two U.S. Fish and Wildlife Service (FWS) regulations, one that applied statewide to all refuges and a second rule that applied only to the Kenai Refuge.

MS. ALLOWAY noted that at the beginning of the Trump administration, Congress used the Congressional Review Act which gives Congress the abilities to easily review regulations that are promulgated by federal agencies, and then decide whether they agree with the policies set by that agency. Congress used the Congressional Review Act to invalidate the FWS rule that applied throughout Alaska. Congress said to all refuges, "We do not like that policy determination, and we are going to invalidate that rule."

She said last year the Trump administration pulled back on the National Park Service rule and issued a new regulation which resolves some the state's concerns regarding preserves and how the federal government was limiting the state's ability to manage hunting and fishing on the preserves. The state still has litigation over that rule because it did not satisfy all the state's concerns and that is in the district court. The briefing is stayed pending allowance for the Biden administration to decide which way it is going to go on the rule, will the administration make additional changes as requested by the state, and does the administration want to litigate the rule as it stands. The briefing will probably take place early in 2021.

4:39:42 PM
MS. ALLOWAY stated the second litigation DOL has going is regarding that Kenai specific rule. If committee members

remember, Congress said, "Hey, we don't like this regulation as it applies to all the refuges throughout the state." However, for some reason the Fish and Wildlife Service has said, "We are going to still apply those same regulations but only to the Kenai Refuge." The state is challenging that regulation as it applies to the Kenai Refuge, and the district court ruled against the state at the lower court proceedings and that is now on appeal to the Ninth Circuit. Briefing has not yet begun and that will probably take place in the spring or early summer with oral arguments possibly in fall 2021.

MS. ALLOWAY said the next fish and game case deals with the Federal Subsistence Board. In 2020, the Federal Subsistence Board issued an order closing moose and caribou hunting to non-federally qualified users, so state users in game management units 13A and 13B. This was significant for the state because these areas are quite popular for hunting because of their proximity to the Richardson Highway.

She noted the game management unit closures are supposed to take place for two years, through 2022. The state filed a lawsuit in the district court arguing the Federal Subsistence Board overreached its authority to manage this type of hunting and has not supported its decision under ANILCA or the Administrative Procedures Act, which basically says the government must adequately support and say, "These are the reasons why we are taking this action."

MS. ALLOWAY detailed the state received an unfavorable decision on a motion for preliminary injunction; in other words, the state said, "Hey federal court, this is really bad. Will you step in right away before we get to major briefing on the merits?" The federal court declined to step in right away, but that case is still proceeding. The state has just received the administrative record, so all the documents the federal government looked at for regulation promulgation is going to be reviewed. The briefing is going to take place in the next couple of months. The state will get a final decision on whether that regulation is within the Federal Subsistence Board's authority.

4:42:30 PM
MS. ALLOWAY said the last thing she wanted to talk about is the Salmon Fishery Management Plan (FMP). She explained the Magnuson-Stevens Act (MSA) requires federal councils to create management plans for fisheries under their authority. Typically, the state has management authority from the coast to 3 miles out

and the federal government manages miles 3 to 200 out. It is known as the Exclusive Economic Zone (EEZ).

MS. ALLOWAY detailed that the federal government amended the FMP to recognize the benefit of state management in particular instances. It excluded three pockets within the EEZ including a pocket adjacent to Cook Inlet. The federal government said, "We recognize the benefits of state management and we are going delegate our management authority within the EEZ to the states."

MS. ALLOWAY noted the United Cook Inlet Drift Association (UCIDA) filed litigation to challenge the federal government's delegation. The Ninth Circuit agreed with UCIDA to the extent that the federal government had to create a plan and say why it was delegating management authority to the state.

She detailed the district court—after the higher court remanded the case to the lower court—imposed deadlines on the council to issue the plan. The plan was issued late in 2020 where the federal council closed the EEZ in Cook Inlet to any commercial salmon fishing. That plan—sent up to the Secretary—is awaiting a final decision and final rule promulgation.

4:45:13 PM
CHAIR REVAK asked Ms. Mills if she had anything to add.

MS. MILLS agreed with Senator Micciche that cases could change; DOL is getting requests for stays so that the federal government can reevaluate its case positions.

CHAIR REVAK expressed appreciation for DOL's time and testimony, and agreed with the statement that these cases are bipartisan; they are Alaskan issues. Importantly, DOL represents Alaska when the state is at odds with what the federal government

4:48:07 PM
There being no further business to come before the committee, Chair Revak adjourned the Senate Resources Standing Committee meeting at 4:48 p.m.