

**ALASKA STATE LEGISLATURE**  
**SENATE RESOURCES STANDING COMMITTEE**

February 17, 2023

3:30 p.m.

**MEMBERS PRESENT**

Senator Click Bishop, Co-Chair  
Senator Cathy Giessel, Co-Chair  
Senator James Kaufman  
Senator Forrest Dunbar  
Senator Matt Claman

**MEMBERS ABSENT**

Senator Bill Wielechowski, Vice Chair  
Senator Scott Kawasaki

**COMMITTEE CALENDAR**

SENATE JOINT RESOLUTION NO. 7

Supporting oil and gas leasing and development within the National Petroleum Reserve in Alaska; and urging President Biden and the United States Department of the Interior to approve the Willow Master Development Plan.

- HEARD & HELD

STATEHOOD DEFENSE LITIGATION

- HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SJR 7

SHORT TITLE: NAT'L PETROLEUM RESERVE IN ALASKA

SPONSOR(s): RESOURCES

02/10/23	(S)	READ THE FIRST TIME - REFERRALS
02/10/23	(S)	RES
02/15/23	(S)	RES WAIVED PUBLIC HEARING NOTICE, RULE 23
02/17/23	(S)	RES AT 3:30 PM BUTROVICH 205

**WITNESS REGISTER**

JULIA O'CONNOR, Staff  
Senator Giessel  
Alaska State Legislature  
Juneau, Alaska.

**POSITION STATEMENT:** Introduced SJR 7 on behalf of the committee.

REPRESENTATIVE JOSIAH PATKOTAK, District 40  
Alaska State Legislature  
Juneau, Alaska.

**POSITION STATEMENT:** Provided supporting testimony for SJR 7 as sponsor of the House companion resolution.

AGREUK HARCHARIK, President  
Voice of the Arctic  
Anchorage, Alaska

**POSITION STATEMENT:** Provided invited testimony in support of SJR 7.

KARA MORIARTY, President and CEO  
Alaska Oil and Gas Association (AOGA)  
Anchorage, Alaska

**POSITION STATEMENT:** Testified in support of SJR 7.

DR. MICHAEL TOBIN, MD, Board Member  
350Juneau - Climate Action for Alaska  
Juneau, Alaska

**POSITION STATEMENT:** Testified in opposition to SJR 7.

ELAINE SCHROEDER, Co-Chair  
350Juneau - Climate Action for Alaska  
Juneau, Alaska

**POSITION STATEMENT:** Testified in opposition to SJR 7.

DOUG WOODBY, Co-Chair  
350Juneau - Climate Action for Alaska  
Juneau, Alaska

**POSITION STATEMENT:** Testified in opposition to SJR 7.

CORI MILLS, Deputy Attorney General  
Civil Division  
Department of Law  
Juneau, Alaska

**POSITION STATEMENT:** Participated in the presentation on statehood defense litigation.

RON OPSAHL, Assistant Attorney General  
Natural Resources Section

Civil Division  
Department of Law  
Anchorage, Alaska.

**POSITION STATEMENT:** Participated in the presentation on statehood defense litigation.

JESSIE ALLOWAY, Solicitor General  
Statewide Section Supervisor  
Opinions, Appeals, and Ethics Section  
Civil Division  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** Answered questions during the presentation on statehood defense litigation.

THAD ATKINS, Assistant Attorney General  
Natural Resources Section  
Civil Division  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** Participated in the overview of litigation related to statehood defense.

#### **ACTION NARRATIVE**

[3:30:04 PM](#)

**CO-CHAIR CATHY GIESSEL** called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Dunbar, Claman, Kaufman, Co-Chair Bishop, and Co-Chair Giessel.

#### **SJR 7-NAT'L PETROLEUM RESERVE IN ALASKA**

[3:30:59 PM](#)

**CO-CHAIR GIESSEL** announced the consideration of SENATE JOINT RESOLUTION NO. 7 Supporting oil and gas leasing and development within the National Petroleum Reserve in Alaska; and urging President Biden and the United States Department of the Interior to approve the Willow Master Development Plan.

She directed attention to the sponsor statement in member's bill packets and highlighted the fourth paragraph. It read:

Revenue from the Willow project will produce positive results for the residents of the region for generations. This will come from the subsequent family-supporting jobs, expanded healthcare and

education opportunities and overall prosperity. As happened over the past 40 years or more, this project will result in positive health and well-being impacts for Alaskans in every corner of our state.

CO-CHAIR GIESSEL relayed that the foregoing statement was based on the substantive data from the Journal of American Medical Association Retrospective Study on Life Expectancy in the state of Alaska over the years when the Trans Alaska Pipeline System (TAPS) came online, Red Dog Mine started production, and the Magnuson Stevens Act passed.

[3:32:12 PM](#)

JULIA O'CONNOR, Staff, Senator Cathy Giessel, Alaska State Legislature, Juneau, Alaska, introduced SJR 7 on behalf of the committee with the following statement:

- The National Petroleum Reserve in Alaska (NPR-A) was established in 1923 by the federal government to provide oil for the United States Navy.
- The 23.5 million acres of NPR-A falls entirely within the North Slope Borough.
- The NPR-A has become a critical source of oil and gas production in Alaska, with great potential for future development.
- The Willow Project, located in the Bear Tooth Unit of the NPR-A, is one of the largest oil development prospects in Alaska. The project would tap into reserves of an estimated 600 million barrels of oil and produce 180,000 barrels per day at peak production. If approved, the project could generate billions of dollars in revenue and create thousands of jobs.
- The Willow Project has support from communities on the North Slope, Alaska Native leaders, labor unions, and stakeholders. In addition, Alaska's entire United States Congressional delegation stands together in support of the project.
- The NPR-A's 2020 Integrated Activity Plan was developed in partnership with local communities and tribes. It included provisions to ensure responsible

development and mitigation of impacts on the environment and cultural resources.

- The Department of the Interior's recent reversal to the 2013 plan, which removes 7 million acres from potential oil and gas development, ignores the needs and input of local communities and violates Executive Order 13175.
- Safe and responsible oil and gas development has been demonstrated by over 50 years of activity on the North Slope without adverse effects on the environment or wildlife populations.
- Senate Joint Resolution 7 urges the Department of the Interior to support the responsible development of resources in the National Petroleum Reserve in Alaska and issue a positive final record of decision for the Willow Project.

[3:34:22 PM](#)

CO-CHAIR GIESSEL found no questions and moved to invited testimony.

[3:34:49 PM](#)

REPRESENTATIVE JOSIAH PATKOTAK, District 40, Alaska State Legislature, Juneau, Alaska, sponsor of the House companion resolution for SJR 7, confirmed that oil development had generational impact on the people living on the North Slope. He conveyed that his grandfather was born in 1932 just outside of Kaktovik, which is now known as ANWR, the Alaska National Wildlife Refuge. His grandmother, who was born in 1920 on the delta of the Prudhoe Bay area, told stories of getting crude oil on her boots when she played in the mud. Her grandfather migrated from Noatak to Colville to start whaling. Representative Patkotak said his family's history in this area is why he's compelled to speak to development in this region.

REPRESENTATIVE PATKOTAK reviewed the history of the NPRA beginning in 1923 when it was established by President Warren Harding as a source of oil for commercial development. In 2017, US Geological Survey (USGS) research estimated the area had 8.7 billion barrels of recoverable oil. In 2020, the Bureau of Land Management (BLM) issued a record of decision for the Willow Project Master Plan and in 2021 the Ninth Circuit issued an injunction. As of February 1, 2023, the final environmental impact statement (EIS) with the preferred alternative E was

issued. This started the 30-day period for the record of decision.

REPRESENTATIVE PATKOTAK conveyed that the companion resolution for SJR 7 was amended to speak to the role that the Willow Project could play in furthering renewable energy where possible. He highlighted that the residents of Utqiagvik/Barrow were able to access natural gas starting in the '60s and the residents of Nuiqsut began using natural gas in 2008 from the Alpine facility. This has saved money and reduced dependence on diesel for these residents. He said his priority is to help more people in the region reduce their reliance on diesel for home heating and power generation.

CO-CHAIR GIESSEL asked him to illuminate the fiscal impact of development in the NPRA for the North Slope Borough.

[3:39:43 PM](#)

REPRESENTATIVE PATKOTAK replied that the property tax assessment over the 30-year estimated life of the Willow project is estimated to have a local impact of \$1.2 billion. Over that timeframe the share of state and federal royalty that goes into the NPRA grant mitigation fund is expected to be about \$2.3 billion. The aggregated total is \$3.5 billion. Importantly, this allows affected municipalities, city governments, and tribal entities east of the Colville River to access these grant funds and better the lives of residents.

CO-CHAIR GIESSEL relayed that she worked for the North Slope School District for nine years, so she knows first-hand the positive impact the Willow Project will have on the communities in the area.

[3:43:45 PM](#)

SENATOR CLAMAN asked if he was requesting this committee amend SJR 7 to match the companion House resolution that was amended in the Resource Committee.

CO-CHAIR GIESSEL said it was not necessary for the committee to address an amendment at this time.

REPRESENTATIVE PATKOTAK agreed that action was not necessary at this time.

[3:44:53 PM](#)

NAGREUK HARCHARIK, President, Voice of the Arctic Inupiaq, Anchorage, Alaska, provided invited testimony in support of SJR

7. He described the nonprofit organization and relayed that the board asked him to convey its unanimous support of the Willow Project and SJR 7. He said it represents a positive model of cultural, economic, and ecological interdependence. He highlighted the benefits to communities from projects like Willow, including food security through research and monitoring of marine mammals by state and federal agencies as well as direct and indirect jobs. Projects like Willow help the people in the area use modern technology and equipment to continue their customary and cultural traditions.

MR. HARCHARIK stated that the Voice of the Arctic Inupiaq is asking the Biden administration to fulfil its promise and listen to the indigenous voice. Throughout the North Slope, the people value and believe in unity in the family and among and between communities. Legislative support of SJR 7 will send a clear message of unity to the Biden administration.

[3:49:22 PM](#)

CO-CHAIR GIESSEL opened public testimony on SJR 7.

[3:49:49 PM](#)

KARA MORIARTY, President and CEO, Alaska Oil and Gas Association (AOGA), Anchorage, Alaska, stated that SJR 7 represents a tremendous opportunity to meet the energy needs of Americans while also benefitting the people of the North Slope. The Willow Project will generate an estimated 2,500 union jobs and significantly boost throughput in TAPS by about 180,000 barrels/day at peak production. She noted that permitting began 70 months ago for three well sites. On behalf of AOGA, she urged the committee to support the resolution.

[3:51:15 PM](#)

DR. MICHAEL TOBIN, MD, Board Member, 350Juneau - Climate Action for Alaska, Juneau, Alaska, stated that he was speaking in opposition to SJR 7. He noted the International Energy Agency statement that no new fossil fuel infrastructure can be developed if there is to be a chance of having a stable climate. Tremendous technological progress has been made in in the area of renewable energy since the oil fields in Prudhoe Bay were discovered and developed. He emphasized that Alaska must go in that direction for the future. A 30-year commitment to fossil-based energy is taking Alaska in the wrong direction. He urged the committee to vote against SJR 7.

[3:52:26 PM](#)

ELAINE SCHROEDER, Co-Chair, 350Juneau Climate - Action for Alaska, Juneau, Alaska, stated opposition to SJR 7. She said climate scientists worldwide have called fossil fuel projects like Willow climate bombs. This is because the Arctic is warming at four times faster than the rest of the planet. This increases the risk worldwide of sea level rise and catastrophic flooding. She noted that UN Secretary Antonio Guterres sent a special message to fossil fuel producers during his annual report to set a credible course for net zero emissions. When asked, she restated opposition to SJR 7.

[3:53:55 PM](#)

DOUG WOODY, Co-Chair, 350Juneau - Climate Action for Alaska, Juneau, Alaska, advised that he submitted written testimony. He said he opposes SJR 7 even though another oil boom is tempting because of the economic opportunities for communities and jobs. He relayed his first-hand experience of paying for heating oil when he lived in the areas around Norton Sound and Kotzebue Sound. Nevertheless, he supports a sustainable energy plan that is not dependent on fossil fuels. That's what the state needs and it will take leadership to get there.

[3:55:21 PM](#)

CO-CHAIR GIESSEL closed public testimony on SJR 7.

She found no questions or comments and solicited a motion.

[3:55:34 PM](#)

SENATOR BISHOP moved to report SJR 7, work order 33-LS0454\A, from committee with individual recommendations and no fiscal note(s).

[3:55:55 PM](#)

CO-CHAIR GIESSEL stated that without objection SJR 7, is moved from the Senate Resources Standing Committee.

[Subsequent to this bill action, SJR 7 was held in committee awaiting a fiscal note per Sec. 24.08.035. Fiscal notes on bills.]

[3:56:03 PM](#)

At ease

**UPDATE: STATEHOOD DEFENSE LITIGATION**

[3:57:35 PM](#)

CO-CHAIR GIESSEL reconvened the meeting and announced the committee would hear an update from the Department of Law on litigation associated with statehood defense.

She directed attention to the document in the packets dated 1/15/2023 titled, "Federal Laws and Litigation Report" that summarizes the extensive roster of litigation the department is currently working on.

[3:58:30 PM](#)

CORI MILLS, Deputy Attorney General, Civil Division, Department of Law, Juneau, Alaska, stated that every year DOL puts out the federal issues list for the legislature. The department intervenes on matters where it aligns with the federal government, or it files suit when it's an issue of jurisdiction/federal overreach. She noted that the bulk of the jurisdictional fights relate to natural resources.

She explained that the overview would highlight certain cases, most of which are funded with statehood defense monies the legislature has provided over the last two years. She noted that the department uses different funding sources for litigation depending on the matter.

[4:00:13 PM](#)

THAD ATKINS, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, Anchorage, Alaska, began the statehood defense litigation update with a review of Wild Fish Conservancy v. Rumsey, et. al. No. 2:20-cv-00417. He spoke to the following points:

- In early 2020 the Wild Fish Conservancy sued the United States, arguing that the Southeast Alaska Chinook Biological Opinion related to Southern Resident Killer Whales was flawed and that take of their food (chinook salmon) was unlawful
- Alaska intervened to defend the Biological Opinion
- The court granted the plaintiff summary judgment, finding that the Biological Opinion violated the ESA and National Environmental Policy Act
- The parties have briefed remedy and the issue is ripe for a final order from the District Court judge

[4:02:23 PM](#)

SENATOR DUNBAR asked what the practical impact will be on the fishery if the ruling is upheld on appeal.

MR. ATKINS answered the winter and summer troll fisheries will terminate if the recommendation is upheld.

MS. MILLS added that a new biological opinion from the National Marine Fisheries Service (NMFS) is expected this summer. The hope is to avoid the devastating impacts this could have if the judge upholds the recommendation.

[4:03:44 PM](#)

SENATOR DUNBAR asked if upholding the recommendation would actually cancel the fisheries or if they would be suspended to give the agencies time to do what she described.

MS. MILLS said that was the focus in oral arguments. There has been a determination of what's wrong and now the work is on the remedy. She deferred to Mr. Atkins for further explanation.

[4:05:00 PM](#)

MR. ATKINS said he would need to confer with Assistant Attorney General Aaron Peterson before he could provide additional information.

SENATOR DUNBAR indicated the answer was satisfactory.

[4:05:37 PM](#)

RON OPSAHL, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, Anchorage, Alaska, discussed the following cases relating to marine mammals, one that the department supports the federal decision and two that it opposes:

- ~ Defense of nonlethal incidental take of polar bears for oil and gas activities
  - o Alaska Wildlife Alliance v. Haaland (U.S. Dist. Alaska)

He explained that the incidental take regulations (ITR) are reissued every five years to allow oil and gas activities to continue on the North Slope. The last authorization in August 2021 was challenged and the state intervened to defend the regulations. The magistrate judge upheld the regulations, and a final order is expected.

[4:07:06 PM](#)

SENATOR CLAMAN asked him to clarify what would remain in place if the decision were upheld.

MR. OPSAHL explained that upholding the regulations maintains the status quo regarding oil and gas operations on the North Slope. If the regulations were struck down, oil and gas activities on the North Slope would stop.

SENATOR CLAMAN asked how long the status quo regulations have been in place.

[4:08:41 PM](#)

MR. OPSAHL answered that a new biological opinion and new regulations are issued every five years. They are different every time. The regulations allow a scope of activities that allow the incidental harassment of polar bears. A certain number of those ITRs can be divided among the activities on the North Slope.

[4:10:06 PM](#)

MR. OPSAHL continued to review marine mammal litigation.

- ~ Challenge to negative 90-day finding regarding State's petition to delist Arctic ringed seal
  - o Alaska v. National Marine Fisheries Service (U.S. Dist. Alaska)

He explained that ringed seals were listed as threatened in 2012. Based on research after that time, ADF&C petitioned for delisting in 2019. The petition was denied, and the state sued. If the state wins the case, the petition will be pushed forward in full review for the next 12 months.

[4:12:36 PM](#)

SENATOR DUNBAR asked whether the state ever supported the listing of a species under the Endangered Species Act.

MS. MILLS said the state didn't have a lot of problems with the Endangered Species Act until the federal government started applying speculative modeling on healthy populations. The modeling indicated species would be threatened in 50-100 years, and they were listed now. The state believes the statute requires the species to be imminently threatened, not 50-100 years from now. She deferred to ADF&G to talk about specific recent cases and the science behind those.

CO-CHAIR GIESSEL noted that the committee could follow up with the Alaska Department of Fish and Game (ADF&G). She clarified that species are being listed based on the notion that they could be threatened in 50-100 years which is even more speculative.

[4:15:13 PM](#)

SENATOR DUNBAR asked when the federal government started the speculative modeling, and if she was asserting that the state was not involved in ESA litigation before then or just not in as many lawsuits.

MS. MILLS said the first time she was aware of the new model was when the polar bear was listed the 2008-2009 timeframe.

[4:16:08 PM](#)

MR. OPSAHL reviewed the third case of marine mammal litigation.

- ~Challenge to critical habitat designations for Arctic ringed seals and bearded seals
  - o Alaska v. National Marine Fisheries Service (U.S. Dist. Alaska)

He said critical habitat is defined under the ESA as specific areas that are essential to the recovery of the species. When these seals were listed, the entire 324,000 square miles where they range in Alaska was designated as critical habitat. He said it's hard to believe all that area is indispensable. Critical habitat designations in the Lower 48 are much more targeted. The state is trying to get the designation reversed.

CO-CHAIR GIESSEL reminded the members that Mr. Mulligan highlighted this case during the last meeting.

[4:17:59 PM](#)

JESSIE ALLOWAY, Solicitor General; Statewide Section Supervisor, Opinions, Appeals, and Ethics Section, Civil Division, Department of Law, Anchorage, Alaska, began by discussing two cases that are meant to preserve the state's traditional authority to manage the methods and means of hunting. She would touch briefly on why the state believes it has that authority then talk about the two related cases: State v. Haaland No. 22-401 and Alaska Wildlife Alliance v. Haaland No. 3:20-cv-209-SLG.

She spoke to the following points to explain why the state has this authority:

- ~ The Alaska Statehood Act transferred the authority from the federal government to the State of Alaska to manage wildlife, including on federal land. The state had to develop a system through the constitution or laws to manage and protect wildlife in the broad interest. The Sustained Use Principle is in the constitution and the legislature enacted appropriate statutes. The Secretary of the Interior certified that these actions met the Statehood Act and management authority was transferred to the state.
- ~ The state believes it has had the traditional authority and ability to manage the methods and means of hunting since that time. The federal government maintains the overarching authority to step in if it has a conservation concern. Through regulation in 1971, the Department of the Interior recognized that states have the authority "to regulate the capturing, taking, and possession of fish and resident wildlife within the public, in-state boundaries."
- ~ When ANILCA passed, Congress created Conservation System Units, but also meant to preserve certain authority for the state. Sections 13-14 says, "Nothing within ANILCA was meant to enlarge or diminish the State of Alaska's authority over wildlife or to change the constitutional provisions." The state has interpreted that to maintain the status quo. That includes the ability to regulate the methods and means of hunting.
- ~ At the end of the Obama administration, the U.S. Fish and Wildlife Service and the National Park Service started promulgating regulations to preempt state law over the methods and means of hunting.
- ~ One rule that's being litigated applies on the Kenai Refuge where certain state-authorized hunting methods were banned, including the take of brown bear over bait. That was later expanded in a statewide refuge rule to include predator control methods the state authorizes. The National Park Service then said it would limit those and other methods of take in national preserves.
- ~ These two cases are related in that they address the federal agencies' authority to preempt state law
- ~ The State filed litigation to challenge all the regulations in 2017. Congress used the Congressional

Review Act to invalidate the statewide refuge rule. That challenge is settled, but the state still needs to challenge the Kenai and national preserve rules.

- ~ The Ninth Circuit Court of Appeals said the federal government has plenary authority over wildlife on federal land. This means there is no limit for when a federal agency can preempt state law.
- ~ After Congress invalidated the statewide refuge rule, the National Park Service changed the rule and recognized the state's authority. The state intervened on their behalf to defend the 2020 regulation that recognized the state's authority.
- ~ The district court looked at the Ninth Circuit decision and said the federal agency had plenary authority to regulate the methods and means of hunting service. The rule was remanded to the agency. The state appealed but that will be held up while the Park Service promulgates new regulations.
- ~ The State filed a petition for certiorari with the Supreme Court, asking it to consider the Ninth Circuit's conclusion on the Kenai rule. It is scheduled for conference on March 3.

[4:25:05 PM](#)

SENATOR CLAMAN asked if this was related to the subsistence priority dynamic in that there is a distinction between one's method of hunting and taking, and how many one may take.

[4:26:11 PM](#)

MS. ALLOWAY said Title VIII of ANILCA has a mechanism for the state to manage that rural subsistence priority. Unfortunately, the Alaska Supreme Court said that rural preference violated the Equal Protection Clause so a federal subsistence board provides management.

To the question, she said Congress has authority under the property clause to manage wildlife populations. The state has its own constitutional provision, but the federal government can overrule a state decision to kill all Brown bears, for example, because of the interest in preserving that wildlife population. Hunting could be closed on the refuge. The state recognizes this but takes the position that for the federal government to exercise that authority, it has to show a conservation concern

that the state is managing the population such that it can't survive. The Alaska Constitution requires management on a sustained yield so there's a little conflict between the two provisions. If the state were to brief that National Park Service appeal, some of those things might be addressed.

SENATOR CLAMAN asked if there was overlap between the lawsuits about the method of taking and the fish and game resources that are subject to the subsistence priority that the federal government is managing.

MS. ALLOWAY replied there is some overlap between management authorities, but not for the Kenai Refuge because that area doesn't have a subsistence priority. There are subsistence priorities in the national preserves.

SENATOR CLAMAN asked her to focus on where there was a subsistence priority managed by a federal agency. He asked if the lawsuit she described had any overlap or was managed entirely by the federal subsistence board.

MS. ALLOWAY replied there's overlap between the management authorities.

SENATOR CLAMAN asked her to describe the overlap. For example, how does the state regulate a subsistence hunter when they are hunting in a federal subsistence unit where they are authorized to take a certain number of game?

MS. ALLOWAY suggested she respond by using the example in the next appeal she was going to talk about.

[4:30:12 PM](#)

SENATOR DUNBAR wondered how the district court and Ninth Circuit Court of Appeals worked around Title XIII and Title XIV of ANILCA.

MS. ALLOWAY answered that Part A preserves the state's authority, Part B preserves the federal government's authority to manage the habitat to sustain the species, and Part C says hunting can happen on these federal lands, subject to federal and state law. She said both the district court and the Ninth Circuit suggested that Part C granted extra authority, but she disagrees. Her interpretation of the provision was that hunting can occur on federal land, but it must comply with the methods and means under state law and comply with federal law on how the

land is accessed. She said DOL will ask the US Supreme Court to look at the congressional grants of authority in ANILCA.

[4:32:16 PM](#)

MS. ALLOWAY turned to slide 9 to discuss Case # 22-0195, State v. Federal Subsistence Board. She spoke to the following points:

- In August 2020, the State challenged the Federal Subsistence Board ("FSB") decision to close moose and caribou hunting in GMU 13A and 13B for two years to non-federally qualified hunters only.
- The State also challenged FSB's delegation of authority to local federal land managers to open emergency hunts and to delegate hunt administration outside of a federal agency.
- In December 2021, the Alaska federal district court issued a decision favorable to the FSB.
- The State appealed and oral argument was held before the Ninth Circuit Court of Appeals in December.

MS. ALLOWAY said the overlap she mentioned occurs when the federal government can step in through the FSB with regulations that are in addition to state regulations. She asked Senator Claman if his question about overlap was answered.

[4:35:35 PM](#)

SENATOR CLAMAN suggested they continue the conversation offline.

MS. ALLOWAY agreed.

[4:35:52 PM](#)

MS. MILLS added that DOL's position is that the means and methods is a state authority.

SENATOR CLAMAN offered his understanding of DOL's perspective that the number of the take is a federal question, and the method of the take is a state question, unless the federal government can show the method would cause harm.

MS. MILLS answered yes; the overall position is that the default is always state methods and means.

SENATOR CLAMAN assumed that an attorney for the federal government might have a different opinion on the question.

MS. MILLS said that's true, but that power wasn't invoked in either the Kenai Refuge case or the National Park Service case.

SENATOR CLAMAN acknowledged subsistence was a little off topic.

MS. MILLS replied that it all intertwines.

[4:38:12 PM](#)

SENATOR DUNBAR asked if it was the state's position that the federal government could not take action on behalf of federally qualified hunters in the circumstance that wealthier non-federally qualified hunters consistently out competed those subsistence hunters.

MS. MILLS clarified that the state has a subsistence hunt but it can't impose it based on zip codes. Rather, all subsistence hunters are in one category, with some exceptions. Without getting into that, she said non-federally qualified hunters are still subsistence. Federally qualified users are those subsistence users that fit into the rural preference that the federal government enforces, but the state cannot.

She continued that it is fact-specific based on things like access, number of animals, and whether the hunt is staggered or phased. The boards of game and fish make those determinations.

SENATOR DUNBAR asked if the case in question involved a remedy for some sort of out-competing.

MS. ALLOWAY said no; the record had no evidence of that. The federal subsistence board considered and rejected the same proposal at the last meeting because it didn't have any basis. The board didn't provide any new evidence but made the decision to close those to areas to non-federally qualified subsistence hunters.

MS. MILLS stated that Mr. Opsahl would provide an update on the cases about navigability.

[4:41:33 PM](#)

MR. OPSAHL stated that he would start by answering some of the questions about navigability that were raised during the previous meeting. He said the confusion stems from the fact that the term navigable waters is used in three contexts.

**Commerce Clause:** In the broadest sense, navigability is in the Commerce Clause. It reaches waters that are navigable in fact, that could be made navigable in fact, or waters that touch waters that are navigable. This is where the Clean Water Act jurisdiction comes in and this is where discharge cannot go into wetlands that drain into navigable waters. This is where the definition of waters of the United States (WOTUS) comes from.

**Rivers and Harbors Act:** A second way that navigability is used is for transport under the Rivers and Harbors Act. Here the term is mostly concerned with obstructions to navigability. This is where the permitting authority resides for the US Army Corps of Engineers for building a levy or a dock or a dam that is going to impede the use of the navigable waters for transportation interstate.

**Equal Footing Doctrine:** Navigability in the current context is for purposes of the Equal Footing Doctrine. This is an older concept than both the others. It comes from the law of the English King. The crown owns tidal waters that boats use. This was introduced in America when the original 13 colonies inherited the rights of the crown at Independence. The only rights that were ceded were those ceded in the Constitution. A right that the states reserved was ownership of the beds of the navigable waters. That right stayed with those states and every state that comes into the union is placed on an equal footing with those original 13 states. They receive ownership of the submerged land under navigable waters. That comes with the right to regulate the uses of the water above the submerged land. The water is owned by the public for the public use. Ownership of water is governed by water law; with a water right, comes the right to use the water, but not own it. Nobody actually owns the water.

MR. OPSHAL continued to explain that the Commerce Clause navigability can change. If a river is made navigable, it can come under the Commerce Clause regulatory authority. The same applies to the Rivers and Harbors Act; navigable servitude looks at present use and it can change in the future, but it doesn't look at the past. The question is navigability today. Under the Equal Footing Doctrine statehood rights governing navigability look to the past to the time of statehood. It's a fixed point in time. By operation of law, submerged lands were transferred to the state for waters that were navigable or susceptible to navigability at statehood. The federal government held those rights for future states.

MR. OPSHAL said there is a lot of confusion about navigability and the courts are never clear about the test it is applying and when. He asked Senator Claman if the explanation answered his question.

[4:47:48 PM](#)

SENATOR CLAMAN summarized his understanding relative to the earlier discussions about assuming primacy of Section 404 of the Clean Water Act. He said the point is that the state's interest is in the submerged lands and that may or may not include the ability to regulate the navigable waters of the US that are above the submerged lands.

[4:48:47 PM](#)

MR. OPSAHL posed a hypothetical example to clarify the point. If somebody put up a zip line on their property that crossed onto the neighboring homeowner's lot, that neighboring property owner could stop the activity. The concept is the same in submerged lands. As the owner of the submerged lands, the state has the obligation to manage how the water above that submerged land is used. The Commerce Clause mixes in with right to regulate the water and discharges into it; the federal government has the right to regulate the things that would affect interstate commerce.

[4:50:02 PM](#)

SENATOR CLAMAN offered a hypothetical situation where it would be a Commerce Clause matter if the federal government wanted to dam the Copper River because it affects commerce. The state could assert different interests but in the end the control of the water in that instance would fall to the federal government. Absent a Commerce Clause assertion, the state may have more control over how the water is managed.

MR. OPSAHL said that's what happens when the Federal Energy Regulatory Commission (FERC) permits dams. The Commerce Clause gives the federal government the authority to permit dams. The state would be reasonably compensated when its submerged lands ownership is impacted. Similarly, if the dam were on private land, the private landowner would be reasonably compensated. Those are examples of taking. What has not yet happened to the extent that it's an issue, is the federal government as an adjacent landowner trying to control impacts when it asserts what happens on the navigable water with state-owned submerged lands. He cited the hypothetical example of BLM saying people cannot drive across BLM land on a boat with a large outboard. It

doesn't affect BLM lands but the agency is trying to bootstrap into the regulation because it doesn't want the large outboard on the state-controlled submerged lands. He said that's happening but it's not an issue at this point. He opined that if the state isn't happy with the way the management plays out, it's the state's duty and obligation to change it through DNR or state law, and prohibit uses it doesn't want.

[4:54:40 PM](#)

SENATOR CLAMAN returned his attention to Section 404 of the Clean Water Act. He recapped that the federal government was exercising its Section 404 authority in the 47 states that have not assumed primacy based on a combination of WOTUS and a Commerce Clause analysis that authorizes permitting what goes into federal waters.

MR. OPSAHL agreed, adding that it applies to both state and private ownership of the submerged lands.

[4:56:38 PM](#)

MR. OPSAHL directed attention to the cases related to submerged lands on slide 11 and explained that the state selected the cases it was challenging based on the likelihood of winning. A reasonable person would say they're navigable. He spoke to the following:

- ~ Middle Fork and North Fork of Fortymile River, Alaska v. United States (U.S. Dist. Alaska) is in a wild and scenic river corridor and a drainage with significant placer mining. The importance is that the decision will talk about state submerged lands in wild and scenic river corridors. This area is easily accessible and sees a lot of activity. The case is in summary judgement.

[4:59:31 PM](#)

SENATOR CLAMAN recapped that in this instance, the state had an interest in confirming title to the submerged land because of the placer mining. The suit asserted the state's claim to the submerged lands. In the course of the litigation, the federal government disclaimed interest in the submerged lands, which effectively acknowledges that the water is navigable. If the state were to win on navigability on the Fortymile River, it would give the state title to the submerged lands that have placer deposits and the state can make those accessible to the placer miners.

MR. OPSAHL said access to the mining claims is a driver, but the state is also looking at how that interacts with wild and scenic rivers. Additionally, the Fortymile connects to waters the state already has ownership of and it drains into the Yukon River that crosses the entire state and into Canada.

CO-CHAIR GIESSEL briefly reviewed the remaining slides and said the discussion probably would continue at a later time. She thanked the presenters.

MS. MILLS suggested that the information was helpful to educate both the legislature and the public since needed explanations sometimes are missing in the media.

[5:03:23 PM](#)

There being no further business to come before the committee, Co-Chair Giessel adjourned the Senate Resources Standing Committee meeting at 5:03 p.m.