ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
March 25, 2022
3:41 p.m.

MEMBERS PRESENT

Senator Peter Micciche, Vice Chair
Senator Click Bishop
Senator Jesse Kiehl
Senator Scott Kawasaki (via teleconference)

MEMBERS ABSENT

Senator Joshua Revak, Chair
Senator Gary Stevens
Senator Natasha von Imhof

COMMITTEE CALENDAR

DEPARTMENT OF LAW PRESENTATION ON STATEHOOD DEFENSE

- HEARD

SENATE BILL NO. 239
"An Act approving and ratifying the sale of royalty oil by the State of Alaska to Petro Star Inc.; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 240
"An Act approving and ratifying the sale of royalty oil by the State of Alaska to Petro Star Inc.; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

TREG TAYLOR, Attorney General

Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Introduced the Department of Law presentation on statehood defense.

CORRI FEIGE, Commissioner
Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: Spoke about navigability during the Department of Law presentation on statehood defense.

RON OPSAHL, Assistant Attorney General
Natural Resources Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Discussed litigation related to navigable waters during the Department of Law presentation on statehood defense.

JASON BRUNE, Commissioner
Department of Environmental Conservation
Anchorage, Alaska
POSITION STATEMENT: Spoke about waters of the US during the Department of Law presentation on statehood defense.

JULIE PACK, Assistant Attorney General
Environmental Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Discussed litigation and the importance of the Waters of the United States (WOTUS) comment letter during the Department of Law presentation on statehood defense.

CODY DOIG, Assistant Attorney General
Environmental Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Spoke about ANCSA contaminated sites during the Department of Law presentation about statehood defense.

DOUG VINCENT-LANG, Commissioner
Alaska Department of Fish and Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: Provided the fish and game perspective during the Department of Law presentation about statehood defense.

CHERYL BROOKING, Senior Assistant Attorney General
Natural Resources Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Discussed litigation related to the state's right to manage hunting and fishing during the Department of Law presentation about statehood defense.

ACTION NARRATIVE

3:41:43 PM
VICE CHAIR PETER MICCICHE called the Senate Resources Standing Committee meeting to order at 3:41 p.m. Present at the call to order were Senators Kiehl, Kawasaki (via teleconference), and Vice Chair Micciche. He asked the record to reflect that the committee did not have a quorum, but one wasn't required because no official business would be conducted. Senator Bishop joined the committee during the course of the meeting.

Department of Law Presentation on Statehood Defense

3:42:40 PM
VICE CHAIR MICCICHE announced the Department of Law presentation on statehood defense. He welcomed the presenters.

3:43:22 PM
TREG TAYLOR, Attorney General, Department of Law (DOL), Anchorage, Alaska, began the presentation by introducing the Department of Law staff who would assist in the presentation. He thanked the commissioners who were present, calling it an illustration of the importance of statehood defense to the various agencies. This team meets once per week on the various issues on statehood defense. He also highlighted that the DOL team meets weekly on this issue, had filed some successful lawsuits, and had more planned.

3:44:50 PM
ATTORNEY GENERAL TAYLOR advanced to slide 2 and described the five main components of the statehood defense strategy:

- **Initiate & Defend Litigation**

- **Partner with Resource States** Department of Law partners with other states on letters, comments, and litigation.

- **Engage With Federal Administrative Processes** This is done through comment letters, hearings and other outreach to federal sister agencies.

- **Submit Amicus Briefs In Ongoing Litigation** This is usually in cases where there are tangential issues that could affect outcomes in Alaska. He noted the specific issues the state has regarding the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA.)

- **Enlist Experts For Environmental Impact Studies** Having better science is how the state has achieved victory in many of its cases.

3:46:32 PM
ATTORNEY GENERAL TAYLOR advanced to slide 3 and read the definition of statehood defense:

> Defending the rights and privileges promised to the Citizens of the State of Alaska upon the State's admission into the Union, especially concerning the use, conservation, and management of the State's lands, waters, and natural resources.

He stated that the commissioners would speak to the reasons for statehood defense, the issues the state is facing, and why this is important to Alaskans and the state.

3:47:09 PM
VICE CHAIR MICCICHE said he wonders whether some of the statehood defense issues the state faces stem from federal agencies' basic lack of knowledge about ANILCA, ANCSA, and the statehood compact. These make Alaska different and prevent it from fitting with the federal government's standard blueprint for dealing with states.

ATTORNEY GENERAL TAYLOR said that's part of it and it's also that Alaska is somewhat off the beaten path so it's a matter of out of sight, out of mind. But there's also a begrudging resistance to do what's right. He said he's come to that conclusion based on the uphill battles Alaska has faced on issues that are very clear from a legal standpoint. In addition

to ANILCA, ANCSA, and the Statehood Act, Alaska's rights come from the equal footing doctrine, the Tenth Amendment, and the Submerged Lands Act, all of which outline Alaska's rights relating to lands, and resource development. These are the laws the state looks at to support its arguments.

3:49:51 PM
ATTORNEY GENERAL TAYLOR stated that in the interest of time, he was skipping to slide 6, Multi-State Efforts - 19 ongoing cases. He directed attention to the list that included:

Affordable Clean Energy Rule
Endangered Species Act Rule
Oil and Gas Drilling Ban
Emissions Regulation (Clean Air Act)
Federal Energy Regulatory Commission (FERC)
Social Cost of Carbon

He said the state tries to work with its federal counterparts through personal relationships, letter writing, providing science, and engaging in federal processes and comment periods as proscribed by administrative rules. This takes considerable resources of talent and money and still doesn't always work out, so the state has to be in a position to fight back when necessary.

3:51:04 PM
ATTORNEY GENERAL TAYLOR advanced to slide 8 and described his general strategy for statehood defense:

Engage Alaska resources and expertise, which is letting Department of Law attorneys take on these cases as the experts in the areas.

Partner with others when there's the ability to do so. This can be partnering with nongovernmental organizations (NGO), businesses, and other states that have a lot of federal lands, are resource-development minded, and have similar views on policy issues. Joining with others in some litigation and relying on their expertise has been a cost-saving measure that has made it possible for the state to engage in many more cases.

Outsource when necessary is something that DOL is increasingly facing as the number of cases increase. He said he foresees the department increasingly engaging outside counsel because the cases are coming at such a rapid pace. Over the last year, DOL has seen a 30 percent increase in these cases. The team meets

weekly and it seems that there's a new issue to look into every week.

ATTORNEY GENERAL TAYLOR deferred to Corri Feige for the next part of the presentation.

3:53:15 PM
CORRI FEIGE, Commissioner, Department of Natural Resources, Anchorage, Alaska, stated the following:

> We'll begin this discussion talking about navigability. Alaska uses our navigable lakes and rivers differently than any other state. They are literally the arteries that connect our communities and they facilitate commerce in this state.
>
> When we are talking about navigability, what we're talking about is that the state has ownership of the submerged lands. That's everything below the ordinary high water mark. And those lands in Alaska, reside under roughly 800,000 river miles of navigable in fact rivers, and below over 30 million acres of lakes across the state. These submerged lands came to the state at statehood, and yet the federal government refused and continues to refuse to recognize the state's ownership and the management authority since then. This is negatively impacting the rights of Alaska citizens and this is why Alaskans should care. They have the right to the full use and enjoyment that was granted to them of the state submerged lands at the time of statehood.
>
> And so our citizens have been harassed and even cited by federal law enforcement while undertaking legal activities on state submerged lands, simply because the federal government refuses to acknowledge the state ownership and the rights conveyed to us under ANILCA.
>
> And it's this type of wrongful bullying that has led to certain litigations, in part the Sturgeon v. Frost litigation and others. After more than 60 years of statehood, during which time the state has vigorously engaged with the Department of the Interior on administrative and other very collaborative measures to remove cloud of title from the state submerged lands, this is what those measures have resulted in.

3:55:40 PM
COMMISSIONER FEIGE directed attention to the state map on slide 10 and explained that the rivers and lakes that are colored blue are where the Department of Interior concurs with the state that those are navigable waters. The areas colored pink are those that remain undetermined by federal agencies. She highlighted that the federal government acknowledges the state's clear title to submerged lands on just nine percent of the 800,000 river miles, and only 16 percent of the 30 million acres of state lake lands. She said the federal government is particularly resistant to recognizing the state's ownership and management authority within conservation system units such as the Yukon Delta National Wildlife Refuge and the Lake Clark National Park and Preserve. This was the reason for the governor's unlocking Alaska initiative last year.

COMMISSIONER FEIGE advanced to the state map on slide 11 that stands in stark contrast to the previous map. It shows what the state has determined to be state-owned navigable waters, and there are no areas colored pink. These are all rivers that the state asserts are navigable, based on criteria derived from case law and field data. Regardless, the state must continue to litigate to remove the cloud of title to state owned submerged lands.

3:57:19 PM
VICE CHAIR MICCICHE asked if she was saying that the state has management authority over all navigable waters in Alaska.

COMMISSIONER FEIGE answered that is correct and there is criteria and well defined case law that supports that those lands belong to the state.

VICE CHAIR MICCICHE commented that slide 10, STATE-OWNED NAVIGABLE WATERS ACKNOWLEDGED TO DATE was a strange heading.

COMMISSIONER FEIGE responded that the federal government has only acknowledged as navigable the waters colored in blue.

VICE CHAIR MICCICHE offered his view that it should say acknowledged by the federal government to date.

COMMISSIONER FEIGE acknowledged the point.

3:58:40 PM

COMMISSIONER FEIGE advanced to the picture on slide 12 to explain the types of rivers and lakes that the federal government does not concur are navigable. The picture is of two BLM employees paddling an inflatable boat on a portion of the Fortymile River in the eastern Interior. Nevertheless, BLM asserts this river is not navigable, so settling the dispute will require litigation.

COMMISSIONER FEIGE deferred to Ron Opsahl to talk about specific cases.

3:59:34 PM
RON OPSAHL, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, Anchorage, Alaska, stated that the river depicted on slide 12 is illustrative of the type of rivers DOL is choosing to litigate. They are clearly navigable and despite BLM's assertion, its rangers routinely patrol these rivers in boats.

4:00:51 PM
SENATOR BISHOP joined the meeting.

4:01:08 PM
MR. OPSAHL directed attention to the list of rivers on slide 13 that the state has chosen to litigate the question of navigability:

- Kuskokwim River
  - State of Alaska (Interior Board of Land Appeals)
- Middle Fork and North Fork of Fortymile River
  - Alaska v. United States (U.S. Dist. Alaska)
- Middle Fork of Koyukuk River, Dietrich River, and Bettles River
  - Alaska v. United States (U.S. Dist. Alaska)
- Mulchatna River, Chilikadrotna River, Twin Lakes, and Turquoise Lake
  - Alaska v. United States (not yet filed, anticipated May 2022)
- Sarkar Canoe Route
  - Alaska v. United St

MR. OPSAHL stated that the latest update on the Kuskokwim litigation is that IBLA reversed BLM's non-navigability determination last September on a 14.5 mile segment near McGrath. In January of this year BLM acknowledged that and

issued the recordable disclaimer of interest (RDI) for that segment, so the river is now recognized as state-owned from statehood.

The litigation of the Middle Fork and North Fork of the Fortymile River has been ongoing for several years. The case is in the discovery stage and about 16 expert in fact witness depositions have been conducted. Some of the depositions required out of state travel because the federal government would not produce the witnesses locally for DOL to depose. Dispositive briefing is anticipated to begin in early May with trial probably in the spring of 2023.

The Department of Law recently filed litigation to quiet title segments of the Koyukuk, Dietrich, and Bettles rivers. The United States has filed a motion to dismiss that case. The motion is fully briefed and DOL is waiting for a decision or setting of oral argument on the motion.

The Department of Law has noticed its intent to sue under the Quiet Title Act for several rivers and lakes in the Lake Clark vicinity, including the Mulchatna River, Chilikadrotna River, Twin Lakes, and Turquoise Lake. DOL anticipates it will file a complaint in May and the notice of intent will run at the end of April.

The Department of Law recently filed notice of intent to sue under the Quiet Title Act for the Sarkar Canoe Route in the Tongass National Forest. This will run until about the middle of September.

4:03:54 PM
VICE CHAIR MICCICHE asked why DOL hasn't filed a case that outlines the entire state so these questions can be settled in one fell swoop as opposed to these one-offs.

MR. OPSAHL answered that he'd like to do that but these cases are very fact and labor intensive cases and the state would go broke if it tried to do it in one fell swoop. The hope is that the Department of Interior will eventually recognize that Alaska was granted these rights at statehood, and the case law will be so well established that there is no longer any question. The department currently is litigating the most minor of questions in these cases. For example, BLM refuses to agree what boat should be considered a criteria boat to determine navigability. In the Fortymile litigation it will be a serious contention whether rafts can be considered, what the draft can be, how deep

the water has to be, and for what portions of the year. There aren't real court determinations on these questions because the federal government forces the state to go through the most expensive portions of the litigation before disclaiming interest on the eve of summary judgement argument or trial. This avoids a court determination that would settle some of these issues.

MR. OPSAHL explained that DOL's strategy is to focus on families of rivers, picking a point and working upstream to collect as many rivers as possible into the particular litigation. In the Fortymile case, the department worked on the Mosquito Fork and Denison Fork in separate cases, and is now working on the middle and north forks. That approach has changed to try to capture as much in the litigation as possible to make it more cost effective. The department now is trying to work on the Koyukuk, Dietrich, and Bettles rivers together. In the Mulchatna family the work is from the headwaters to as far down as is navigable and that hasn't been determined. It's a balance between size and manageable cost.

4:07:16 PM
COMMISSIONER FEIGE added that the court rendered a decision of bad faith against the federal government for making the state bring cases on rivers like the Denison portion of the Fortymile when it was obvious that the river met the criteria for navigability. She noted that the state recovered more than $660,000 in court costs in that case. She emphasized that DNR continues to work to ensure that these cases have solid scientific underpinnings to support any litigation that is required.

4:08:32 PM
SENATOR BISHOP asked whether federal publications of historical facts about head of navigation are used to help the state make its case.

COMMISSIONER FEIGE answered that those documents definitely are used as part of the record in making in making determinations of navigable in fact.

COMMISSIONER FEIGE advanced to slide 15 to discuss the state's second area of litigation, which is access to state lands. She provided the following explanation:

> Access means a lot of things, and it does include the complex suite of special rights that the state was provided in ANILCA. These go to support our economy,

our way of life, our unique geography, and our lack of infrastructure.

The cases in the land access topic area are about statehood rights, economic development, infrastructure, and community access.

These cases go to support programs like our Alaska Native Vietnam veterans having access to a broader suite of lands, which they can select their own allotments from. These cases include the Ambler Access Project, which is recognized in ANILCA as a transportation corridor and which will facilitate the next generation of resource development opportunities in the state. This project also has national security implications for the long-term mineral security of the United States.

The Izembek Road case is unfortunately now a multi-generational struggle to let an isolated community build a road to an airport, something that just about everywhere else in the country simply takes for granted.

COMMISSIONER FEIGE asked Mr. Opsahl to speak to the cases listed on slide 15 and the advancements in the Izembek case:

- King Cove – Dep't of Interior land exchange (Izembek Road)
  - Friends of Alaska Nat'l Wildlife Refuges v. Haaland (9th Cir.)
- Defense of federal rights-of-way to access Ambler Mining District (Ambler Road)
  - Northern Alaska Environmental Center v. Haaland & Alatna Village Council v. Heinlein (U.S. Dist. Alaska)
- Challenge to delay of revocation of ANCSA Section 17(d)(1) withdrawals covering 28 million acres of federal public lands
  - Alaska v. Haaland (U.S. Dist. Alaska)

4:10:41 PM
MR. OPSAHL corrected the record stating that the bad faith case was on the Mosquito Fork of the Fortymile River. He said he informed the judge hearing the Koyukuk case about that decision and the motion to dismiss as evidence of BLM's policies and how it is handling these cases.

MR. OPSAHL reported that on the Izembek Road case the state received a favorable ruling from the Ninth Circuit Court of Appeals that reversed the district court's invalidation of the land exchange. The decision also included a good discussion of the history of ANILCA and the compromise it represents between conservation and development.

The update on the Ambler Road is that the Department of the Interior filed a motion for a voluntary remand. DOL is strenuously opposing the motion arguing that remand is unnecessary because the record has more than enough information and analysis to uphold the decisions to issue the rights-of-way. AIDEA joined the case and the other interveners to a lesser extent. They still opposed the motion for remand. Plaintiffs are also opposing the motion for remand, arguing it doesn't go far enough. He called it a case of wanting their cake and eating it too.

The case involving the revocation of ANCSA Section 17(d)(1) withdrawals covering 28 million acres of federal public lands was dismissed March 14 after the district court held that there was no final agency action and it was necessary to wait until the two year reanalysis period had lapsed and BLM had issued a new decision before a case could be brought. DOL views the two-year delay as a new withdrawal, particularly since the Interior Secretary had issued and signed orders, although they weren't published in the federal register.

MR. OPSAHL said he believes that an environmental assessment was released yesterday dealing with Vietnam veteran issues in basically the same areas. He had not had time to review the assessment.

4:14:49 PM
COMMISSIONER FEIGE stated that the last category that DNR has engaged in litigation on statehood defense is oil and gas development. She stated the following:

> Unfortunately, oil and gas development in Alaska, particularly on the North Slope, has long been a target of extensive litigation by environmental groups, and that's nothing new. But what is new today is the fact that we find many of the same senior litigants who were leading those very suits against the state and our projects, now holding leadership positions within the Biden Administration Department

of Interior, BLM etc. And they're now pushing to restrict from within and from leadership positions in the federal administration, pushing to restrict, reduce or eliminate production from federal lands in Alaska altogether. We see this happening in the 1002 area, we see it in the National Petroleum Reserve Alaska, and in the Outer Continental Shelf, particularly for the 1002 area and the NPRA. In order to protect states' interest the state has had to join in litigation that seeks to delay or restrict activities on valid leases or seeks to delay and alter terms of already approved projects, projects where we have had a record of decision.

Current events have certainly highlighted the shortcomings and shortsightedness of an Alaska focused decision, but we unfortunately are not expecting a change to this policy anytime soon. Consequently, the state has had to take up these cases to prevent the Biden Administration from settling behind closed doors. And if we ever want to see these resources brought into production, we must be at the table.

4:16:49 PM
MR. OPSAHL provided updates on the cases listed on slide 17:

- Defense of National Petroleum Reserve—Alaska Integrated Activity Plan
  - National Audubon Society v. Haaland & Northern Alaska Environmental Center v. Haaland (U.S. Dist. Alaska)

He explained that a number of environmental and tribal nongovernmental organizations (NGO) are suing to set aside the 2020 integrated activity plan (IAP). The case is stayed and the Department of Interior has indicated that it intends to issue a new record of decision to reinstate the prior IAP with some 2020 leasing stipulations. DOL has yet to see what those may be or how they will be interjected or enforced. DOL is also looking at the new biological opinion that was issued earlier in March to see what was changed from the 2013 biological opinion, particularly as it involves mitigation measures for the various animal species that were discussed.

- Challenge to Bureau of Land Management de facto suspension of processing pre-development activity permits

- Alaska Industrial Development and Export Authority v. Biden (U.S. Dist. Alaska)

MR. OPSAHL explained that this second case is about AIDEA's oil and gas leases in the 1002 area of ANWR. AIDEA submitted permit applications to do predevelopment work, including archeological clearing and survey work, but BLM said it would not process the applications until other litigation had run its course. AIDEA sued and DOL intervened as a plaintiff and plaintiffs from the next case intervened as defenders. DOL is opposing the intervention arguing that the Gwich'in Steering Committee, the National Audubon Society, and the Native Village of Venetie Tribal Government don't have an interest in this case because it's a contract dispute about lease terms between BLM and AIDEA.

- Defense of federal oil and gas leasing program for Arctic National Wildlife Refuge
  - Gwich'in Steering Committee v. Haaland, National Audubon Society v. Haaland, Native Village of Venetie Tribal Government v. Haaland, & Washington v. Haaland (U.S. Dist. Alaska)

MR. OPSAHL said this case is larger in scope in that it is about the underlying decision to have a leasing program. This cases is stayed pending review, and a new environmental impact statement (EIS) is being prepared. He said it's unclear how long this process may take, which underscores the lack of certainty associated with these cases.

- Defense of Willow Project Master Plan
  - Sovereign Inupiat for a Living Arctic v. Bureau of Land Management & Center for Biological Diversity v. Bureau of Land Management (U.S. Dist. Alaska)

MR. OPSAHL explained that the Willow case was remanded for additional National Environmental Policy Act of 1969 (NEPA) analyses of global greenhouse gases and polar bears. He said this illustrates why the state's participation is crucial and brings value to these cases. In this case the plaintiffs brought about a dozen cases, ten of which were not successful. The cases that were successful had the same issues as the Hilcorp Liberty Project decision. By intervening, DOL was able to limit the remand and defend the [Section 404 Clean Water Act] permit.

4:22:31 PM
MR. OPSAHL opined that this shows that the definition of a win has to be viewed in context in these cases. It's difficult to get every plaintiff claim rejected, but if the state doesn't step in, odds are that more issues will be remanded.

VICE CHAIR MICCICHE recognized Commissioner Brune as the next presenter.

4:23:36 PM
JASON BRUNE, Commissioner, Department of Environmental Conservation (DEC), Anchorage, Alaska stated that DEC, DOL, DNR, and ADF&G meet weekly to address the new issues the state is forced to defend. He gave credit to the agency staff who were doing this amazing work.

COMMISSIONER BRUNE began the presentation highlighting the size and scope of Alaska waters:

ALASKA WATERS:

- Nearly 900,000 miles of navigable rivers and streams
- 22,000 square miles of lakes (3 million lakes larger than 5 acres)
- Nearly 27,000 miles of coastline (more coastline than Lower 48 combined)

He emphasized that no other state will be affected more if there is any change in the definition of waters in the US. Furthermore, if the state doesn't specifically mention issues during any comment period, it won't have standing if and when the definitions are changed, as they have in each of the last three administrations.

4:25:44 PM
COMMISSIONER BRUNE advanced to slide 20, Waters of the United States (WOTUS) that shows that 43 percent of the surface area of Alaska is wetlands, which is 63 percent of the total wetlands in the US. He stated that less than one quarter of one percent of Alaska's nearly 175 million acres of wetlands have been developed. By comparison, the Lower 48 has developed over half of the 200 million acres of wetlands it used to have. When the Biden Administration talked about again changing the definition of WOTUS, DOL submitted comment letters and ultimately requested a regional roundtable to prevent Alaska from being considered

together with nine other West Coast states. The administration agreed and a WOTUS regional roundtable was held in Anchorage on February 25 of this year. He deferred to Julie Pack to discuss what was included in the comments and the statements that were made.

4:27:07 PM
JULIE PACK, Assistant Attorney General, Environmental Section, Civil Division, Department of Law, Anchorage, Alaska, stated that roundtables with federal agencies are part of the effort to narrow the expansion of the definition of WOTUS in Alaska. She said this is important because the more expansive the rule, the less control Alaska has over project and mitigation specifics.

MS. PACK stated that DOL is challenging the WOTUS definition on 1) rule making proceedings and 2) the US Supreme Court case Sacket v. EPA. DOL formally requested Alaska-specific exclusions from the rule for permafrost wetlands, forested wetlands, wetland mosaics, and other water category. She said these mirror the data gap in the federal science underpinning the federal definition of WOTUS. If these exclusions are granted, many Alaska wetlands would return to state control. If the exclusions are not granted, Department of Law's comment letter is the foundation for a future challenge that the WOTUS definition is arbitrary and capricious as it is applied to Alaska.

MS. PACK conveyed that the Department of Law was also supporting a court challenge to the federal agency's authority to craft such an expansive rule to begin with. In Sacket v. EPA, the US Supreme Court will decide whether or not the test the Ninth Circuit Court of Appeals used was appropriate for determining whether wetlands are WOTUS. The strategies differ but both challenges are aimed at limiting federal power and federal agency discretion over wetlands in Alaska. The goal is for Alaska to have more control over waters in the state.

4:29:39 PM
SENATOR KIEHL commented on the court's unpredictability on water cases, and cited the surprising decision in Maui v. Hawaii Wildlife Fund as an example. He then suggested everyone keep in mind that water tends to flow down slope continually connecting with other water bodies.

VICE CHAIR MICCICHE questioned whether settling these arguments once and for all would require the repeal of ANILCA.

4:31:00 PM

MR. OPSAHL responded that the term "navigable waters" is used in many contexts, but the broadest definition is in the Commerce Clause of the US Constitution. ANILCA really isn't at issue because the Commerce Clause will trump anything in ANILCA based on constitutional versus statutory definition.

VICE CHAIR MICCICHE asked whether the definition in the Commerce Clause wasn't more closely related to an interstate highway definition than a small stream that isn't connected to other waters.

MR. OPSAHL answered yes. The potential for federal overreach into this area is why it's so important for Alaska to accurately define the extent of WOTUS within its boundaries. The definition should be limited to every extent possible to recognize that Alaska is unique. It has more wetlands and less development than the rest of the Lower 48 combined. He opined that the tendency for the Corps of Engineers and EPA to use Alaska as a wetlands bank for the rest of the US diminishes the state's ability to develop basic infrastructure. He offered his view that this was why it was so important for the state to participate in cases like Sacket.

4:34:54 PM
VICE CHAIR MICCICHE summarized his understanding that the foregoing illustrates the importance of the February 7, 2022 comment letter in isolating the obviously non-navigable waters of permafrost wetlands, forested wetlands, wetland mosaics, and other waters from the Commerce Clause waters. He asked if that was accurate.

MS. PACK confirmed that was what DOL was arguing. Those waters clearly are not navigable and the Commerce Clause authority is based on navigability. That is why those exclusions are requested.

4:36:15 PM
SENATOR KIEHL asked whether the Clean Water Act didn't discuss significant nexus to navigable waters.

MS. PACK clarified that the term "significant nexus" has no legitimate connection to the Clean Water Act or the Commerce Clause authority that undergirds the Clean Water Act. She advised that US Supreme Court Justice Rehnquist first coined the term, Justice Kennedy picked it up in the 2006 Rapanos v. United States decision, and since then it has snowballed into the rule today.

SENATOR KIEHL thanked her for clarifying the state's argument.

4:37:23 PM
COMMISSIONER BRUNE added that he would ensure that the members receive a copy of the letter Ms. Pack composed regarding DOL's position on definitions of WOTUS.

COMMISSIONER BRUNE turned to the topic of ANCSA contaminated sites and the associated litigation. He said the state is on the offensive because ANCSA lands were contaminated before conveyance. He described the letter writing efforts he'd been part of since the Obama Administration to get these lands cleaned up through the ANCSA resource manager's group. These multiple efforts have been unsuccessful and on the eve of the 50th anniversary of ANCSA, the state made the decision to file 548 notices of intent to sue to force action from the Department of Interior (DOI). The response to Governor Dunleavy's letter was that BLM had no continuing obligation to document or remediate contaminated sites conveyed under ANCSA unless future documentation showed that the contamination occurred while BLM managed or controlled a particular parcel. He deferred further explanation to Cody Doig who was leading this effort.

4:39:43 PM
CODY DOIG, Assistant Attorney General, Environmental Section, Civil Division, Department of Law, Anchorage, Alaska, stated that this case is a little different than the ones discussed previously because the complaint has yet to be filed. Nevertheless, Department of Law sent 548 notices of intent to sue under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), while also reserving the right to bring other claims. The notice period affords the federal government the opportunity to avoid litigation through settlement. DEC hired outside counsel to assist in these conversations and potentially in litigation. Outside counsel and the Department of Law have had three conversations regarding the notices of intent to sue. In the first two meetings, the Department of Justice tried to gain insight on the state's legal theory underpinning these claims. In the third meeting DOI and EPA indicated they were working on a plan to address some or all of the issues, but there were no details about the plan or a timeline for when the state could expect to see the plan. Additional meetings are anticipated and the federal government will be encouraged in writing to provide the details and respond timely when the state comments on the proposed plan.

4:42:03 PM
SENATOR BISHOP commented that DOI's response that BLM had no continuing obligation for contaminated sites conveyed under ANCSA was an insult given that elders living on the North Slope are able to point out the contamination from federal activities pre-statehood.

COMMISSIONER BRUNE responded that he could not agree more.

VICE CHAIR MICCICHE asked what proportion of contaminated sites in Alaska were on ANCSA lands.

4:43:38 PM
MR. DOIG answered that all 548 notices of intent to sue were attached to ANCSA lands.

VICE CHAIR MICCICHE asked if there were contaminated sites that were not on ANCSA lands.

MR. DOIG answered yes.

VICE CHAIR MICCICHE wondered whether the Bureau of Indian Affairs (BIA) supported the Natives it represented on ANCSA lands or if it was always a federal government versus state issue.

MR. DOIG deferred to Commissioner Brune.

COMMISSIONER BRUNE answered that the response to the state's letter came from the Department of the Interior and BIA falls under that agency.

VICE CHAIR MICCICHE asked how many of the NGOs that were litigating cases in defense of Alaska Natives had indicated interest in this litigation.

COMMISSIONER BRUNE answered that none of the environmental organizations had expressed interest in joining the case to ensure that ANCSA lands are cleaned up.

4:45:10 PM
SENATOR KIEHL suggested formally inviting the NGOs to join the litigation. He also asked whether the state should notify the federal agencies that were operating on the land when it was polluted.

MR. DOIG answered that he didn't believe it would advance the case from a legal perspective. He deferred to the commissioner to talk about any possible political benefit in doing so.

COMMISSIONER BRUNE said he believes the recommendation to ask the NGOs to join the case was a good idea. He added that he was very pleased when several ANCSA corporations indicated interest in joining the litigation when it's brought forward. Cleaning up these contaminated sites on indigenous land was a promise under ANCSA to get the Trans Alaska Pipeline System built. Unless this case is brought forward, he estimated that cleanup efforts could continue for the next 150 years.

VICE CHAIR MICCICHE recognized Commissioner Vincent-Lang as the next presenter.

4:47:44 PM
DOUG VINCENT-LANG, Commissioner, Alaska Department of Fish and Game (ADF&G), Juneau, Alaska, stated that he would talk about: 1) the state's right to manage its fish and game resources and uses, and 2) ensuring that the best available information possible is being used in federal permitting processes.

COMMISSIONER VINCENT-LANG advanced to slide 31, Right to Manage our State's Fish and Game Resources and their uses. He relayed that the fight for statehood was fought largely over the issue of who would control fish and game resources. Alaskans' argument was that the federal government was mismanaging these resources to the point of extinction. Alaskans were successful and the statehood compact and Executive Order 1087 by President Eisenhower officially transferred the control of fish and game resources to the State of Alaska in 1959. The Alaska Native Claims Settlement Act (ANILCA) reconfirmed that the state was the primary manager of its fish and game resources. He said the bottom line is that this was a clear contract from the time of statehood. The state was able to manage these resources and see that they were utilized in the best interest of the state.

COMMISSIONER VINCENT-LANG recounted the reasons, listed on slide 32, that state management of its fish and game resources is important:

- Alaskans ability to access and utilize its fish and game resources is being unnecessarily restricted by federal agencies.
- This is impacting the ability of Alaskans to hunt and fish and the food security of Alaskans

He deferred to Cheryl Brooking to discuss two cases that challenge federal actions related to primary management of fish and game resources in the state.

4:51:44 PM
CHERYL BROOKING, Senior Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, Anchorage, Alaska, stated that federal statutes specifically preserve the state's right to manage hunting and fishing, and recognize the state as the primary manager, including on federal lands within the boundary of the state.

MS. BROOKING advanced to slide 33, Alaska v. Federal Subsistence Board 22-35097. She explained that the state brought this lawsuit against the Federal Subsistence Board based on the premise that the board was exceeding the authority it was granted in ANILCA. Last December, the federal district court declined to address many of the state's claims, and upheld a two year closure of moose and caribou hunting for non-federally qualified subsistence users on road-accessible federal areas in Game Management Unit (GMU) 13. The case currently is on appeal to the Ninth Circuit Court of Appeals.

MS. BROOKING highlighted that the court also agreed with the Federal Subsistence Board argument that it was not required to hold open meetings. The court ruled that the board can hold secret meetings and take action by email without letting the public know or be present. She said this illustrates the persistent federal creep to close federal lands to hunting despite that hunting for federal subsistence hunters and others is specifically preserved in ANILCA, which also has a Savings Clause that preserves the state's ability to manage fish and game.

4:53:38 PM
SENATOR BISHOP asked if she said the Department of Interior (DOI) Federal Subsistence Board can hold secret meetings.

MS. BROOKING answered that is correct.

SENATOR BISHOP said he wanted to make sure that everyone heard and understands that the Federal Subsistence Board can hold secret meetings.

4:54:10 PM

COMMISSIONER VINCENT-LANG explained that in 2020, the Federal Subsistence Board closed hunting on federal lands to everyone but those who were federally qualified to hunt. This closed the Glennallen Nelchina Caribou Hunt in GMU 13. The state challenged the closure and the federal district court upheld the decision so it's now on appeal to the Ninth Circuit Court of Appeals.

COMMISSIONER VINCENT-LANG said the state mounted the challenge even though subsistence needs were being met and the caribou herd was large enough to meet the subsistence needs of both federally qualified users and state qualified users. The board's reason to favor federally qualified users was safety and experience. ADF&G's view was that the decision displaced the people, including AHTNA Native Corporation members and others, who had grown up in the Glennallen region and pushed them into urban areas. He acknowledged that at some point there may be a conservation reason to close this region, but not at this time. This highlights the persistent creep of federal overreach into other areas. In Northwest Alaska the Federal Subsistence Board is trying to close vast portions of federal land to all but federally qualified users, despite the fact that the Western Alaska Caribou Herd in that area has about 200,000 animals. In Southeast Alaska the board seeks to close deer hunting on federal land on the Tongass National Forest to everyone but those who are federally qualified users. He stressed that in both areas there are more than enough animals to satisfy the needs of both state and federally qualified subsistence users.

4:56:27 PM
MS. BROOKING advanced to slide 34, Alaska Wildlife Alliance v. Haaland 3:20-cv-00209-SLG. She explained that in this case the state intervened to defend a 2020 National Park Service rule that reversed a 2015 rule the state objected to that regulated methods and means of hunting and allowed park superintendents to annually preempt state hunting regulations without any public process such as the Administrative Procedures Act (APA). The 2020 rule recognizes the state as the manager of hunting on national preserves, as stated in ANILCA. She highlighted that most of the restrictions in the 2015 rule are in state regulations, which underscores that the state is the manager of hunting, including on national preserves.

MS. BROOKING said this litigation has been stayed for some time, at the request of the federal government. The district court judge recently ruled that the federal government's brief on the merits was due next Tuesday.

4:57:47 PM
VICE CHAIR MICCICHE asked if there was a reason the state did not seem to be willing to challenge the rights of Alaskans in federal waters to manage Alaska-bound anadromous species of value. He cited the example of the recent closure of half of Cook Inlet to commercial fishing, which are only Alaska-bound anadromous species of value.

4:59:01 PM
COMMISSIONER VINCENT-LANG explained that the Ninth Circuit Court of Appeals ordered the state to look at the next steps relating to the federal waters in the Economic Exclusion Zone (EEZ) in Cook Inlet. The state tried to protect the rights of Alaska fishermen, but the court told the state to go back through the fishery management council process to correct the action. Instead of taking the matter to the US Supreme Court, the state decided to work with the congressional delegation to answer the question once and for all about who has the authority to manage salmon species that are returning to a state stream in EEZ waters of the US. He expressed hope for a legislative rather than court solution.

VICE CHAIR MICCICHE said he wanted to make sure that the state was willing to fight the federal government for the inalienable rights of all Alaskans. He added that he hopes that the administration will be willing to take on that fight if there isn't a legislative fix in a reasonable amount of time. He acknowledged that not all Alaskans support all uses, but pointed out that the state either has the right for management as a state or it doesn't.

COMMISSIONER VINCENT-LANG mentioned previous conversations about whether it was time for the state to ask for a 12-mile territorial limit rather than the current three-mile limit. That would resolve many of the cases since very little salmon fishing occurs outside the 12-mile zone. He noted the precedence for that because several of Mexico's Gulf States have jurisdiction further out than three miles.

5:01:32 PM
COMMISSIONER VINCENT-LANG advanced to slide 35 to discuss the two ways ADF&G works to ensure that the best available information is used in federal permitting processes. The first is to participate in lawsuits to defend federal findings the department supports. He noted that Ms. Brooking will describe cases where the state is intervening to defend the federal government from challenges by environmental nongovernmental

organizations. The second way the state ensures that the best information is used in the federal permitting processes is to collect state scientific data to inform the federal decision processes.

He deferred to Ms. Brooking to discuss the next cases.

5:02:27 PM
MS. BROOKING said the importance of the state providing data cannot be understated. In the previous case, the National Park Service passed the 2015 rule that attempted to usurp the state's authority to manage hunting on national preserves. That was adopted as a policy decision but there was no data. When the 2020 rule was adopted, it was based on a large amount of data that the state provided.

MS. BROOKING advanced to slide 36, and explained that Alaska Wildlife Alliance v. Haaland 3:20-cv-00209 relates to the nonlethal incidental take of polar bears, which are listed as an endangered species under the Endangered Species Act. Polar bears are also protected under the Marine Mammal Protection Act, which allows the US Fish and Wildlife Service (USFWS) to issue five-year Incidental Take Regulations (ITRs) so that oil and gas activities can occur. She noted that USFWS had issued ITRs consistently since 1953, but recently started using a new model to predict unrealistically high levels of nonlethal incidental take. Despite that, USFWS did correctly find that the nonlethal take would be in small numbers and have negligible impact. The regulation was issued and letters of authorization are being issued to allow oil and gas activities in the southern Beaufort Sea to continue.

5:04:34 PM
COMMISSIONER VINCENT-LANG added that various environmental groups are challenging the Department of Interior's incidental take regulations (ITRs) and the state is intervening in defense of the federal government and the ITRs. All oil and gas activities on the North Slope is what's at risk if the court were to uphold the challenge to the ITRs. At the same time that the state is intervening, he said it also is collecting additional scientific data that will hopefully address ongoing concerns with the modeling processes for the incidental take regulations.

5:05:37 PM

MS. BROOKING advised that the state has consistently communicated with USFWS on this case and has provided a great deal of documentation and responses to the modeling.

She advanced to slide 37 and relayed that the state also intervened in support of the federal decision in Cook Inletkeeper v. Ross 3:19-cv-00238-SLG, which was about the ITRs for beluga whales in Cook Inlet. The nonlethal incidental take regulation in this case allowed Hilcorp's oil and gas activities to continue. The court ultimately ruled to vacate the use of tugs towing drilling rigs for exploratory well drilling and production, but the rest of the ITRs remain in place pending review.

5:06:54 PM
SENATOR BISHOP referenced slide 36 and questioned whether "nonlethal incidental take" referred to harassment.

MS. BROOKING answered that's correct; it allows activity that could change the behavior of an animal. For example, it might be taking for a truck to approach an animal standing in the road and cause it to move off the road.

SENATOR BISHOP commented on the lunacy of power producers in California raising California Condors in captivity for release into the wild to offset the condors killed by windmills that produce power for those power companies.

5:08:02 PM
COMMISSIONER VINCENT-LANG responded that the rules are applied differently for Alaska than any other state. That's becoming apparent in how critical habitat is designated and how incidental take is calculated.

He noted that he wrote a letter recently asking the Secretary of Commerce to reconsider the discrete, small area critical habitat designation for North Atlantic Right Whales versus the calculation of critical habitat for Ring Seals in Alaska, which is virtually any place a Ring Seal currently or potentially could exist with climate change. His point was it can't be both ways. Either the Alaska designation should be reconfigured to be discrete or the East Coast designation should be reconfigured to be more consistent to applications in Alaska. The same thing is happing with incidental take regulations; they are applied differentially in Alaska than in the Lower 48.

5:09:26 PM

VICE CHAIR MICCICHE asked where the federal Endangered Species Act interfaces with state management primacy and whether the ESA always overrides state law.

MS. BROOKING answered that the ESA and the Marine Mammal Protection Act are the limited preemption of the state's right to manage wildlife, although the state still plays an active role. She deferred to the commissioner to address that active role.

COMMISSIONER VINCENT-LANG explained that when a species is listed under the ESA, the federal government assumes control over the take and any critical habitat designated for that species, but the state retains a trust authority over the species.

5:11:10 PM
COMMISSIONER VINCENT-LANG skipped to slides 39 and 40. He thanked the legislature for appropriating funds last year to look at ways to collect scientific data to inform federal decisions about listed species and listing decisions.

He referred to Ms. Brooking's discussion about the USFWS decision to switch from observational data to modeled data. The federal agency is essentially saying that polar bears can exist anywhere on the North Slope for denning, and that it was possible to model the incidental take associated with disturbance of the dens that can't be seen.

COMMISSIONER VINCENT-LANG said ADF&G knows that the snow depth on 95 percent of the North Slope is insufficient for a polar bear den, and it is currently conducting snow modeling exercises to demonstrate that much of the polar bear critical habitat in Alaska does not have sufficient snow depth to support a den. If the state can demonstrate this it will reduce the amount of incidental take because there can't be an associated incidental take if there can't be a den. He said the department is also collecting scientific data to challenge the USFWS model that says that any activity within a mile of a polar bear den results in a complete take of an animal in that den. The idea is to publish data that shows that there is a higher probability of a take the closer the activity is to the den, not the blanket one mile.

COMMISSIONER VINCENT-LANG said the department is also using the money from the legislature to collect scientific data to inform listing decisions because the state is under fire from various

environmental groups asking for listing of species in Alaska from bumblebees to brown bats to sea flowers to sun stars. He noted that the department has already prevented the listing of several species in the state. The scientific data has also been important in the decision to not list the entirety of the Alaska coastline as Mexican humpback whale critical habitat. The coastline of Southeast Alaska was excluded based on the data the department collected and informed through the processes.

COMMISSIONER VINCENT-LANG recapped that the money was spent to inform the Endangered Species Act potential listing decisions and to actually look at the biological factors going into incidental take regulations and how biological opinion decisions are made in Alaska.

5:15:08 PM
SENATOR KIEHL asked how the department prioritizes and makes the decision about whether or not to sue.

ATTORNEY GENERAL TAYLOR answered that the focus now is on areas that Alaska residents use the most and the questions for which the argument is the clearest. He expressed hope of getting to the point that the courts say, "enough is enough" and allow cases that are broader in scope.

5:16:41 PM
At ease.

5:17:03 PM
VICE CHAIR MICCICHE reconvened the meeting.

ATTORNEY GENERAL TAYLOR continued to say that DOL was working to get the biggest bang for the buck.

5:17:22 PM
SENATOR KIEHL asked for the mechanics of how the department was making decisions about potential legal challenges.

ATTORNEY GENERAL TAYLOR answered that the Governor's Office had given clear direction to take on this fight. With that policy direction the department works with agency partners to look at where to get the biggest bang for the buck and move forward accordingly.

5:18:07 PM
VICE CHAIR MICCICHE thanked the presenters for the comprehensive multidepartment statehood defense presentation.

5:18:58 PM
There being no further business to come before the committee, Vice Chair Micciche adjourned the Senate Resources Standing Committee meeting at 5:18 p.m.