

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

March 29, 2023

3:31 p.m.

MEMBERS PRESENT

Senator Click Bishop, Co-Chair
Senator Cathy Giessel, Co-Chair
Senator Bill Wielechowski, Vice Chair
Senator Scott Kawasaki
Senator James Kaufman
Senator Forrest Dunbar
Senator Matt Claman

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 87

"An Act relating to a lumber grading training program and lumber grading certificates; relating to use of lumber graded and certified by a person holding a lumber grading training program certificate; and providing for an effective date."

- MOVED SB 87 OUT OF COMMITTEE

SENATE BILL NO. 92

"An Act relating to state ownership of submerged land underlying navigable water within the boundaries of and adjacent to federal areas; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 67

"An Act relating to firefighting substances; and providing for an effective date."

- MOVED CSSB 67(RES) OUT OF COMMITTEE

HOUSE JOINT RESOLUTION NO. 11

Urging the United States Environmental Protection Agency to develop a woodstove certification program that addresses the threat to clean and healthy winter air in Fairbanks; and urging

the state Department of Environmental Conservation to develop an economically and legally defensible state implementation plan for the Fairbanks North Star Borough nonattainment area.

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: SB 87

SHORT TITLE: LUMBER GRADING PROGRAM

SPONSOR(s): SENATOR(s) BJORKMAN

03/01/23	(S)	READ THE FIRST TIME - REFERRALS
03/01/23	(S)	RES, FIN
03/15/23	(S)	RES AT 3:30 PM BUTROVICH 205
03/15/23	(S)	Heard & Held
03/15/23	(S)	MINUTE(RES)
03/24/23	(S)	RES AT 3:30 PM BUTROVICH 205
03/24/23	(S)	Heard & Held
03/24/23	(S)	MINUTE(RES)
03/29/23	(S)	RES AT 3:30 PM BUTROVICH 205

BILL: SB 92

SHORT TITLE: STATE OWNERSHIP OF SUBMERGED LAND

SPONSOR(s): SENATOR(s) GIESSEL BY REQUEST

03/08/23	(S)	READ THE FIRST TIME - REFERRALS
03/08/23	(S)	RES
03/29/23	(S)	RES AT 3:30 PM BUTROVICH 205

BILL: SB 67

SHORT TITLE: PFAS USE FIREFIGHTING

SPONSOR(s): SENATOR(s) KIEHL

02/10/23	(S)	READ THE FIRST TIME - REFERRALS
02/10/23	(S)	RES, FIN
03/01/23	(S)	RES AT 3:30 PM BUTROVICH 205
03/01/23	(S)	Heard & Held
03/01/23	(S)	MINUTE(RES)
03/13/23	(S)	RES AT 3:30 PM BUTROVICH 205
03/13/23	(S)	Heard & Held
03/13/23	(S)	MINUTE(RES)
03/29/23	(S)	RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

JOHN HOUGH, Intern

Senator Cathy Giessel
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented the explanation of changes for SB 92 from version A to version B.

JIM WALKER, Section Chief
Public Access Assertion and Defense
Division of Mining, Land, and Water
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Co-delivered a presentation titled "State ownership of Submerged Lands - SB 92."

DANIEL HOVANCSEK, Natural Resources Specialist
Division of Mining Land and Water
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Co-delivered a presentation titled "State ownership of Submerged Lands - SB 92."

RON OPSAHL, Senior Assistant Attorney General
Natural Resources Section
Civil Division
Department of Law
Anchorage, Alaska

POSITION STATEMENT: Answered questions during the hearing on SB 92.

JOHN STURGEON, President
Safari Club International - Alaska Chapter
Anchorage, Alaska

POSITION STATEMENT: Provided invited testimony in support of SB 92.

MIKE SEWRIGHT, retired Assistant Attorney General
Anchorage, Alaska

POSITION STATEMENT: Provided invited testimony in support of SB 92.

SENATOR JESSE KIEHL
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Sponsor of SB 67.

ACTION NARRATIVE

[3:31:16 PM](#)

CO-CHAIR CLICK BISHOP called the Senate Resources Standing Committee meeting to order at 3:31 p.m. Present at the call to order were Senators Dunbar, Kawasaki, Claman, Kaufman, Co-chair Giessel, and Co-Chair Bishop. Senator Wielechowski arrived during the course of the meeting.

SB 87-LUMBER GRADING PROGRAM

[3:32:12 PM](#)

CO-CHAIR BISHOP announced the consideration of SENATE BILL NO. 87, "An Act relating to a lumber grading training program and lumber grading certificates; relating to use of lumber graded and certified by a person holding a lumber grading training program certificate; and providing for an effective date."

CO-CHAIR BISHOP found no questions or comments and solicited a motion.

[3:32:35 PM](#)

CO-CHAIR GIESSEL moved to report SB 87, work order 33-LS0380\S, from committee with individual recommendations and attached fiscal note(s).

[3:32:48 PM](#)

CO-CHAIR BISHOP found no objection and SB 87 was reported from the Senate Resources Standing Committee.

SB 92-STATE OWNERSHIP OF SUBMERGED LAND

[3:33:00 PM](#)

CO-CHAIR BISHOP announced the consideration of SENATE BILL NO. 92 "An Act relating to state ownership of submerged land underlying navigable water within the boundaries of and adjacent to federal areas; and providing for an effective date."

He noted there was a committee substitute (CS) for the committee to consider.

[3:33:18 PM](#)

CO-CHAIR GIESSEL moved to adopt the committee substitute (CS) for SB 92, work order 33-LS0536\B, as the working document.

[3:33:34 PM](#)

CO-CHAIR BISHOP objected for an explanation of the changes.

[3:34:26 PM](#)

JOHN HOUGH, Intern, Senator Cathy Giessel, Alaska State Legislature, Juneau, Alaska, presented the explanation of changes for SB 92 from version A to version B.

1. In Section 10 (AS 38.04.910), page 87, lines 25-30, page 88, lines 1-2:

a. Deleted "federal area" means land within state borders that is managed by a federal agency, including the United States National Park Service, the United States Fish and Wildlife Service, the United States Forest Service, or the United States Department of the Interior Bureau of Land Management, but does not include federally managed land that is subject to a pre-statehood federal withdrawal that clearly and explicitly evinces the intent to defeat state acquisition of title; "

b. Added "federal area" means federally owned land within state borders that is managed by a federal agency, including the United States National Park Service, the United States Fish and Wildlife Service, the United States Forest Service, and the United States Department of the Interior, Bureau of Land Management; "federal area" does not include

(A) federally managed land that is subject to a pre-statehood federal withdrawal that clearly and explicitly evinces the intent to defeat state acquisition of title; and

(B) land that is privately owned;.

This change clarifies that it is not the intent of the state to claim privately owned lands, including those of regional and village Native corporations.

2. In Section 8, page 3, line 19:

a. Corrected an incorrect cross-reference to a definition of "navigable water."

3. In Section 9, page 63, line 16:

a. Removed typographical error.

[3:36:28 PM](#)

CO-CHAIR BISHOP removed his objection and version B was adopted.

[3:36:41 PM](#)

SENATOR CATHY GIESSEL, District E, sponsor of SB 92, explained that the bill reasserts the state's claim to its submerged lands. This will allow the state to better define, recognize, and catalog navigable waters and submerged lands in the state. She noted that SB 92 builds on the historic John Sturgeon litigation and the Gulkana River case.

SB 92 allows active management of state-owned navigable waters, asserts state sovereignty in state and federal land planning initiatives, and specifically identifies these areas. It does this by codifying state ownership, management, and control. SB 92 requires an annual legislative report and criteria for DNR's navigability determinations. SB 92 has a zero fiscal note.

She identified Section 8 and Sections 10-13 as the substantive sections. The rest of the bill names the waters being referenced, many of which are unnamed. She reviewed and defined the terms mean high water, mean high water line, and ordinary high water mark, all of which are used in the bill.

[3:39:08 PM](#)

MR. HOUGH presented the sectional analysis for SB 92, version B.

Section 1 - Amends law by adding a new section to state the purpose of the act.

The purpose is to assert the state's ownership interest in all submerged land underlying navigable water since the date of statehood. The statement of purpose specifically calls out state-owned submerged land within the boundaries of and adjacent to federal areas.

Section 2 - Amends AS 38.04.062(a)

Clarifies that the state owns all submerged lands underlying navigable water from the date of statehood through the equal footing doctrine, including those within the boundaries and adjacent to federal lands.

Section 3 - Amends AS 38.04.062(b)

Adds the additional obligation for the Department of Natural Resources commissioner to conduct ongoing research to identify submerged lands within and adjacent to federal areas to make state title determinations.

Section 4 - Amends AS 38.04.062(c) to change a reference from the time of statehood to the date of statehood.

Creates the obligation for the commissioner to maintain a list of all water in the state for which the commissioner determines are non-navigable.

Section 5 - Amends AS 38.04.062(d) to insert a citation to proposed new section of statute under this bill.

Clarifies that water not included on lists of navigable or non-navigable, is not considered either until the commissioner has made a determination of navigability. Added citation to refer to lists and determinations under AS 38.04.063 as well as existing those in (b) and (c).

Section 6 - Amends AS 38.04.062(e)

Amended section serves as a disclaimer for commissioner determinations made under (b) or (c) in that they may not be representative of final action, may not be recorded and does not create new property.

Section 7 - Amends AS 38.04.062(g) (2)

This section clarifies the language defining the date of statehood in regard to the definition of "non-navigable water".

Section 8 - Amends and adds new subsections under AS 38.04.062, (h)-(j), that create new obligations for the commissioner.

Subsection (h) creates an added obligation for the commissioner, requiring him to submit an annual report to the legislature. The report shall identify navigable waters within or adjacent to federal areas not listed in AS 38.04.063(b), as well as changes to previously identified navigable water. Subsection

(i) clarifies that failure to include or identify navigable waters does not relinquish the states' rights regarding those submerged lands. Subsection

(j) clarifies that determinations of navigability will be consistent with the definition of navigability and be based on corroborating evidence. Subsection (j) also outlines criteria for navigability.

[3:42:17 PM](#)

Section 9 - Amends AS 38.04 and adds a new section AS 38.04.063 concerning state ownership of submerged lands within federal areas.

This section makes clear that since statehood Alaska owns, claims, occupies, possesses, manages, and controls all submerged lands underlying navigable waters. In subsection (b) it creates a list of navigable waters within and adjacent to federal areas.

Section 10 - Amends AS 38.04.910 by adding a definition section.

The following terms are defined in section 10: federal area, mean high water line, navigable water, ordinary high-water mark, and submerged land.

Section 11 - Repeals AS 38.04.062(g)(1), the previous definition of "navigable water".

Section 12 - Amends the law to make it retroactive to January 3, 1959, the date of statehood. T

This bill will require a special vote of two-thirds of the members of each house because the proposed retroactive effective date for this section varies from the standard language providing for an effective date 90 days after enactment.

Section 13 - This section provides for an immediate effective date under AS 01.10.070(c).

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CO-CHAIR BISHOP found no questions and turned to invited testimony.

[3:44:05 PM](#)

JIM WALKER, Section Chief, Public Access Assertion and Defense, Division of Mining, Land, and Water, Department of Natural Resources, Anchorage, Alaska, co-delivered a presentation titled "State ownership of Submerged Lands - SB 92." He began on slide 2, "The Navigable Waters Issue."

- Alaska holds an estimated 800,000 miles of navigable rivers
- Alaska holds an estimated 30 million acres of navigable lakes
- Alaska owns the submerged lands beneath every navigable-in fact river and lake, and beneath tidally influenced waters in the state, unless a valid pre-statehood withdrawal EXPLICITLY defeats state title
- In Federal Conservation System Unit areas created in Alaska post-statehood, the submerged lands beneath navigable-in-fact and tidally influenced waters are State-owned lands

[3:45:59 PM](#)

MR. WALKER spoke to slide 3, "Federal Areas Where the State of Alaska Owns Submerged Lands."

- National Park Service: Noatak National Preserve (NPr), Kobuk Valley National Park (NP), Bering Land Bridge NPr, Denali National Park and Preserve (NPP) (ANILCA additions), Wrangell-St. Elias NPP, Glacier Bay NPP, Katmai NPP, Kenai Fjords NP, Gates of the Arctic NPP, Lake Clark NPP, Yukon-Charley Rivers NPr, etc.
- U.S. Fish and Wildlife Service: Becharof National Wildlife Refuge (NWR), Innoko NWR, Izembek NWR, Kanuti NWR, Kenai NWR, Kodiak NWR, Koyukuk NWR, Nowitna NWR, Selawik NWR, Tetlin NWR, Togiak NWR, Yukon Delta NWR, Yukon Flats NWR, etc.
- U.S. Forest Service: Tongass National Forest, Chugach National Forest
- Bureau of Land Management: Beaver Creek Wild and Scenic River (WSR), Birch Creek WSR, Fortymile River WSR, Gulkana River WSR, Unalakleet River WSR, Delta River WSR, etc.

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MR. WALKER turned to slide 4, "Status of Efforts to Clear Title 1959 to Present" to discuss why this issue is so timely.

The federal government acknowledges Alaska's clear title to its submerged lands beneath navigable-in-fact and tidally influenced rivers and lakes in only:

- 9 percent of 800,000 river miles of submerged lands under state-owned rivers
- 16 percent of 30,000,000 acres of submerged lands under state-owned lakes

He stressed that without bold action to force resolution, fulfilling the fundamental promise of Alaska statehood will take hundreds of years. SB 92 calls the question; it tells the federal government to either acknowledge and acquiesce to the state's ownership or object. Objecting would give the state the necessary standing to begin litigation pursuant to the federal Quiet Title Act.

[3:52:42 PM](#)

MR. WALKER turned to slide 5, "Sturgeon vs. Frost, 136 S. Ct. 1061 (2016 & 139 1066 (2019))." He said this case provides much of the impetus for the statewide defense initiatives. In this case the US Supreme Court ruled unanimously that federal regulations do not supersede State of Alaska ownership and management of navigable waters within ANILCA Conservation System Units (CSU). He deferred to Mr. Hovancsek to continue the presentation.

[3:54:20 PM](#)

DANIEL HOVANCSEK, Natural Resources Specialist, Division of Mining Land and Water, Department of Natural Resources, Anchorage, Alaska, continued to slide 6 that shows the nine actions that assert state ownership and authority relating to statehood defense and navigability. It read:

Statehood Defense: Navigability

- Intensify quiet title litigation against the Federal Government
- Partner with users to document navigable waters usage for strategic purposes
- Negotiate in good faith with federal authorities
- Educate, energize public on State efforts and federal
- Heighten failures number of RDI applications filed to highlight BLM backlog
- Assert State management of submerged lands in federal areas
- Aggressive approach in State and Federal land planning initiatives
- Release map of State-owned navigable waters in federal areas
- Legislatively codify State-owned navigable waters in federal areas

MR. HOVANCSEK explained that every river within a federal Conservation System Unit is either navigable or non-navigable. If the state disagrees with a non-navigable determination, the remedy is to file a quiet title action in court. If navigability is ambiguous, the state can file a recordable disclaimer of interest. In that filing the state provides facts including the state's own navigability determination. This is a relatively simple process that was intended to expedite navigability determinations. Unfortunately, it hasn't worked as intended and there is a large backlog.

SB 92 offers an alternative option for DNR. He noted that all nine actions listed on the slide work together to strengthen the state's hand.

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SENATOR DUNBAR referenced the last bullet and asked whether the state was following federal law or a state agency had indicated that this type of legislation would strengthen the state's hand.

MR. WALKER answered no, but the department hopes that passing SB 92 will facilitate federal legislation.

[3:57:47 PM](#)

SENATOR KAWASAKI asked if the idea was that putting it in state law makes it true.

MR. WALKER responded that DNR is saying that this is an important issue that requires a statement from the legislature that the state is claiming the lands it was promised at statehood. A statement from the legislature is more significant than if it were to come from the department, because the legislature represents the voice of Alaska.

He added that the state's navigability determinations include the robust body of federal case law on navigability. That law says that navigability determinations are based on what was navigable at statehood using watercraft that were traditional at the time. The watercraft used in 1959 are much the same as the watercraft used today.

SENATOR KAWASAKI asked what other states have done to assert ownership of state lands.

MR. WALKER said the cases are similar in that they all involve proving the navigability of the river. This is done by showing through either historical proof that it was used as a route for trade, travel, or commerce or by showing that the river is in its natural condition and can be floated in a boat that is meaningfully similar to a watercraft used at statehood for trade, travel, or commerce.

He acknowledged that most states decided these issues much earlier because they became states long before Alaska achieved statehood. The State of Tennessee, for example, decided these issues in the 19th century based on settled case law at the time.

[4:02:08 PM](#)

SENATOR WIELECHOWSKI joined the committee.

[4:02:16 PM](#)

CO-CHAIR BISHOP noted the earlier statement that the state owns these submerged lands. He asked Mr. Walker if he agreed that the state was trying to get title to these submerged lands so it would own them.

MR. WALKER submitted that title was vested immediately on January 3, 1959 when Alaska became a state. SB 92 clarifies what the state has title to and settles the lingering questions about how far upstream a river is navigable. He reminded the committee that Alaska received lands in two ways: 1) through statehood selections and 2) separately under the equal footings doctrine that gives a state entering the Union title to the beds of waters then navigable or tidally influenced. Title to these lands were vested immediately at statehood.

[4:03:50 PM](#)

SENATOR KAUFMAN offered his understanding of the explanation, which was that the state has title but it's clouded, and SB 92 provides the opportunity to remove the cloud.

MR. WALKER responded that a cloud on a title describes the legal state when two parties claim ownership to the same property. This is different because the federal government has been ambiguous, but is treating the waters as non-navigable. He said SB 92 removes the ambiguities from the clean title that the State of Alaska owns.

[4:05:23 PM](#)

SENATOR CLAMAN offered his understanding that the questions about ownership of submerged lands were getting litigated slowly in federal court.

MR. WALKER agreed.

SENATOR CLAMAN summarized that SB 92 asserts a claim to submerged lands, and it's not clear how the federal government will respond.

MR. WALKER opined that the federal government could do one of two things. One, it could disagree and assert ownership and thus the standing to begin proceedings pursuant to the Quiet Title Act. Second, the federal government could assert ownership when

the state makes a navigability determination. He described the sequence of events after the state made a navigability determination at Crescent Lake that's located within the Lake Clark National Park and Preserve. Importantly, the National Park Service treated Alaska as a sovereign. He opined that this was the foundation for a partnership that the state and federal government would enjoy moving forward.

MR. WALKER maintained that throughout the state there has been a general acquiescence to state ownership of submerged lands and navigable waters when the federal government feels the state has done the necessary analysis and made a decision based on the application of sound federal law.

[4:08:53 PM](#)

SENATOR CLAMAN pointed out that this was supposition; he wasn't representing the federal government and he didn't know what the federal government would do.

MR. WALKER agreed.

SENATOR CLAMAN commented that he wasn't sure that SB 92 would produce the result he was describing.

[4:10:13 PM](#)

SENATOR DUNBAR said the federal government could also choose to ignore SB 92 and continue to settle the question on a case-by-case basis. He said he agrees with the legal underpinning of the bill and probably agrees with the list of lands and waters, but he doesn't agree that SB 92 calls the question in a meaningful way. The state can make the assertion but inaction by the federal government does not mean it acquiesced. The federal government can always come back and assert ownership, and the matter will have to be settled in federal court.

[4:12:17 PM](#)

CO-CHAIR GIESSEL responded that the purpose of the bill is to help the state move forward. Section (6)(m) of the Statehood Act regarding submerged lands says, "...said State shall have the same rights as do existing States thereunder." The Alaska National Interest Lands Conservation Act (ANILCA) repealed that section and replaced it with Public Law 100-395. Title I addresses submerged lands and the state possession thereof. She acknowledged the possibility of lawsuits, mentioned the John Sturgeon case, and posited that it was time for the legislature to take a stand.

[4:14:06 PM](#)

MR. HOVANCSEK continued to slide 7, "Proposed Codification Legislation Overview." He described the four things that the bill does that will help DNR achieve its goals.

1. Codifies State of Alaska (SOA) ownership, management and control of navigable waters and submerged lands within federal areas not covered by a valid pre-statehood withdrawal explicitly defeating state title
2. Lists specific navigable waters and submerged lands in federal areas statewide belonging to SOA
3. Enshrines foundational elements of relevant caselaw to guide in navigability determinations
4. Establishes annual reporting requirement to legislature

[4:16:19 PM](#)

MR. HOVANCSEK advanced to slides 8-9, "Proposed Codification Legislation," and spoke to the following:

1. Codifies SOA ownership, management and control of navigable waters and submerged lands within federal areas not covered by a valid prestatehood withdrawal explicitly defeating state title
 - Underscore state ownership, management and control of lands owned by the state since statehood
 - Clarify and educate: Clearly enumerates the extent of state management authority within federal boundaries
 - Increases public understanding and aids in management
 - Correlates with publicly maintained records and maps
 - Reflect reality: Accurately depicts land ownership and state boundaries with ongoing quality control
2. Lists specific navigable waters and submerged lands in federal areas statewide belonging to SOA
 - First phase: All NPS and USFS areas statewide plus Tetlin National Wildlife Refuge
 - Second phase: Remaining USFWS refuges
 - Third phase: All BLM lands

- Fourth phase: Ongoing process of clarification, modification and amendment

Framework for proposed statute is based upon RS 2477 Right-of-Way codification project in 1990s [AS 19.30.400].

[4:19:33 PM](#)

CO-CHAIR BISHOP asked him to go over the four tests to be on the list of navigable waters.

MR. HOVANCSEK responded that to create the list DNR looked at historical images from the '50s, modern-day images, archival use accounts from miners, anecdotal accounts or historical records showing the ways that people traveled, and modern-day use accounts such as a whitewater guide book.

CO-CHAIR BISHOP asked if they used any historical accounts from indigenous people about their trade routes.

MR. HOVANCSEK said yes; he cited an example where DNR was able to determine navigability on two creeks in the southern Brooks Range based on the evidence of significant Native use.

[4:21:25 PM](#)

SENATOR DUNBAR asked whether DNR had published this list and the maps administratively for public use.

MR. HOVANCSEK answered yes; it's published on Alaska Mapper. He noted that each navigable water that's listed has a state water federal area (SWFA) number that ties to a corresponding file.

[4:22:20 PM](#)

MR. HOVANCSEK advanced to the map on slide 10 that shows the navigable waters that the federal government has acknowledged are state-owned. The rivers that the federal government deems navigable are the blue lines and the rivers that are federally undetermined as to navigability are the pink lines. The tan areas are federal Conservation Service Areas. He noted that the valid pre-statehood withdrawals have been removed from the map. These are Glacier Bay, Katmai, Denali, and the North Slope.

He directed attention to the map on slide 11 that shows the state-owned navigable waters if the bill were to pass. All the pink lines on the previous slide are blue. He cautioned that this was a course view of an intricate and dynamic system.

SENATOR DUNBAR pointed out that even if the bill didn't pass, slide 11 still would be an accurate depiction of the rivers the state owns.

MR. HOVANCSEK said that's correct, but it would be a more significant statement for the users if it were Alaska law as opposed to an administrative determination.

[4:24:35 PM](#)

CO-CHAIR BISHOP turned back to slide 10 and asked if the federal government might cite him if he took his boat on one of the rivers depicted with a pink line.

MR. HOVANCSEK said it's a possibility.

MR. WALKER added that one reason that John Sturgeon succeeded in his case against the USNPS was that the Nation River had been determined navigable. This gave the state the authority to regulate the types of usage on the floating waters above the state-owned land. The map on slide 10 reflects the federal perspective, which is that ownership is uncertain so the federal government will act as the owner until a navigability determination is made. Adopting the new map on slide 11 shows areas that DNR knows are fully navigable. The department is highly confident that it will win if the federal government litigates on these rivers.

CO-CHAIR BISHOP asked whether the state would come to his defense if he took his boat on any of the rivers on the blue map because navigability would still be in question even if the bill were to pass.

MR. WALKER said a primary reason for this map is so the state can assert the rights of all Alaskans. It represents the department's best understanding of what is and is not navigable. He opined that DNR would welcome litigation on any of the areas depicted in blue because it is highly confident it will win.

[4:28:01 PM](#)

SENATOR DUNBAR asked if he agreed that a person could get cited regardless of whether the bill passes and the state could defend that person regardless of whether the bill passes.

MR. WALKER opined that the person was likely to find they are on their own if there isn't something that affirmatively states what is state-owned property. He deferred further response to Ron Opsahl.

CO-CHAIR BISHOP asked Mr. Opsahl if he heard the question.

[4:29:09 PM](#)

RON OPSAHL, Senior Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, Anchorage, Alaska, asked him to repeat the question.

SENATOR DUNBAR asked whether the state had the ability to intervene on behalf of a citizen who was cited, based solely on the list and map that the state issued administratively. He also asked if that would change if this law were to pass.

MR. OPSAHL answered that he doesn't believe the state would file a motion to intervene in a lawsuit. It was more likely that the state would file a quiet title action based on the federal government's assertion of ownership as indicated by the citation. The person who was cited could use the state's litigation to either dismiss or stay the proceedings on their citation.

SENATOR DUNBAR asked if that could be done now.

MR. OPSAHL said yes; the difference is that once the list is codified, the public will be more aware of the rivers the state has title to.

[4:31:51 PM](#)

SENATOR WIELECHOWSKI said he believes that many Alaskans appreciate the aggressive stance the department has taken with the federal government to protect the waterways. He asked whether the department takes the same aggressive position when landowners block access to state recreational areas such as Chugach State Park and Campbell Lake. He asked, if not, why not?

MR. WALKER said the answer is generally yes; the department has advocated for the public's right to enjoy the waters of Campbell Lake and numerous other rivers statewide where individuals have tried to block access. He described Campbell Lake as a confused situation; DNR believes Campbell Creek was navigable at statehood so it owns some of the submerged lands. However, most of the usage is on the surface waters of the lake. The department has worked with the municipality to clarify that the public has a right to use those surface waters and has identified the section line and public access easements that provide access to the water. He understands that House Finance

appropriated \$10,000 for DNR to sign those access points to inform the public of how to get to the waters of Campbell Lake.

[4:35:40 PM](#)

SENATOR CLAMAN agreed with Mr. Opsahl that if a person were to be cited for using their boat on a river that's shown as a pink line, the state would not represent that citizen. The state might file a quiet title action, but the individual would be on their own to deal with their citation.

[4:37:06 PM](#)

MR. WALKER maintained that if the boat owner could point to an Alaska statute that says the state owns that river, it would create reasonable doubt.

SENATOR CLAMAN conveyed that Sturgeon was a civil case.

CO-CHAIR BISHOP asked whether this type of citation would be handled in state or federal court.

MR. WALKER answered that a person cited by federal authorities would go before a federal magistrate. He relayed an example of a case a federal magistrate dismissed relating to a waterway for which the state had affirmatively asserted quiet title.

[4:39:22 PM](#)

At ease

[4:39:55 PM](#)

CO-CHAIR BISHOP reconvened the meeting and asked Mr. Hovancser to continue.

[4:40:04 PM](#)

MR. HOVANCSEK continued the presentation on slide 12, "Noatak and Kobuk Valley National Parks Federally-Acknowledged Navigable Waters." He said the federal perspective is that the main river in the Noatak is navigable up to the confluence with the Aniak River. The map shows the blue line turns to a blue and red hatched line at the confluence. He relayed that he floated the river this last summer and took a hydrological measurement at the confluence. It indicated that the flow rate was 3,088 cubic feet per second (CFS). The river was 320 feet wide at that point. He said it would not be a hardship to navigate a canoe or raft on that portion, but the Bureau of Land Management determined navigability stopped at the confluence. He continued to say that many of the waters addressed in the bill are "hallowed, large, significant Alaskan rivers."

MR. HOVANCSEK advanced to slide 13, "Noatak and Kobuk Valley National Parks Navigable Waters After Codification." It shows considerable growth in state ownership, management, and control, but there are still pink lines where ownership has not been determined. He described DNR's calls and the map as conservative. He conveyed the department's belief that as a matter of law, Alaskans are due navigability determinations. If the state disagreed with the determination, it would have an administrative remedy to move forward.

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MR. WALKER advanced to slides 14-16, "Proposed Codification Legislation," and spoke to the following:

3. Enshrines foundational elements of relevant caselaw to guide in navigability determinations
 - **Susceptibility criteria to guide DNR in making navigability determinations including, but not limited to:**
 - Watercraft Type: Round raft, Canoe, Jon boat, Jet boat
 - Alaska v. Ahtna, Inc., 891 F. 2d 1401 (9th Cir. 1989) (Gulkana River).
 - Susceptibility: Documented modern day use is sufficient
 - Alaska v. United States, Case No. 3:12-cv-00114-SLG (D. Alaska 2016) (Mosquito Fork (Fortymile) River).
 - Navigability doesn't require a clear channel, two-way traffic, or historical evidence if the river is susceptible to navigation.
 - PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012); Utah v. United States, 403 U.S. 9 (1971); United States v. Utah, 283 U.S. 64 (1931).

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- Section Ten:
 - **Define geographical scope of legislation**
 - Post-statehood federally owned lands
 - **Define key navigability terms for purposes of legislation including**
 - Ordinary high-water mark
 - Navigability ▪
 - Submerged land

- Federal area

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4. Establishes annual reporting requirement to legislature

Charges DNR with responsibility to conduct ongoing navigability research to determine state title to submerged lands within relevant federal areas

- Ensures non-exhaustive codified list best reflects reality
 - Ensures public facing document is accurate
- Further refinement and fine tuning as our quiet title litigation continues
- Provides leadership to federal authorities and a path forward to settle ambiguity so that land management benefiting the public will follow

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MR. WALKER advanced to slide 17, "Proposed Legislation," and paraphrased the following:

Alaska's ownership of Submerged Lands beneath navigable -in -fact and tidally influenced rivers and lakes is one of the fundamental promises of Statehood.

It's been 64 years. It is time for the Federal Government to keep its promise to the State of Alaska. SB 92 is a bold step in that direction.

CO-CHAIR BISHOP invited Mr. Sturgeon to provide his testimony.

[4:45:07 PM](#)

JOHN STURGEON, President, Safari Club International Alaska Chapter, Anchorage, Alaska, provided invited testimony in support of SB 92. He paraphrased the following prepared testimony:

The State of Alaska is incrementally being cheated out of one of its most cherished and valuable sovereign rights, the right to manage its navigable waters, like every other State!!! Management of many of its navigable lakes and rivers, are being withheld by the Federal Government. The State of Alaska must take strong and decisive action immediately or watch while it loses management over thousands of miles of rivers and thousands of lakes. Remember, approximately 80% of

Alaska's towns and villages don't have road access. Their roads are Alaska's rivers.

Under the Equal Footing Doctrine, the Statehood Act, and the Submerged Lands Act, the State was granted ownership at Statehood of the submerged lands of all navigable waterways between the ordinary high water marks. The State's Constitution, statutes and regulations clearly say the State owns and manages these submerged lands and navigable waters and that its citizens have free and unrestricted access unless restricted under regulations authorized by the State legislature not the federal government. There are exception such as US Coast Guard boating regulations. Alaska law could not be clearer on this issue.

Thanks to two US Supreme Court decisions, *Sturgeon v Frost*, I and II, the Court unanimously ruled that the State of Alaska has the legal right to manage all navigable rivers and lakes and the submerged lands beneath them regardless of the upland ownership. That took 12 years and \$13 million contributed by thousands of fellow Alaskans. Unfortunately, the Federal government has been extremely slow in conveying title to these navigable waters and submerged lands. Only 9% of the States titles to navigable waters have been adjudicated by the Federal government. This is spite of numerous lawsuits by the State of Alaska on navigable water. The State has not lost even one of these lawsuits. It is clear after these numerous lawsuits there has immerged a definition of what constitutes a navigable waterway in Alaska. However, even with these court losses the feds continue to try redefine what constitutes a navigable waterway. Either the Federal government is intentionally dragging the process out or they are totally inept or both.

SB-92 provides a declaration by the State of Alaska which navigable waters it considers to be owned by the State. It plants the Alaskan flag on all these waters for all to know who owns and manages them.

CO-CHAIR BISHOP asked Mr. Sturgeon to send his comments to his office.

[4:48:45 PM](#)

MIKE SEWRIGHT, retired Assistant Attorney General, Anchorage, Alaska, provided invited testimony in support of SB 92. He stated that this bill is helpful and educational and could lead to less litigation because it would reduce uncertainty. Federal agencies would know where the state stands. With the voice of the legislature, the bill has added importance. It identifies the waterways in question. He likened the bill to the RS2477 legislation in which the legislature recognized more than 600 federal trails in Alaska. DNR could then publish the list of navigable rivers and waterways that the legislature recognized. The identification of these waters is the heart of this legislation.

MR. SEWRIGHT explained that as part of statehood and the Alaska National Interest Lands Conservation Act (ANILCA), both the state and the Alaska Native corporations had the right to select federal lands. Centuries of established law in the Lower 48 said a state's right to submerged lands and control over the waters above was established by evidence of the susceptibility of a waterway to use by fur traders. Contrary to this, the federal government took the position that in Alaska, only waterways like the Yukon, Kuskokwim, and Susitna were navigable because they could handle large volumes of traffic in very large boats.

MR. SEWRIGHT related his experience litigating the test cases in the late 1970s and 1980s. Chief among these was the Gulkana River case; it became precedent because the federal government was trying to transfer much of the bed of that river to a regional Native corporation. The state's position was that this was state land. The case was decided in the state's favor and both the state and Native corporations benefited. This continues to be the law for Alaska.

He said the second dynamic, that gets to the current situation and why SB 92 is important, is that the National Park Service resisted. This culminated when the NPS kicked John Sturgeon off the Nation River. The case went to the US Supreme Court and the decision was in Alaska's favor. Alaska's waterways and various private, state, and Native inholdings would not be subject to NPS regulations.

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CO-CHAIR BISHOP asked him wrap up and send the remainder of his comments to the committee so the members could read it.

MR. SEWRIGHT concluded that SB 92 is important legislation and if he were a park manager, he would tell his staff to avoid

confrontation on the waterways that the legislature has identified as navigable and the state claims. He restated that this legislation is educational and can be very positive in avoiding litigation by getting people to work together.

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CO-CHAIR BISHOP held SB 92 in committee.

SB 67-PFAS USE FIREFIGHTING

[5:00:55 PM](#)

CO-CHAIR BISHOP announced the consideration of SENATE BILL NO. 67, "An Act relating to firefighting substances; and providing for an effective date."

He noted that there was a committee substitute for the committee to consider.

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CO-CHAIR GIESSEL moved to adopt the committee substitute (CS) for SB 67, work order 33-LS0148\S, as the working document.

CO-CHAIR BISHOP objected for an explanation of the changes.

[5:01:25 PM](#)

SENATOR JESSE KIEHL, Alaska State Legislature, Juneau, Alaska, sponsor of SB 67, spoke to the following explanation of changes from version B to version S for SB 67:

1. In Section 1 (AS 46.03.340), page 1, lines 9-12:
 - a. Deleted "engaged in the business of oil of gas production, transmission, transportation, or refining"
 - b. Added "to respond to a fire that originates in relation to oil or gas production, transmission, transportation, or refining"

This change allows for any respondent to a fire relating to oil or gas production, transmission, transportation, or refining to use PFAS or PFAS containing substances to fight the fire.

2. In Section 1 (AS 46.03.340), page 2, line 6:
 - a. Deleted "25"
 - b. Added "40"

This change allows the state to accept for disposal a quantity not to exceed 40 gallons per year, up from 25 gallons in the previous version; 40 gallons covers the estimated 35 gallons of substance anticipated to be accepted from impacted Project Code Red communities.

CO-CHAIR BISHOP removed his objection and version S was adopted.

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At ease

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CO-CHAIR BISHOP reconvened the meeting and invited Andy Mills to explain the new fiscal note.

[5:03:37 PM](#)

ANDY MILLS, Legislative Liaison, Office of the Commissioner, Department of Transportation and Public Facilities (DOTPF), Juneau, Alaska, reported that DOTPF did an extensive analysis because it is the state agency that will operate the program to ensure that PFAS containing substances are collected and disposed of properly. Prior to this legislation, the department was not associated with Project Code Red. This is the program that gave 132 Alaska villages the equipment to use PFAS-containing aqueous film forming foam (AFFF) for firefighting purposes as federally required. DOTPF anticipates the need to collect and dispose of PFAS from these sites. This will be done in cooperation with the Department of Environmental Conservation (DEC) and private contractors.

DOTPF has a manifest list of the Project Code Red equipment provided to these villages, but there is no current inventory to show how much PFAS each village may have used or what it may have received afterward. The fiscal note has assumptions and that is what was quantified as the capital appropriation and one personnel to handle the contracting effort. However, additional entities may seek to utilize this program and there was no way for the department to quantify what that amount would be. The fiscal note addresses that by clarifying that it would be a situation of first-come-first-served to dispose of up to 40 gallons of PFAS-containing aqueous film forming foam per year.

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CO-CHAIR BISHOP found no questions and solicited a motion.

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[5:07:23 PM](#)

CO-CHAIR GIESSEL moved to report CSSB 67, work order 33-LS0148\S, from committee with individual recommendations and the attached fiscal note(s).

CO-CHAIR BISHOP found no objection and CSSB 67(RES) was reported from the Senate Resources Standing Committee.

5:07:55 PM

There being no further business to come before the committee, Co-Chair Bishop adjourned the Senate Resources Standing Committee meeting at 5:07 p.m.