CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS
ALASKA STATE LANDS ADVISORY GROUP
DECEMBER 10, 2015 | TELECONFERENCE

DRAFT MEETING MINUTES

2:08pm: Call to Order

Roll Call and Introductions

Scott Ogan; Stan Leaphart; Ray Kreig; John Crowther; Cameron Eggers; Wes Keller; JP Tangen; Bud Fate

2:10pm: Approval of Agenda

Bud Fate – Motion to amend agenda to include ALUC memo discussion
No objections

Scott Ogan – Motion to amend agenda to include report from JP Tangen on U.S. Senate testimony
No objections

Bud Fate – Motion to approve agenda as amended
No objections

2:11pm: Approval of October 9 Meeting Minutes

Scott Ogan – Motion to approve minutes
No objections

[Mead Treadwell joins the call]

2:14pm: Member Opening Comments

Mead Treadwell – appreciate work everyone has done to get the report to CACFA. Conversation with the Governor and those helping the Governor prepare his remarks in the U.S. Senate testimony on ANILCA, began to have some effect. Alaska Land Use Council restoration has gotten some traction. Couple long conversations about joining the American Lands Council, brand new legal analysis with good arguments, may file a lawsuit. Hopeful that, as we get through the research assignments today, we are good about pinging Utah, AG, DNR to get the information we need. **Try and aim for time to get together with the Alaska State Legislature in Juneau.**

Representative Wes Keller – **legal opinion out of Utah** is a multi-million dollar document and they were eager we were among the first to get it. May be something we really want to look at to help us.

Scott Ogan – outreach with some of the players involved in this, have good relationship with John Howard, the lead on the legal opinion for Utah. I have not read it yet, looking forward to reading, tremendous opportunity for us to look at, and encourage others to look at, and give us objective opinions on it to forge a way forward.

Bud Fate – reserve comments when we get to part on ALUC.

John Crowther – wanted to note there were some good DNR meetings on U.S. Senate ANILCA hearing follow-up, continuing to work with the committee, there may be some research to be done.

Mead Treadwell – thought on the Utah opinion, might make sense to figure out what press they are getting in Utah and here locally. **Encourage somebody covering this, put out a reaction, that the report is received and has been forwarded to us for review in Alaska.**

Scott Ogan – have a personal relationship with Gary Bower, forwarded the information to him and asked him to consider putting it out to his readers. He has a wide readership and is reasoned and respected.

Sara Taylor – Chairman Treadwell could put in op-ed.
Mead Treadwell – could you write draft?
Sara Taylor – I could not provide anything timely.
Mead Treadwell – **if anyone has ideas, send them to me.**
Scott Ogan – I'll send some thoughts your way.

Stan Leaphart – put out memo on ALUC, good starting point, have not had time to follow-up on some of this stuff. Study has been commissioned in Wyoming and a committee was put together in Arizona to look at the same issues. I have reached out to them and not heard back.

Mead Treadwell – looking forward to meeting with Vice-Chair Leaphart in Fairbanks in the future.

2:24pm: Focal Area Updates

Litigation

Mead Treadwell – Sturgeon case going to the Supreme Court.

Scott Ogan – curious to hear if there was any discussion with Director of BLM in D.C. about case law with respect to navigability.

John Crowther – there were five topics on the short list with summaries and details and that was one of them, litigation on Mosquito Fork and the need for a susceptibility to navigation standard going forward other than a historic standard. Joe Balash going to work with Senator Sullivan on a joint congressional delegation letter on the topic, wants to do a deep dive on the Recordable Disclaimer of Interest process and contesting the legal standards, sort out with legislative changes.

JP Tangen – one of the things I was arguing for in my Senate testimony was the concept of changing the burden of proof with regards to navigable waters and RS 2477s. The only way title can be conveyed now is pursuant to Quiet Title and it seems to me the State of Alaska in those situations has the burden of proof. Trying to frame in my comments that the burden of proof ought to be shifted – all waterways in the state ought to be presumed to be navigable unless federal government can prove by preponderance of the evidence otherwise. The problem until this point is the litigation burden.

Scott Ogan – litigation burden is clear and convincing evidence that it was navigable. I would say the other way to clear up title is through a Recordable Disclaimer of Interest, little to no consideration of susceptibility to navigation, all about historical use, should try and streamline that approach and avoid these long, extensive, expensive Quiet Title actions. But on RS 2477s and navigable waters, especially RS 2477s, Department of the Interior and Department of Agriculture have a unilateral position that, unless you prove it in court, you do not own the right of way.

JP Tangen – the idea of a presumption of the entitlement is already in ANILCA when it comes to state-selected lands, so we don't have to wait for the survey for title to be conveyed. We should point to that precedent with regard to navigable waters.

John Crowther – the chief counsel of the Senate Committee on Energy and Natural Resources made the contrast that half the federal government thinks every drop of water is navigable and subject to EPA jurisdiction and the other half thinks no drop of water is navigable.

JP Tangen – the distinction needs to be made between "waters of the U.S." and navigable waters, commerce clause-related term vs. police powers-related term. Goes back to when the Clean Water Act was before Congress.

Mead Treadwell – besides Sturgeon, **what other litigation do we need to be promoting**, or do we promote a much more aggressive litigation plan on Quiet Title? What else should we be pushing? The 800lb gorilla in the room is whether we join Utah's approach, but should we be working on anything else?

Scott Ogan – there is a case in the Chicken area on RS 2477s on appeal to 9th Circuit, issue was whether State could condemn across an allotment. There is some case law from the Chickaloon case, remaining Quiet Title actions have been stayed until that is cleared up. We picked those rights-of-way because they are obvious, lots of current and past use, good documentation. We need to see that thing through in order to negotiation a non-litigious solution from a place of strength.

[Bill Satterberg joins the call]

Legislation

Mead Treadwell – the issues in this focal area include:

- Alaska Land Use Council (ALUC)
- Legislation identified in the "Research Assignments"
- Coalition of western states

Stan Leaphart – the key thing in our favor is the delegation has some momentum behind it to address these issues. If you listened to the U.S. Senate testimony last week, what would appear to be relatively small adjustments to ANILCA would solve a multitude of problems. There are no small issues once it hits the floor. The fact the delegation is willing to take these issues on and find resolution – such as the ALUC and clarification of ANILCA Section 103(c) – that is a huge issue. If you read the Greenwire article reporting on the U.S. Supreme Court's decision to hear the Sturgeon case, it speculates on why the Court would take this little case, which represents a complete misunderstanding of how important it is, and how the State and Native Corporations will be affected. The NPS has been preparing a programmatic EIS on management of non-federal oil and gas interests. Up to this point, Alaska has been exempted from requiring concurrence from NPS. The new proposed rule, released a month ago, does away with that exemption and cites the Sturgeon case as the reason. That is huge. Most people outside Alaska, and most inside, fail to realize this is far bigger than Sturgeon using a hovercraft or not. One thing we have to be prepared for is the Court will uphold the 9th Circuit decision and we will need a legislative fix to make it clear that agency regulations do not apply to non-federal lands. Tweaking ANILCA has to at least include clarification of that point, we cannot overemphasize it.

Mead Treadwell – since our conversation with Senator Murkowski and her staff, is there anything she is going to move coming up? Republicans may have an incentive to not look bad on the environment. What I am getting at here is recommendations to CACFA, legislature, Governor, what should we be pushing? ALUC traction is good, argue it may be worthwhile to do that with every other state (make a land use council where no federal rule applies to the state without concurrence). We need to know where we can make impact.

JP Tangen – as an arrow in another direction, we must not lose sight of the fact Senator Murkowski sits on the appropriations committee. The only way we will ever get the land management agencies in Alaska to even hear our concerns is through their pocketbooks. Deantha Crockett and I were on the phone with Senator Murkowski's office regarding the pending appropriations bill, asking to put language in consistent with ANILCA Section 101(d) to ensure no money shall be appropriated to or spent by land management agencies in Alaska to withdraw land or impede access to renewable energy projects, mining projects or timber harvest. **The possibility of getting a one-liner in the appropriations bill at some point may be a way to get our point across and force compliance with the "no more" clause.** We would have more leverage.

Scott Ogan – excellent idea, floated something similar by Joe Balash in Chicken last summer. He said you need 60 votes, depends on how innocuous the language is and how softly it can be done without getting on a radar screen. Regime change in Senate and White House may accomplish that. We have been trying to stop appropriations that support land use planning for a long time.

Stan Leaphart – Congress was effective in initially killing the Wild Lands initiative by choking off the money, and the reason that was successful was all the western states were affected. There is an increase in the number of withdrawals throughout the western states, and taking development lands off the table, that will resonate with other states. Sixty votes may not be out of reach.

Mead Treadwell – we agreed when we met with Senator Murkowski that we would come up with a menu of opportunities.

Bud Fate – regarding the ALUC, we need to be careful on that. The reason the council was put together in the first place was the interpretation and application of the new law called ANILCA. It was not well defined, but that council's prime goal was to help implement ANILCA. Now we are coming up with a concept of reinvigorating the ALUC, so we need well-defined goals and objectives. ALUC was extremely successful in whatever mission it undertook, and it may be counterproductive to arrest management from the federal government and give it to the state if we can find resolution in the ALUC. **Have to be very careful on how we construct the new council and how we go about it.** If it gets traction without these well-defined goals, we could be in trouble with our many endeavors. I was chairman of the ALUC's Land Use Advisory Council and am familiar with what went on. It may be more difficult to make these other endeavors work if we have a very successful ALUC. We should bear this in mind as we testify on behalf of a new ALUC; bear in mind what the purpose of that will be.

Stan Leaphart – should ask the charter include the "transfer of public lands" concept. Being a little facetious about that, but there was some clear direction in ANILCA for the ALUC, and it floundered when it drifted from that direction. Looking at the reports that were done, they had a lot of suggestions for how to better structure the council. I had not thought about the fact a successful council could run counter to the transfer of lands concept.

Bud Fate – unless the council melded itself to that purpose.

Mead Treadwell – there are three different bills that do not give land to states right away but instead give a veto on land decisions, or not fee simple ownership but development rights, to the states. I tend to look at things on a spectrum: look at one end, does not change much, or includes an ALUC; on the far right, puts federal government out of the land ownership business entirely. May be hard to get through Congress but may not be hard to get a land use council with some teeth. Agree we need to be cautious.

Bud Fate – I am not opposed to a new ALUC, but we have to be careful. If it were really successful, with a clear mission statement, goals and objectives, it could be counter to the objective of wresting management from federal agencies. *Unless* we know the purpose of that ALUC and it is aligned to those other purposes.

Mead Treadwell – as we write up the potential reestablishment, look at an approach to get an ALUC-type forum with teeth. Undo the subset in ANILCA and make the ALUC the approval body for the State to not go along with a land use plan, meaning it will not be adopted.

Bud Fate – politically there are times when the federal government will have more political sway than the state, and that can be dangerous. Stan hit on this in his memo. The constitution of that council is extremely important.

Stan Leaphart – that is why both reports recommended an equal number of federal and state participants on the council, whereas before it was over-weighted to the federal agencies. Question for everyone to think about, I am of the opinion we will not get support from the federal agencies for a recreation of the ALUC, which made them somewhat accountable for their actions. **Has anyone discussed this with federal agencies?** When they did the reports, the agencies agreed, but that was 25 years and three administrations ago.

Mead Treadwell – had a discussion with leadership at BLM, may set up a talk session on that. I had forgotten about this during litigation, but I would also point out one potential piece of litigation. The ALUC language in ANILCA, it sunset the council but did not sunset the interagency federal group to make decisions about public process. I would argue that we need to say they never should have shutdown the federal group when they shut down the ALUC. **John and Sara, look at that and see about AG opinion.**

Stan Leaphart – if you mean the Federal Coordination Committee, when I started back in 2008 (during the second life of CACFA), I was invited to attend a Federal Coordination Committee meeting. Not sure if they called it that *per se* but it was constituted the way it is in Section 1202 of ANILCA. I just went the one time. Has it ceased to operate? It included the Special Assistant to the Secretary of the Interior.

Mead Treadwell – there is a law out there and they're not following it.

Sara Taylor – **I will ask Michael Johnson about compliance with ANILCA Section 1202.**

Stan Leaphart – a key difference/sticking point in the two ANILCA Section 1201(l) reports was whether there should be a separate state and federal co-chair or whether it should be a rotating chairmanship. Presidential appointee as federal co-chair and state governor or designee as state co-chair. That needs to be worked out in any reauthorization but it is critical. After ten years of a lot of conflict between the Governor and the federal co-chair, people were war weary and may have just decided to walk away, not worth the tension, it was pretty bad at times.

Bud Fate – they got rid of the Land Use Advisors Committee before they got rid of the council because we started to question things. They'd have four pages on habitat and one paragraph on economics. We would ask for more on the economics, and other common sense proposals, and Governor Sheffield defunded the Committee and, after that, things began to fall apart. But they had been falling apart all along. Vern Wiggins was the federal co-chair.

Stan Leaphart – the animosity kind of poisoned the waters to some extent. We have the Governor as the state co-chair and effectively the CEO of Alaska. All the commissioners work for the Governor and s/he can direct all the votes, but the federal co-chair had no such authority over the federal agencies. Vern could never force someone to sign off on a modification if they did not agree to do so. Again, as Bud said, the structure of that council will be critical to its success or failure.

Mead Treadwell – **Sara, email to the committee the council paper we have and the legislation that gives the states veto power on certain decisions**. The legislation makes a land use plan not effective without a Governor OK. If there are no constitutional issues, that kind of thing could really make the ALUC far more effective than it is today. Should include that in discussion, get some language. Right now, I am for it, but I want to be clear on how. A good example of a council with teeth would be the Exxon Valdez Trustee Council. In working with the settlement, if the federal and state representatives didn't agree, then a proposal didn't go forward. Saw governors hold up things, used that leverage to get money into things that would not have happened without forcing the State preference to be heard. When they have to listen to us, we can get things done. As it is now, they treat us like any other stakeholder.

Negotiation

John Crowther – I would categorize some of DNR's discussions working on letter writing campaigns to be in the realm of negotiation but nothing to update.

Bill Satterberg – we need to have strong political support for litigation, otherwise we are talking in the air. Sturgeon case will be argued in Washington D.C. on January 20. I feel the Court may take this as an opportunity to push back on federal overreach. Sturgeon is so far along now, it may not reach a negotiated settlement.

Scott Ogan – seating for the Court is first come, first serve.

Bill Satterberg – senators have limited seats available, need seat assignment and security cleared ahead of time.

Scott Ogan – will we send anyone from this group?

Bill Satterberg – may attend, 70% odds of attending.

Mead Treadwell – may attend, as I will be in Washington D.C. that day for another purpose (son's 21st birthday).

Bud Fate – would love to go, but have surgery.

Mead Treadwell – **Sara, check on seating situation.**

Confrontation

Mead Treadwell – there are two major confrontational avenues that have been considered. Number 1 is a professor at the University of Alaska Anchorage who is thinking about doing something about the King Cove Road. Not sure the State would get behind it, but we could hear his premise on this. **Might ask the professor, Forrest Nabors, to make a presentation at our next meeting.** Number 2 is the conflicting hunting rights. Federal agencies are saying the State can manage but will consider some things to be trespass; **talk to Sam Cotton about it.** Hypothetical situations may abound.

Sara Taylor – on the resignation of Dick Randolph from this advisory group, we no longer have a leadership member for "Confrontation." Ray Kreig, as our alternate, has taken Mr. Randolph's seat on the group. CACFA's Executive Committee is still considering the need to place another alternate. There is currently an appropriations bill rider addressing the King Cove Road situation, finding a land exchange is in the "public interest" and laying out the process for an equal value exchange in 90 days. **Will have to see where it goes.**

3:18pm: Update on Senate Committee Hearing, Testimony of JP Tangen

JP Tangen – last Wednesday was the 35th anniversary of ANILCA. Senator Murkowski sent out a number of invitations requesting testimony on problems and possible fixes. I spoke of a couple horror stories raised in a book published by the Alaska Miners Association in 2000 called "d2 Part 2," which has 15 chapters to it, takes a few minutes to read. In 2000, a lot of identified problems – issues with access and the "no more" clause – were still problematic and, 15 years later, things have gotten a lot worse. Drew on the Orange Hill mine in Wrangell-St. Elias, a large copper deposition completely inside the park owned by consortium of people, including Wally Hickel. The group literally went around the barn twice for agency approval to access patented mining claims. When that failed, they went to the courts and litigated without success. They went to Congress, which gave money to the NPS to buy the land. NPS said it would not give value to subsurface or surface because there was no access. They went back to the courts again, went back to Congress again, and Senator Stevens promoted appropriations to pay for the property, but it could not get past the NPS appraisal process. After a good 15 years of trying, threw in the towel, deposit is still there. That was one of the horror stories, lots of others, only had five minutes to testify. Testimony is available to look at, identified about a dozen specific recommendations to consider. ANILCA should be action-forcing and bind federal agencies to comply; land management agencies have become very adept at ignoring it. Second thing is to require FLMPA and other organic acts be deemed amended by ANILCA and interpreted through ANILCA. Notwithstanding the Administrative Procedure Act, courts should have *de novo* authority to consider matters challenging federal agency actions, to get by deference problem. All waters in Alaska should be deemed subject to exclusive state jurisdiction and agencies forced to prove non-navigability to get jurisdiction. All logging roads and RS 2477s should be deemed conveyed to the State and based on 50' from the centerline right-of-way, with burrow pits as necessary in the opinion of a developer. Permits/studies required by agencies should be paid for by the lead agencies through appropriated funds. Applications for access should be approved unless denied for cause within one year of filing. Withdrawals should be statutorily revoked unless there is another authority for it. Wetlands should be deemed sufficient. ALUC should be restablished. Quiet Title Act should not apply to transferring public lands in Alaska. Mining in Parks Act should exempt conservation system units. Laundry list of things I had, and some others have been shared with me since, such as exemption from international compacts. At the conclusion, there was a global question for two things to fix – I suggested "no more" clause and access, as things on the table could be resolved if those two provisions required implementation. Every time federal agencies operating in Alaska published something in the Federal Register, need to certify compliance with ANILCA. The hearing was not particularly well-attended by committee members; Cantwell was there for a bit, Colorado senator there for a bit. Point was not to impress audience, just articulate concerns and get them on the record. Several of us have been talking

about coming up with an update on "d2 Part 2," so we will be trolling for anecdotes and insights people want to share with us. **If anyone has 1000 words to share on ANILCA, get in contact with me.**

Mead Treadwell – what was Senator Murkowski's reaction? Which ones do you think she'll put into effect?

JP Tangen – she was gracious as far as the book is concerned, she showed me her well-annotated copy and said she considered it a bible regarding these issues. She is interested in the concepts. There is a two-step answer to the questions here. Framing legislation which conforms with certain parameters, like getting the Quiet Title Act to not apply or amending the Administrative Procedure Act, are kind of long reaches, whereas some other things, like repealing lapsed public land orders, or maybe doing some of these other mundane things, she'd be happy to run with if she got votes in support of them.

Mead Treadwell – fully supportive of everything I just heard. ASLAG is a subset of CACFA. When it comes to filling in things in this list and finding how we make things better, that is what CACFA does. We are a group to figure out how to vest control of federal lands. Just want to remind us of our charter.

JP Tangen – not my intention to give the report at this meeting, was asked to, but appreciate that point. Per the testimony, I was not speaking for ASLAG, or CACFA, or even the Alaska Miners Association, I was just asked to testify because of the book.

Mead Treadwell – **I hope our report to CACFA can recommend a "d2 Part 3," have an agenda on ANILCA with legislative fixes, to compliment a green book going to the new administration.**

3:30pm: Public Participation

No one on the phone

3:32pm: Set Next Meeting Date

Proposed date of January 27

Mead Treadwell – considering the number of assignments, we should do one more teleconference before January 27. **Sara, send around a tickler asking for scheduling, get it resolved by Monday so we have 30-days notice.** Can we simply recess today's meeting, like recessing to the call of the chair? **Sara, check with attorney**, try for something in the early part of January. Moving from conceptual stage to make recommendations in Juneau with better idea what we are doing.

Sara Taylor – will check with attorney, but I am 98% sure we cannot simply recess to the call of the chair with almost a three-week gap between convening. Feel we should err on the side of having a scheduled follow-up teleconference with sufficient time to provide a 30-day public notice.

3:40pm: Closing Comments

Scott Ogan – one of the take-aways I had from the October 23 CACFA meeting: Rod Arno wanted to make sure we are strictly advisory to CACFA. I am honored to be on this committee, some real players with hands-on experience with these issues, and I assured them we understand we are advisory. **If there is a high-profile meeting, we should inform CACFA and invite commissioners.** Be mindful, because there was some concern. Part of my outreach included a woman named Harriet Hageman, a dynamic speaker, very passionate, an attorney; asked her directly if she would help us put together the "book" for the next administration and she agreed to be involved. If there are discussions going on about that, she is a resource we should consider.

Ray Kreig – just quickly on the subject of re-establishing the ALUC, I read Stan's memo carefully and listened to discussion on it, not persuaded this is likely to be successful. Dr. Fate, every time this comes up, gives us well-considered warnings. The ALUC failed due to partisan strife, and that divide now is much wider than it was in 1990, based on some real foundational differences. Even if we achieve reauthorization, it is highly likely to be

sabotaged and not the council envisioned to make a difference. JP's book revisions are extremely important, as are a hundred other things we are doing. Not sure a new ALUC will result in an important advance.

Bill Satterberg – sorry about being late, had hearing today.

Stan Leaphart – what is the timeline you want to hear from people on "d2 Part 3," what is a target date?

JP Tangen – **would like input in next 60 days, by end of January**, primarily the substance of comments. Most of the chapters in the last book were reasonably short. I think almost anybody can write 1000 words off the top of their head which both makes sense and highlights bad practices. I solicit anyone who would like to participate.

Stan Leaphart – I may have a war story or two worth telling, will get back to you.

Mead Treadwell – I hope you include the federal state advisory group. If the state has no leverage, you might as well not do it. I hate saying that because it is always better to be talking, we make huge progress where we both come to the table with an objective. The Exxon Valdez council worked because we had money and had to agree. Ray and Bud make good points. **We need to find out where we can get leverage that works.** Most important part of the inquiry. Have a great Christmas, will reconvene in January.

3:49pm: Recess to the Call of the Chair