

DATE: October 15, 2015

TO: Citizens' Advisory Commission on Federal Areas

FROM: Mead Treadwell, Chairman, Alaska State Lands Advisory Group
Stan Leaphart, Vice-Chair, Alaska State Lands Advisory Group

RE: Report and Update on Advisory Group Activities and Requirements

The following briefing is intended to update the Commission on the activities and progress of our group since its establishment. We have no resource requirements to request at this time. Vice-Chair Leaphart will be delivering an in-person update at the forthcoming Commission meeting and will be available for questions, feedback and communications to the group.

MISSION AND OBJECTIVES

We have expanded on the "transfer of federal ownership" focus to include multiple aspects of devolution and appropriate efficiencies and issues in public land use management in Alaska, recognizing and connecting the essential nature of both ownership and management authority.

We have established **four focal areas** of solution-based inquiry and assigned volunteers from the membership to coordinate research, draft reports and direct related efforts by the group:

- 1) **LEGISLATION** | Legislature
- 2) **LITIGATION** | Judiciary
- 3) **NEGOTIATION** | Administration
- 4) **CONFRONTATION** | Sovereign Action

Reports on objectives and progress for each focal area are provided below and will be included in all future reports to the Commission.

LEGISLATION REPORT

The following research topics of interest were developed through conversations with the delegation and staff, primarily Senator Murkowski's office; the items noted in **bold** are the subject of currently ongoing research efforts by the group:

- **Rep. Bishop (chair of the House Resources Committee overseeing Public Lands) is looking at regional management issues in the Utah Public Lands Initiative**
- **The idea of reinstating, with real state leverage, the Alaska Land Use Council**
- **Follow closely and look for opportunities in the OCS Lands Act**
- Rep. Gosar (Arizona member of the Resources Committee) has mentioned offering up federal lands for the federal inability to fund payments in lieu of taxes (PILT)
- **Look at various bills pending to transfer USFS lands to the states, energy rights to the states, management to the states**

- **Look at S. 1230 by Sen. Murkowski**
- Review the enforceability of Statehood Compacts
- Consider revenue trust relationships where revenues are shared
- Understand how these efforts relate to sovereignty and indigenous land transfers
- Look at federal legislation that will be necessary to implement new federal claims in lands offshore; see if there are ways to address states' rights and revenue sharing
- Look at ways to avoid continuous litigation on RS2477 and navigable waterways
- **Look at BLM approach to ASRC lands in NPRA Greater Mooses Tooth Project**
- **Look at existing statutes that allow disposal, sale or transfer of public lands (FLPMA, Recreation and Public Purposes Act)**

Several plans of action are taking shape around potential legislative solutions, including:

- 1) Devolution Bills: e.g., forcing agencies to delegate authorities to the states through memoranda of understanding or primacy statutes; have states make all development decisions; fix PILT system; offer reverse revenue sharing for state-managed lands; Governor veto on federal land use management plans and actions; treat federal land management as equivalent to a trust/beneficiary relationship with the states
- 2) Landscape-Scale Policies: set up unified interstate compacts (based on watersheds or multistate-specific interests) to advocate for shared concerns
- 3) Senate and House Committee Action: e.g., working with Committee on Commerce, Science & Transportation; Red Tape Act in Environment and Public Works Committee
- 4) Request Congressional Research Service Review of Relevant Litigation
- 5) Keep RS2477 and Navigability Determinations Out of Court: e.g., RDI process
- 6) Maps of the States: e.g., have all maps designed, approved and maintained by states; will include identified RS 2477s, historic sites, minerals, critical properties and uses

While not commenting on the content and strategy employed by [House Bill 115](#), which passed the Alaska House of Representatives on April 6 and is currently pending before the Senate, the group recommends doing no harm to its progress or development.

LITIGATION REPORT

Through a series of discussions, the members of the Litigation Subgroup have determined that litigation would be both expensive and uncertain. Our key discussion take-aways are:

- Policy and ideas for litigating claims are sound and interesting
- There are many counter and alternative litigation positions that, from different policy positions, are comparably sound and interesting
- There is no controlling law or precedent that will clearly direct a reviewing Court to one or more of these positions; the issue will involve a novel application of existing case law and legal principles
- Fully supporting a claim is very time- and expertise-intensive, and thus expensive

We do not see a critical flaw with the legal theories supporting the transfer of public lands; therefore, we do not see a need to repudiate or counter positions taken in favor of litigation by other states or groups. The primary identified flaw, disclaimer of additional rights to land included in statehood compacts, would involve review of unique constitutional concepts that could go either way.

To elaborate on resource needs for constitutional litigation, policy, legislative theory and history, past practice and legal theory would all have to be researched at length. It is not enough to develop a plausible constitutional claim, we have to assess possible counterclaims and weigh them against each other from the variety of likely judicial perspectives.

Constitutional law on this scale is rare. To the degree there is precedent on some of these concepts, it is complex, arguable and faces many directions. The judicial review associated with expanding/modifying/redirecting/overruling precedent is intensive, and in part driven by the legal and policy perspectives of the reviewing judiciary.

Members of the sub-group, Chairman Treadwell and Director Taylor met with Attorney General Craig Richards on September 11 at the Atwood Building. Mr. Richards was encouraged to hear of our group and its efforts and noted Assistant Attorney General Mike Schechter was tasked with researching, advising and liaising on this issue. He also explained his litigation philosophy as emphasizing cases with a high likelihood of success. He asked to continue being apprised of group actions and developments.

In sum, after synthesis and discussion of these points, we cannot recommend pursuing or initiating a state-led litigation effort at this time, in particular due to:

- Supporting the Alaskan interests in the negotiation and legislation processes may be a more effective focus of limited resources (meaning administrative engagement backed by threat of legislative/appropriation changes).
- Financial position of the State – aside from the viability of other approaches, we do not have the resources to support the legal and policy research-intensive nature of federal constitutional litigation, and there are challenges in predicting what resources will be available in the future for what would be a multi-year effort.

We recommend continued discussion with third-party legal experts (e.g., foundations, think tanks, policy groups) to continue to learn about these issues, which could allow us to support other parties' litigation conceptually if not financially. While the likelihood of legal success is uncertain and has many challenges, many of the principles, philosophies and legal doctrines utilized to support litigation ideas may support the development of effective policy in the areas of negotiation and legislation.

NEGOTIATION REPORT

We drafted a letter to Secretary of the Interior Sally Jewell requesting a brief meeting during her [visit to Anchorage](#) in September. The letter and invitation were communicated to her through Special Advisor on Alaska, Michael Johnson, who advised that her time was already allocated.

No meeting was scheduled with the group during her visit and the group received the Secretary's regrets thru Mr. Johnson in a September 28 letter. The letter intimated that future visits to the state are tentatively planned.

The group is considering the development of a "Green Book" for the incoming federal administration, outlining a list of potential additions and amendments to the statutory, regulatory and policy environment to strengthen state sovereignty, resolve issues of overreach and limit or negate improper use of discretionary authority.

Chairman Treadwell personally introduced the group to a supportive Governor Walker. Craig Fleener has been appointed to be the group's liaison with the Governor's Office. Updates on the group's activities are also communicated to the Governor's Office in D.C. and the Department of Natural Resources Commissioner's Office in conjunction with CACFA updates.

CONFRONTATION REPORT

Within this focal area, the group will coordinate input on, deliberate and discuss principled and defensible civil disobedience or resistance to laws, policies and actions found to be inconsistent with state sovereignty. This can include arbitrary prohibition on infrastructure development (e.g., King Cove Road), preemption of State fish and game or other management authority, improperly enacted regulation, oppressive policies and effective or actual violation of signed agreements (e.g., memoranda of understanding).

On the resignation of Dick Randolph, this sub-group is currently without a member leader.

OUTREACH AND COMMUNICATION

The group has developed a fact sheet hand-out with a brief description of the group and biographical information on the members. The fact sheet can be downloaded from the [website](#) and has been handed out to numerous interested members of the administration and the public. The group has also developed a website, accessible from the CACFA website, to be frequently updated with meeting information and any documents related to the group's efforts.

<http://dnr.alaska.gov/commis/cacfa/alaskastatelands.htm>

Member Scott Ogan joined commissioners and the Executive Director at the Commission's booth at the Alaska State Fair on August 30 to provide information and be available for questions about the group and its mission and activities.

On September 25, Chairman Treadwell, Member John Crowther and Director Taylor met with Mike Pawlowski, staff to Senator Murkowski, for a very informal issues discussion.

Four inquiries into the group's purpose, capacity, membership and recruitment have been received since its establishment. Two were made via telephone to the CACFA Executive Director from former legislator Fritz Pettyjohn and Alaska resident Dean Coon. Two were made by unknown parties via the legislative offices of Senators Giessel and Gardner.

Meeting with Sen. Murkowski – Anchorage, August 18, 2015

Chairman Treadwell and Vice-Chair Leaphart, along with Director Taylor and members John Crowther, JP Tangen, Scott Ogan and Bill Satterberg, met with Senator Murkowski and her staff to discuss efforts by the Commission and the group to examine the feasibility of devolution and existing problems with the management of federal public land in Alaska.

A presentation on the group and transfer concept in Alaska identified current issues including: violations of ANILCA provisions; fish and wildlife resource management regulations; inholder access and permitting; preemptive administrative decisions that hinder or prevent resource development; and, the frequent disregard for the interests and concerns of Alaska residents and for the rights and guarantees made to the State under the Alaska Statehood Act and ANILCA. The presentation also looked at possible solutions through litigation, legislation and administrative negotiations.

Key Discussion Issues:

- 10th Amendment argument and state sovereignty
- Statehood Compact
- Possibility of selective legislative fixes
- Decentralization of federal agencies
- Use of federal budget to leverage federal agencies
- Effects of 17(d)(1) withdrawals on BLM planning and land management
- Potential of reestablishing the Alaska Land Use Council or similar body

Senator Murkowski stated that she hoped CACFA and ASLAG would not only come up some potential solutions to the identified problems, but also some concrete proposals her office could work on. She is interested in some of the case law (e.g., Wilde decision), examining rationale for the decision and determining some simple legislative fixes. She stated she was always hesitant to open up ANILCA for potential amendment(s), but if there are ways to cleanly and neatly address specific issues, that would be worth trying to do.

American Lands Council Summit – Salt Lake City, October 1-3, 2015

Member Scott Ogan attended the conference on the group's behalf to build connections and develop a nuanced understanding of the issues, including why the federal land transfer movement is gaining traction at a national scale.

Federal overreach appeared to be a very big concern with attendees. Sage grouse was getting a lot of attention, as was federal planning. Hands-off, no-harvest management of the forest fuel load appears to be a harmful strategy for both resources and the public due to catastrophic fires. Many presenters indicated mismanagement was a greater threat than global warming.

One issue is not applicable to Alaska but may be of concern depending on how federal politics continue to merge with resource and Native issues. American Indian tribes own water as a property right. Reports indicated that, with federal support, those tribal water rights are strangling agriculture. For instance, irrigation is being cut-off to support agriculture and the water is being sold for power generation.

One presentation that stood out was the economic analysis of state versus federal management. The numbers looked good but did not account for the cost of firefighting. If state ownership of federal lands creates firefighting expenses, those costs should be factored in. For example, in Northern Alaska, BLM underwrites firefighting.

The San Juan County Commissioner described how one of his county's communities was raided by a massive BLM SWAT task force a couple of years ago. Forty people were arrested for selling artifacts (arrowheads) to undercover agents; most were charged with felonies. Some or all had previously protested and/or litigated RS 2477s and other BLM policies, eliciting concerns they had been unduly targeted.

The best presentation was from Harriet Hageman, a passionate and skilled trial attorney from Wyoming who presented on the last day of the conference. Her deep understanding of federal law, policies and consequences is truly extraordinary. She indicated an interest in coming to Alaska when asked. She would be an excellent person to consult on development of the "Green Book" as she seems to know the concerns and solutions off-the-cuff.

After the conference, Scott had a lengthy discussion with John Howard, an attorney consulting with Utah in its litigation who has assembled what some are calling the "legal dream team" of renowned legal scholars and practitioners. During the discussion, he was understandably vague because he is under contract on a matter pending litigation (Utah Representative Kevin Stratton is managing the contract). However, he and his team will have a public document prepared for Utah's legislative session outlining the state's legal claims and reasoning, which should help us in making recommendations about the probable success of any legal action.

Scott also visited with the commissioner of Moab County, where they have a number of RS 2477 issues and severe ancillary collateral damage.

PUBLIC MEETINGS

We contemplate a meeting schedule of approximately six (6) meetings per year, alternating between Fairbanks and Anchorage and synchronized with the CACFA meeting schedule.

Following are brief summaries of the first three meetings of ASLAG. Meeting minutes are available on the CACFA [website](#). The summaries address key discussion points on relevant issues and any actions taken by the group.

Fairbanks Meeting - June 9, 2015

At this inaugural meeting, ASLAG members introduced themselves, provided personal background information and experience, and historical perspectives. Each member also discussed views and expectations with respect to the issue of the transfer of public lands (TPL) within the Alaskan context. Several CACFA members, legislative staff and members of the public were also in attendance. ASLAG officers were elected, with Mead Treadwell elected chairman and Stan Leaphart vice-chairman, each by unanimous vote.

In order to provide members with additional background regarding federal, state and Native lands and to provide information on land entitlements and land status, there was a presentation on the history of federal, state and Native lands in Alaska - beginning prior to Russian occupation, through territorial days to the present - including the Alaska Statehood Act, the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA) and other key legislation. Presenter Dick Mylius offered a number of observations and recommendations to the group for its consideration, including:

Benefits of Federal Land Ownership in AK

- Federal budget pays significant amount of wildland firefighting costs and BLM/USFS have extensive resources -tied to federal land ownership
- Significant Payments in lieu of taxes from US Forest Service
- Significant federal employment
- 320 million US taxpayers pay land management costs, including recreation facilities (campgrounds, trails, recreational cabins), trails vs 700,000 Alaskans

Additional Land Ownership Considerations

- Much of Alaska's public land is used primarily for hunting, fishing, recreation, habitat, or is ice and rock
- Most public lands in Alaska -federal or state -do not generate revenue
- More than 90% of Alaska's land revenue is from oil and gas
- Mining and gravel sales can be profitable
- State land sales break even, at best
- Most timber sales lose money but provide jobs (Tongass sales heavily subsidized)
- State and ANCSA Corporations already own most of the land suitable for community development/expansion and agriculture
- With a few well-known exceptions, State and ANCSA Corporations already own much of the land with known and prospective:
 - Oil and gas resources
 - Notable exceptions:
 - Arctic National Wildlife Refuge Coastal Plain
 - National Petroleum Reserve Alaska
 - Mineral resources
 - Notable exceptions:
 - National Petroleum Reserve Alaska (especially southwest)
 - Some areas in Tongass National Forest
 - Wrangell Mountains (National Park)
 - BLM Steese and White Mountains Areas

Smaller Steps That Need to be Taken

- Advocate for continued federal funding for land surveys and patents
- Get obsolete ANCSA d-1 withdrawals revoked
- Request Secretary of Interior to implement BLM's plans by revoking outdated and obsolete (d)(1) withdrawals
- Educate state and federal agencies about promises of statehood, ANCSA and ANILCA, especially the latter (Institute of the North -Dept. of Interior training)

Alaska's Relationship is Unique

- Alaska will need to figure out its own solutions to many federal land issues
- Whatever actions the state takes need to ensure that hard fought protections included in ANILCA are not diminished, rather state should focus on making sure they are better understood, enhanced or followed
- Same principle applies to ANCSA

There were also presentations on the history of subsistence management and federal-state relationships in Alaska, including an overview and history of the Alaska Land Use Council and its work. These presentations are available from the CACFA office.

Members then reviewed and discussed the ASLAG Charter and its goals. Initial discussion centered on the first goal in the charter:

Research viability of transferring public federal lands in Alaska

Key Discussion Issues:

- Possible conflicts with the Alaska Statehood Act and State Constitution
- Equal Footing Doctrine
- Relationship with Native community
- Possibility of state management of federal lands rather than transfer of title
- Need to work with other states on TPL

Members were assigned to begin work on implementing research objectives in the fourth goal:

Explore legislative, judicial (litigation) and administrative strategies to accomplish TPL

Additional research needs were identified and included: economics, Native community, environmental, interstate/international and administrative (state/federal).

Assignments:	Litigation	Tangen, Satterberg, Crowther
	Legislation	Leaphart
	Negotiations	Satterberg, Crowther
	Economics	Kreig
	Native Community	Fate, Fleener
	Environmental	Treadwell
	Interstate/Int'l	Ogan

The decision was also made to have one in-person meeting and one teleconference meeting prior to the next CACFA meeting.

Anchorage Meeting - August 19, 2015

This meeting included a briefing from DNR Deputy Commissioner Ed Fogels, followed by a question and answer period.

Key Discussion Issues:

- Impacts to DNR functions from state fiscal problems

- Ways for PAAD, ANILCA Program and CACFA to work together
- Effects of 17(d)(1) withdrawals on finalizing state land entitlement
- Economics of managing additional lands
- Need to develop a "playbook" for new Federal administration

During the work session, it was decided the ASLAG report to CACFA should include:

- a) Recommendation(s) to submit to the Governor and Legislature;
- b) Different perspectives and arguments on TPL; and,
- c) Strategy or roadmap on how to accomplish.

Other Actions:

- Craig Fleener to act as liaison between the Governor and ASLAG
- Litigation subgroup to develop language to include in October report to CACFA
- Litigation subgroup to schedule meeting with Attorney General
- Scott Ogan to attend American Lands Council meeting in Salt Lake City
- Dick Randolph volunteered leadership for civil disobedience/act sovereign column
- Everyone come up with 2 things we can do to act sovereign which we are not doing
- Draft report to CACFA (Stan & Mead to draft initial version by Sept 15)
- Electronic meeting on the draft report on Oct 10
- External engagement: engender public support or at least a position
- Advise CACFA on the significance of that
- Outreach to industry organizations
- Ascertain/explore what venue we use to collaborate with other states
- Meet in person in Juneau during session in conjunction with CACFA meeting

Broad Policy: Federal government should transfer as much land as possible to the states.

ASLAG also was joined by Congressman Young during the meeting, who stated that he has some support from other western states on TPL but that more support and action would be required. He noted he was happy with what ASLAG and CACFA are doing and would support their efforts with legislation. He felt he would be able to get a bill out of committee and through the House, and maybe through the Senate. Other states need to be involved and we need to be aggressive on this issue.

Teleconference Meeting - October 9, 2015

The meeting included a detailed update from Member Scott Ogan on his trip to Salt Lake City to represent the group at the American Lands Council Summit on October 1 through October 3. See above synopsis. He recommended bringing Utah's attorney advisors and presenter, Harriet Hageman, to Alaska to advise the group at a future meeting and to possibly arrange/sponsor larger speaking engagements around that meeting. A report on the legal underpinnings of the transfer of public lands and a litigation strategy will be provided to the Utah Legislature at the start of its session in January. The report will be public and a personal copy has been promised.

Another point of significant discussion was revival of the Alaska Land Use Council. Vice-Chair Leaphart will be researching and drafting a report outlining the merits and legal/procedural capacity to reestablish the council or a group with a similar mandate and authority; various recommendations which were developed when the council disbanded will be incorporated.

Members applauded the U.S. Supreme Court granting John Sturgeon’s petition for certiorari in his appeal from the 9th Circuit. Member JP Tangen suggested looking into other states with federal overreach issues potentially petitioning for amici status. Vice-Chair Leaphart noted that other states may have challenged the National Park Service’s 1996 regulations package, even though Alaska did not, and those states might be most interested in filing amicus briefs.

Next Meeting Date - December 10, 2015; 2pm to 4pm

BUDGET

The following calculations may include some estimates due to delayed updates to the State’s budget tracking system, which has recently undergone a major software transition.

Authorizations:

<u>January 14:</u>	<u>\$10,000 for appointments and initial meeting</u>
Spent: \$7867.54	Balance: \$0 (purpose of funds expired)
<u>June 13:</u>	<u>\$50,000 for Director-approved expenses</u>
Spent: \$8061.39	Balance: \$41,938.61

Expenditures (by type):

Travel:	\$8088.49
Research:	\$4577.50
Publications:	\$2272.94
Supplies:	\$0
Misc:	\$990

Current Additional Funding Requirements:
None - To Be Revisited at CACFA’s Juneau Meeting