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Before the

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC
WORKS; AND SENATE COMMITTEE ON ENERGY AND
NATURAL RESOURCES

UNITED STATES CONGRESS

THE PURPOSE OF THIS JOINT FIELD HEARING IS TO RECEIVE
TESTIMONY FROM THE BUREAU OF LAND MANAGEMENT
(BLM), U.S. ARMY CORPS OF ENGINEERS (USACE) AND
ENVIRONMENTAL PROTECTION AGENCY ON FEDERAL
MITIGATION REQUIREMENTS AND INTERAGENCY
COORDINATION RELATED TO ECONOMIC DEVELOPMENT ON
FEDERAL, STATE, AND PRIVATE LANDS

Monday, August 17, 2015

Wasilla, AK

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8 Monday, August 17, 2015

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10 U.S. Senate
11 Subcommittee on Fisheries,
12 Water and Wildlife
13 Committee on Environment and
14 Public Works
15 Committee on Energy and
16 Natural Resources
17 Wasilla, AK

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19 The committees met, pursuant to notice, at 2:30 p.m.
20 at the Curtis D. Menard Memorial Sports Complex, 1001 South
21 Mack Drive, Wasilla, Alaska, Hon. Lisa Murkowski,
22 presiding.

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1 OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S.
2 SENATOR FROM ALASKA

3 The Chairman: I call to order the meeting of the
4 Energy and Natural Resources Committee and Environment and
5 Public Works Subcommittee hearing on BLM and U.S. Army
6 Corps of Engineers mitigation.

7 I'd like to welcome everybody. I don't know, do you
8 have volume in the back?

9 [Chorus of Nos.]

10 The Chairman: I'm not impressed with this. Let's
11 see.

12 Does that make it any better?

13 [Chorus of Yeses.]

14 The Chairman: Okay, so really close.

15 I want to start off this afternoon by thanking Senator
16 Sullivan for working with me to arrange, what is probably a
17 pretty unprecedented hearing.

18 Senator Sullivan: Yes.

19 The Chairman: To have a joint hearing between the
20 Energy and Natural Resources Committee and the Environment
21 and Public Works panel.

22 I would also like to thank Wasilla for hosting us this
23 afternoon. And I want to welcome and thank our witnesses
24 for joining us and participating in an important dialogue
25 for Alaskans and really, for the broader --

1 We have brought our Committees to Alaska to examine
2 the regulatory practices that impact and often delay or
3 prevent development in our state. Specifically, our focus
4 will be today on the Bureau of Land Management's policies
5 for mitigation and land use and Army Corps of Engineers and
6 EPA's regulation of water and wetlands and related
7 mitigation issues.

8 We here in Alaska are keenly aware of the challenges
9 that current regulatory practices impose. We've heard the
10 statistics before. And you'll hear them a lot today.

11 But approximately 43 percent of our state is
12 categorized as wetlands. And that does not include the
13 lakes and the streams and the rivers and the adjacent
14 waters to them. The BLM also manages 72 million acres of
15 Alaska's land and in many ways, given the reach of its
16 regulations and its ownership of lands in our state, the
17 federal government, is in many ways sort of a gatekeeper
18 and a landlord here in Alaska.

19 So how the federal government chooses to approach
20 those rules has a big impact on our daily lives and our
21 ability to grow as a state. But right now there's a lot to
22 be desired. In some instances we are being held back by
23 ill designed, ill fitted or ill applied policies.

24 It's estimated that the acreage of wetlands in the
25 lower 48 has halved over the last 200 years. While here in

1 Alaska, over the same period of time, we've lost only one
2 tenth of one percent of our wetland acreage. So it's
3 really a different comparison set when you're talking State
4 of Alaska verses the rest of the country.

5 And despite this strong record, our state is still
6 pigeonholed in the same regulations that the limited fill
7 of wetlands in drier climates like Arizona or in more
8 heavily populated regions, like California or New York.
9 The BLM employs many land management regulations including
10 national and regional policies and those concerning
11 mitigation. These are not well suited for Alaska which has
12 some unique history, geography, remoteness, work force
13 needs. We all know. Our considerations should simply be
14 different from those in the lower 48. And yet, Alaska is
15 again categorically analyzed through the lands of national
16 and regional portfolios.

17 Like many Alaskans, my concern about federal overreach
18 has grown dramatically over the years. As I go around the
19 state and I know Senator Sullivan hears the same, if there
20 is one unifying theme amongst Alaskans, whether you are
21 down on Prince of Wales Island, up in the Interior of the
22 40 mile region or up on the North Slope, a concern
23 consistently is we see ongoing, rapidly developing,
24 encroachment, overreach and overregulation that is stifling
25 us.

1 The regulatory scheme within the Department of
2 Interior has significantly departed from the fundamental
3 principle of multiple use as defined in and required by
4 law. And instead is tilted towards conservation, more
5 conservation. And is followed by what appears to be mere
6 lip service towards other uses protected under law.

7 Through the Department of the Interior's authorities
8 are rooted in very different principles from that of the
9 EPA's Clean Water Act. Interior has decided to adopt its
10 regulatory principles on mitigation anyways. Secretary
11 Jewell published an order highlighting Interior's
12 mitigation priorities. And it mirrors the language from
13 the Section 404 sequence of mitigation.

14 There is something fundamentally flawed about an
15 agency that borrows theories and regulations which are born
16 from wholly different laws and adopting them as its own
17 when its authorizing language is so markedly different.
18 And that's what we're seeing here.

19 Then we come to the Corps of Engineers and the EPA.
20 We have seen time and time again in Alaska, instances where
21 individuals and companies have pre coordinated designed --
22 desired projects, redesigned projects, based on the Corps
23 recommendations and paid millions and millions of dollars
24 towards mitigation only to learn, at the very end, that the
25 agency wants additional conditions for dollars. This

1 moving of the regulatory goalpost has a serious, chilling
2 effect on project development it limits the growth of our
3 economy. It hurts the livelihoods of the Alaskan people
4 and it cripples our ability to fulfill promises of our
5 statehood.

6 I think in fairness that the Corps really does try to
7 get to yes. And I wish that I could say the same for EPA.
8 But its prerogative often seems to be finding a way to get
9 to or to perhaps stay at, no.

10 We've reached a point where federal agencies are
11 unreasonably binding the hands of well intentioned,
12 environmentally principled, hard working Alaskans. And
13 whether it's the layering on of new regulations like recent
14 waters of the United States rule, on reasonable litigation
15 ratios or something else, we've reached a point where it
16 often looks like the goal in Alaska is to stop new
17 development in its tracks rather than helping it to
18 reasonably and responsibly advance.

19 So the question then is what do we do about it?

20 What do you do about it?

21 Well, it begins with oversight. And I hope, that the
22 hope would be a constructive and an open conversation
23 amongst us all here today. We will renew our demands that
24 the agencies faithfully apply the law, thoughtfully analyze
25 each and every permit sought in this state and work with

1 us, not against us, but with us as Alaskans. And if that's
2 not enough we will turn to the legislative and
3 appropriations process to secure the fair treatment that we
4 deserve.

5 Again, I want to welcome our witnesses. I'm going to
6 turn to Senator Sullivan for his opening comments. And
7 then for those of us gathered here today we'll, kind of,
8 blow out the program here this afternoon in terms of what
9 you can expect for the timing.

10 But it's a delight and a privilege to be here with my
11 colleague, Senator Sullivan. So appreciate his leadership
12 for Alaska on the Environment and Public Works Committee.
13 It is so key. It is so important to so many of the issues
14 that we're working on here in the State Senate.

15 Thank you, Senator Sullivan.

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1 STATEMENT OF HON. DANIEL SULLIVAN, U.S. SENATOR
2 FROM ALASKA

3 Senator Sullivan: Thank you.

4 Well, thank you, Madam Chair. And I want to thank,
5 first of all, everybody for attending.

6 You know, these issues that we're discussing today, I
7 think, sometimes can be viewed as rather technical. You
8 know, these regulatory issues sometimes are viewed as only
9 impacting large companies.

10 Well, I think the turn out here of many state
11 legislators. Certainly I want to thank Representative
12 Gattis and Keller and Hughes, but there are others in the
13 audience today. I really want to thank you.

14 And just for everybody coming. I've seen so many
15 Alaskans from so many different parts of the state to come
16 out today and show that you're interested in this topic
17 because it's a huge topic for all of us.

18 I want to thank the witnesses. I know we have an
19 outstanding panel both in terms of the first panel and the
20 second panel. And I do want to thank Senator Murkowski,
21 the Chairman of the Natural Resources and Energy Committee
22 in the U.S. Senate.

23 This is, I think, a rather new approach. This is a
24 combination of the Energy and Natural Resources and the
25 Environment and Public Works Committee. I chair the

1 Subcommittee on Waters, on Fisheries, Wildlife and
2 combining here in our great state. So this is an official
3 U.S. Senate hearing. And to have Senator Murkowski's
4 leadership on this, this is critical.

5 So as I mentioned I think that there's a tendency on
6 some of these issues where we dismiss them or say this is
7 kind of technical. It doesn't really impact us or it just
8 impacts large companies which certainly impact us, but how
9 does this affect the lives of our citizens throughout the
10 state.

11 Well, I think that you're going to see today in
12 testimony that these kinds of regulations do hugely impact
13 all of us. And whether it's small placer miners or other
14 examples that we hear about constantly, this really matters
15 to Alaska.

16 Let me provide just two -- a couple examples.

17 Recently the Alaska Association of Realtors shared
18 with us a story about a land transaction that fell through
19 because the Army Corps acknowledged that the land may
20 include wetlands. After disclosing this information to
21 perspective buyers and even after lowering the sale price
22 by a significant amount, the mere suggestion that property
23 could include wetlands in our state made an important real
24 estate transaction fall through.

25 A few months ago a Fairbanks company wrote to my

1 office and explained that they previously had a 404 permit
2 to fill a portion of their land. A few years later their
3 permit expired. After reapplying for another permit they
4 were told they it would only be issued after placing a
5 permanent, non development deed restriction on one fifth of
6 their property. All after paying an undefined sum to a
7 mitigation bank in lieu of fee program.

8 The power to require payment and other concessions on
9 what occurs on private and state lands effectively grants
10 federal agencies the ability to zone the whole state. And
11 that should concern all of us.

12 Finally at an EPW Subcommittee hearing earlier this
13 year in Alaska Mayor Charlotte Brower testified that the
14 North Slope Borough paid over one million dollars in
15 mitigation fees for simply trying to expand their landfill
16 on the North Slope. In testimony before an EPW Committee
17 she stated. "That's one million dollars less to pay for
18 teachers, health aides, police officers and many other
19 services we need on the North Slope."

20 It's important to remember every dollar spent on
21 mitigation is a dollar not spent building Alaska.

22 So I want to conclude by mentioning one other thing
23 that I think is very important. In many ways I think we're
24 going to see a compensatory mitigation often appears
25 arbitrary and even punitive to those of us trying to

1 navigate this complex process.

2 One critical issue that I certainly want to discuss
3 today is the legal authority, the statutory authority for
4 federal agencies to undertake these actions. All federal
5 agencies, all federal actions, whether an action or a
6 regulation, has to be based on a federal statute or the
7 Constitution. That is a fact.

8 Unfortunately I think many agencies forget or
9 downright ignore this bedrock principle of the rule of law,
10 that they have to have statutory authority to do what they
11 do. And when they do this, when they ignore that, it's
12 what we in Alaska refer to and Chairman Murkowski has
13 already mentioned this, this federal overreach.

14 And it's not just us talking about it. It's not just
15 us claiming about it. In the last two terms of the U.S.
16 Supreme Court, two different cases, the U.S. Supreme Court
17 has found that the EPA has violated either statutes or the
18 Constitution of the United States, 0 for 2, on two
19 different cases.

20 So this is a concern for all of us. And it should be.

21 I want to thank everybody who is here again. I want
22 to thank the witnesses. I look forward to an informative
23 hearing so that we can take additional action to address
24 what is a huge concern for our state and I think, a concern
25 for most of you.

1 And again, I want to thank everybody for coming out
2 today.

3 Thank you.

4 The Chairman: Thank you, Senator Sullivan.

5 With that we will now take testimony from two panels.

6 The first panel is the six Alaskans that you have in
7 front of you today. I will introduce them in just a
8 moment. We will hear their comments.

9 And let me just outline to you the process that we
10 will use and follow today which is a little bit different
11 than what you would see if you were attending a hearing in
12 Juneau. And in the Senate we have hearings set up so that
13 the witnesses will provide five minutes of oral testimony.
14 Their full statement will be included as part of the
15 record. But hopefully this will be an opportunity for you
16 to basically outline the issues that you have been dealing
17 with, not only to inform those who are here in the room,
18 but to inform the Senate Committee records, the Committee
19 records for both the Energy Committee and the EPW
20 Committee.

21 We will hear comments from each of the witnesses. And
22 then Senator Sullivan and I will pose questions to each of
23 them after the six have presented.

24 When they have concluded that Q and A exchange we will
25 excuse the first panel and we will turn to the second panel

1 which is comprised of three representatives from our
2 agencies.

3 Now Senator Sullivan and I agreed coming in that
4 typically back in Washington we see the agency people are
5 on the first panel. And no disrespect to the gentlemen
6 that make up that first panel, but we thought it was very
7 important to hear the actual stories, the issues on the
8 ground that these Alaskans have been dealing with so that
9 it would better help form your comments and responses when
10 we get to that panel.

11 So we do appreciate the deference that you show us, no
12 respect to the titles, but just making sure that you all
13 are fully informed as to where they are coming from as
14 well.

15 This will not be an opportunity for you, as audience,
16 to then come up and also present testimony. As much as we
17 would like to be able to do that, that's not a format that
18 we typically use. And perhaps at a Town Hall done where we
19 might be able to look at as one alternative.

20 But I will acknowledge that if you would like to
21 submit written commentary for the public record, we're
22 going to be holding the Committee meeting open or the
23 record open for an additional two weeks. So if you or your
24 companies would like to provide for that, it is welcome.

25 [The information referred to follows:]

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[COMMITTEE INSERT]

1 The Chairman: I also want to acknowledge and thank
2 the representatives who are here today. Senator Sullivan
3 has mentioned Representative Gattis, Representative Keller
4 and Representative Hughes. And I do believe that I saw
5 Senator Stoltze walk into the room a minute ago.
6 Appreciate him being here as well.

7 And a former colleague of mine, Senator, former
8 Senator Scott Ogan is also with us. So thank you for not
9 only your being here today but the good work that you are
10 doing working with us in Juneau.

11 With that, unless Senator Sullivan you think we need
12 to add anything more in process. I think we're ready to
13 go.

14 Senator Sullivan: I think we're good to go.

15 You should know though, we do read the submissions for
16 the record. So, and I think some of us will be staying
17 around after the hearing so we can hear from you then. We
18 want to hear from everybody.

19 But if you're not able to make comments or we don't
20 hear the comments today, we certainly want to encourage
21 you, particularly if you have your own stories on how this
22 has impacted you, we certainly want to hear that because
23 that becomes part of the official record of this hearing.
24 And I think it can have a good impact in terms of
25 legislative actions that we want to take to address some of

1 these challenges.

2 The Chairman: Good.

3 We will turn to our panel to receive testimony on the
4 implications of the regulatory actions that are taken by
5 federal agencies which these witnesses to speak to.

6 We anticipate they'll discuss the affects of
7 regulatory actions on project proponents and the State of
8 Alaska Attorney General, if not -- on federal, state and
9 private lands.

10 So I will go ahead and introduce each of the
11 panelists. And then we will begin with Mr. Fogels.

12 At the end here is Mr. Ed Fogels, who is Deputy
13 Commissioner of the Department of Natural Resources for the
14 State of Alaska. He is here to talk about the development
15 challenges he experiences in his role both as Deputy
16 Commissioner of the Natural Resources agency himself and as
17 a conduit for project proponents who are seeking assistance
18 from the State of Alaska to navigate the maze of federal
19 regulations.

20 So we're pleased that Mr. Fogels is here.

21 Next to Mr. Fogels is Mr. Randy Brand. He is the Vice
22 President of Great Northwest and will speak about his
23 experiences in the construction industry in Fairbanks and
24 the evolution of increasingly complex and costly mitigation
25 and permitting requirements that his business has

1 encountered. And I think it's almost legend in Fairbanks
2 what Great Northwest has had to go through. So, look
3 forward to your testimony.

4 Next to Mr. Brand is Deantha Crockett, who is the
5 Executive Director of the Alaska Miners Association
6 representing miners both large and small across our state
7 and to discuss the challenges that they face with a complex
8 and unclear regulatory scheme required by the BLM, also to
9 speak to miner's experiences with 404 mitigation.

10 We also have Mr. Joe Nukiapiak, Nukapigak. I'm going
11 to get it right, Joe, Nukapigak.

12 Mr. Nukapigak: Right.

13 The Chairman: Nukapigak. He is the Vice President of
14 Kuukpik and he is here to highlight permitting challenges
15 that we experienced on the Spur Road, what might be
16 expected for proposed roads in the Colville Delta and what
17 the community would like to see on GMT1 mitigation funds.

18 Next to Joe we have Theresa Clark, who is Vice
19 President of Lands and Shareholder Services at Olgoonik.
20 She is here to talk about the challenges that the villages
21 face when they try to carry out mitigation and regulatory
22 requirements for growing villages.

23 And rounding out the panel we have Phil Shepard of the
24 Great Land Trust. We greatly appreciate you being here,
25 Phil, to present the interests and the perspectives of the

1 Great Land Trust.

2 So, again, thank you all for being here. We will lead
3 off with Mr. Fogels.

4 And again, if you can try to limit your comments to
5 about five minutes and your full statement will be
6 incorporated as part of the record.

7 I will note that we have the hearing room until five
8 o'clock. So we're going to try to keep moving on this.

9 So, Mr. Fogels, welcome to the Committee.

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1 STATEMENT OF ED FOGELS, DEPUTY COMMISSIONER,
2 DEPARTMENT OF NATURAL RESOURCES, STATE OF ALASKA

3 Mr. Fogels: Thank you, Chairwoman Murkowski, Chairman
4 Sullivan.

5 My name is Ed Fogels. I'm Deputy Commissioner at the
6 Alaska Department of Natural Resources. And on behalf of
7 Governor Bill Walker, I thank you for this opportunity to
8 testify.

9 The focus of my testimony today is to first discuss
10 permit coordination process employed by the State of Alaska
11 and second is to discuss some concerns we have with current
12 mitigation requirements. I'll focus primarily on some BLM
13 mitigation requirements that we are afraid might start
14 duplicating and confusing the mitigation requirements
15 required under the Clean Water Act.

16 The state has established a sophisticated coordination
17 office for large projects within my department. This
18 office, the Office of Project Management and Permitting
19 coordinates the environmental review and permitting process
20 for major development projects. The state has found this
21 leads to real permitting efficiencies for several reasons.

22 First, public processes are integrated across
23 different agency timelines, which prevents repetitive and
24 confusing public notices.

25 It gives the public an accessible source of

1 information about projects in one place.

2 The state processes are synched with corresponding
3 federal processes to minimize duplication of effort, permit
4 collaboration and avoid duplication.

5 The state can speak with a highly coordinated and well
6 informed voice in the federal and local permitting process
7 and in National Environmental Policy Act reviews.

8 Our services are unique in that they are voluntary for
9 project proponents. If a project wants to pursue the
10 efficiency of coordination they must enter into a
11 memorandum of understanding with the state which also
12 requires reimbursement of state expenses.

13 The state has long advocated that the federal
14 government establish a similar coordination process for
15 large and complex projects based on the same principles and
16 structures.

17 Next let me speak to our concerns about the Bureau of
18 Land Management's draft regional mitigation strategy manual
19 which is a guidance document that will direct federal staff
20 on how to require mitigation for impacts to federal lands
21 that occurs as a consequence for permitted activities.

22 The manual mentions different types of mitigation and
23 how they may be applied. But we feel there is little to no
24 discussion of what impacted resources would require
25 mitigation or how those impacts will be calculated in order

1 to determine what mitigation requirements would be
2 required.

3 We are also very concerned about duplication with the
4 compensatory mitigation requirements for permits issued
5 under Section 404 of the Clean Water Act.

6 We're also concerned the manual has not been developed
7 through a public process. As it has been formulated as a
8 guidance document the manual has not gone through a formal
9 rulemaking process.

10 Next I would like to briefly discuss one example which
11 we believe illustrates where the process could be improved,
12 the Greater Mooses Tooth well or GMT1 in the National
13 Petroleum Reserve.

14 First, let me start by emphasizing, however, how
15 grateful we are to BLM and all the federal agencies for
16 permitting this project. GMT1 is anticipated to add about
17 30 thousand barrels per day in the Trans Alaska pipeline
18 system, making it a critical priority for the State of
19 Alaska and furtherance of the national strategic interest.

20 However the state has some concerns about the process.
21 And we believe they should be addressed for future
22 projects.

23 The EIS and BLM's record of decision layered
24 additional mitigation measures on the project. These
25 mitigation measures are in addition to numerous

1 requirements already required by other BLM EIS' and lease
2 stipulations.

3 Cooperating agencies including the state surprisingly
4 excluded from the development of the mitigation measures.
5 BLM required a number of oil spill related measures for the
6 project despite the fact that this authority falls mainly
7 under the Alaska Department of Environmental Conservation.
8 Consultation with the cooperating agencies would have
9 prevented this duplication.

10 Next let me touch briefly on an issue of these new
11 areas of critical environmental concern. This is, I'm
12 sorry, another concerning area on the BLM planning and
13 regulatory activities have a proposal to designate multiple
14 areas of critical environmental concern or ACECs.

15 BLM is increasingly proposing excessively restrictive
16 ACECs across Alaska. If designated as proposed, these
17 ACECs will create uncertainty for development projects of
18 critical public and economic importance such as the natural
19 gas pipeline for the North Slope and the Donlin Gold
20 projects proposed natural gas pipeline. Specifically two
21 ACECs in the Eastern Interior RMP, Resource Management
22 Plan, would close approximately 713 thousand acres from
23 mineral location and leasing, providing blanket closures on
24 restrictions for off highway vehicles including snow
25 machines.

1 We're also concerned that these ACECs could
2 potentially hamper the state's ability to fulfill its
3 statehood land entitlement, as most of these ACECs are
4 layered on top of existing withdrawals.

5 In closing I would like to say that regardless of
6 these issues that I've brought before this Committee, we do
7 have an excellent working relationship with our federal
8 agency partners, especially the Alaska staff. And we
9 continue to work to make that relationship better.

10 Our intent here is to highlight the areas where we
11 must improve. The state needs to be viewed as an equal
12 partner by the federal government. Additionally, the
13 federal government should draw from the success of the
14 state permitting coordination model to improve its own
15 process.

16 We at the state applaud the efforts of the oversight
17 of your Committee to drive federal improvements in these
18 areas.

19 Thank you.

20 [The prepared statement of Mr. Fogels follows:]

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1 The Chairman: Thank you.

2 Mr. Brand, welcome.

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1 STATEMENT OF RANDOLPH BRAND, VICE PRESIDENT, GREAT
2 NORTHWEST

3 Mr. Brand: Thank you.

4 If you visit the EPA website you're bombarded with why
5 we need the clean water rule to protect our streams and
6 wetlands. Now ironically EPA workers accidentally caused a
7 toxic wastewater release in Colorado. If this had happened
8 to any of us in the industry we would soon be out of
9 business and in handcuffs.

10 For the past 22 years my firm has either had a
11 controlling interest or outright ownership of 300 acres of
12 heavy industrial zoned land in Fairbanks. We have
13 developed this property to serve the construction needs of
14 the greater Fairbanks area. Originally all that was
15 required for a wetland permit was to submit a written
16 development plan to show the purpose and need. Over the
17 years things became gradually more difficult.

18 The first change was the requirement that any plan for
19 pit development had to include a restoration plan to
20 include littoral zones. Restricting development of a 20
21 foot wide zone around an old pit may not sound like much,
22 but it adds up quick. A 20 foot strip around a five acre
23 pond equals about 0.85 acres. A geometric calculation of
24 this set-aside equals a volume of 206 thousand cubic yards
25 with a potential value of over 600 thousand dollars.

1 Requirements gradually worsened to the point we are at
2 today with the requirement of compensatory mitigation.

3 In 2006 my firm needed to update our existing wetlands
4 permit. The U.S. Army Corps of Engineers required that we
5 contribute 55 thousand dollars to The Conservation Fund to
6 provide for offsite mitigation of 16 acres of lost
7 wetlands. We were also required to permanently set aside
8 an additional 10.64 acres of our land to be protected
9 wetlands in perpetuity.

10 As we were aware of two U.S. Supreme Court rulings
11 that might affect our determination, we held off executing
12 the permit. After those rulings were published we
13 requested on July 12th, 2006 the Corps revisit the
14 jurisdictional determination for our property. This
15 remained unanswered until March 28th, 2007 when the Corps
16 offered a proffered permit which included a condition that
17 the in lieu fee for compensatory mitigation would be held
18 in escrow until a new jurisdictional determination was
19 issued under the new guidance.

20 On July 28th, 2008 the Corps determined that this
21 property was jurisdictional wetlands. With the help of the
22 Pacific Legal Foundation we fought this determination on
23 our property all the way to the 9th Circuit Court and won
24 at a cost of 89 thousand dollars. The new rulemaking by
25 the EPA will reverse that determination potentially forcing

1 us to re-enter the permitting process for our ongoing
2 development. To hopefully protect ourselves from that
3 situation, we have cleared and disked much of this land at
4 a cost of 73 thousand dollars to convert it to uplands
5 beyond the EPA's reach.

6 In other private cost impacts, a business associate of
7 mine with a development on North Slope Borough leased land
8 in Deadhorse was required to pay 90 thousand dollars in
9 fees to develop seven and a half acres in 2011. Three
10 years later he applied to develop an adjoining seven and a
11 half acre parcel. The price doubled to 180 thousand
12 dollars without any explanation. That's about 24 thousand
13 dollars per acre.

14 This impact is not limited to private landowners. Our
15 ability to improve public infrastructure is also impacted
16 by these rules. Mayor Brower has previously testified that
17 the Barrow landfill project had to pay a million dollars in
18 compensatory mitigation.

19 I would like to add that Northern region
20 transportation projects have paid 3.4 million mitigation
21 payments in 2014 and 1.3 million mitigation payments in
22 2015 to date. During 2014 the credit cost increased from
23 two thousand two hundred dollars per credit to as much as
24 33 thousand dollars per credit.

25 [Audio problems.]

1 The Chairman: Tech?

2 Mr. Brand: Should I try again?

3 [Laughter.]

4 Mr. Brand: Are we good now?

5 The Chairman: You know, is the mic reaching back
6 there?

7 Mr. Brand: Hello? Hello?

8 One, two, three, four, five.

9 One, two, three, four, five, six, seven, eight, nine,
10 ten, eleven, twelve, thirteen, fourteen.

11 The Chairman: There you go.

12 Mr. Brand: Okay. Can you hear me now?

13 [Laughter.]

14 Mr. Brand: So last but not least is an agreement
15 reached in December 2007 whereby the Juneau Airport project
16 paid 5.3 million to the Southeast Alaska Land Trust as
17 compensatory mitigation for impacts to 73 acres of
18 wetlands. That's about 73 thousand dollars per acre.

19 Another interesting note is the government's failure
20 to recognize court rulings. Several of us individually own
21 property upstream of the Great Northwest property that was
22 deemed non-jurisdictional wetlands. The government claimed
23 jurisdiction over my property last week, just as they had
24 done to other property owners in the same neighborhood.

25 To further complicate matters, the EPA has shut down

1 The Conservation Fund until they do an audit of the
2 expenditures. Permits cannot now be obtained as there is
3 no organization to receive the required funds. Progress
4 for future paying projects is now at risk.

5 These payments are impacting our ability to deliver
6 worthwhile infrastructure improvements, predominately
7 within long dedicated rights of way. Additionally, these
8 payments are re-directing taxpayer dollars to NGOs with
9 their own self-serving interests, salaries and expenses.
10 One could even argue these payments constitute extortion
11 due to the fact you will not get a permit to fill your
12 wetlands without making the appropriate payment.

13 These new regulations will take large tracts of land
14 not currently under the authority of the Clean Water Act
15 and redefine them as waters of the U.S. This egregious
16 federal overreach has more to do with the largest land grab
17 in history than with expanding protection under the Clean
18 Water Act. The net result will be changing the Clean Water
19 Act into a Wetlands Protection Act.

20 If there is a need for a Wetlands Protection Act then
21 Congress should enact one and leave public rights of way
22 and privately held properties out of it. If the public
23 wants to set these areas aside then the public should
24 purchases the land outright at fair market value.

25 Thank you.

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[The prepared statement of Mr. Brand follows:]

1 The Chairman: Randy, thank you, appreciate your
2 testimony. And I think sometimes we -- particularly those
3 costs that are associated are just outstanding.

4 Deantha Crockett, welcome.

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1 STATEMENT OF DEANTHA CROCKETT, EXECUTIVE DIRECTOR,
2 ALASKA MINERS ASSOCIATION

3 Ms. Crockett: Thank you, Senators.

4 For the record my name is Deantha Crockett. And I'm
5 the Executive Director of the Alaska Miners Association.

6 I know that you two are quite aware of what AMA is.
7 But for the record, we are the statewide membership funded
8 trade association that represents all aspects of the mining
9 industry. You described the vast affect of the areas of
10 the state that these polices have an effect on our
11 membership spans. We've got branches in Nome and we have a
12 branch in Ketchikan, Prince of Wales and six in between
13 that, so members that really do operate in every corner of
14 our state.

15 I represent six large operating mines, but around 400
16 permitted placer operations. A vast majority of my job on
17 a day to day basis is advocating and helping placer miners
18 to sum up federal policies in five minutes. And I think I
19 heard Mr. Fogels use this word as well and I'm sorry to say
20 that the word I've got to use is uncertainty.

21 Right now I have the large operations that I
22 referenced evaluating what source of investments they'll
23 make of those big projects. But I've got the vast majority
24 of my placer miners evaluating whether or not they'll still
25 have a livelihood.

1 I do have one of my members. It's someone I've become
2 great friends with in the third row, Bronk Jorgensen. He
3 is here from the 40 mile mining district and watches that
4 every single day in terms of how federal management
5 policies affect placer mining on federal land in Alaska.

6 I will begin with the BLM.

7 I think we're seeing multiple policies come from
8 multiple field offices throughout different levels of
9 management in the agency whether it's land planning,
10 regulatory enforcement or how permitting is conducted. But
11 a lot of times policies are introduced in draft form to
12 which the industry scrambles to digest multiple volumes.
13 I'm not exaggerating, about this high, of different plans
14 and policy changes that come out.

15 Sometimes the polices come to fruition. Sometimes
16 they don't. And sometimes in the meantime we see them used
17 by the agency as legitimate land management tools.

18 To be specific, BLM recently reevaluated its
19 implementation of the regulations in which mineral activity
20 is permitted and managed in Alaska which is essentially new
21 regulation that doesn't add any additional environmental
22 protection. It doesn't fix any problems. And it burdens
23 the miners with increasing costs and delays.

24 For many years placer mining operations have applied
25 for permits and been regulated under the Annual Placer

1 Mining Application, the APMA process, which is managed by
2 three State of Alaska agencies and BLM. For a long time
3 these agencies got together and made sure that the APMA was
4 a good program that placer miners could effectively manage
5 permitting for but still establish the objectives of all
6 the agencies involved.

7 That certainly changed into a different animal. And
8 now BLM has proposed seven new supplemental documents for
9 the APMA. And also a requirement to gather new data and a
10 possible Reclamation cost estimate to determine the cost of
11 reclaiming an operation that doesn't have any non
12 compliance issues in the first place.

13 So outside of the permitting the agency has also
14 released a number of land management plans as part of an
15 overarching landscape level process. The RMPs cover really
16 large acreages and often contain management prescriptions
17 that guide policies of the land users in the area outside of
18 what is current land regulation and statute.

19 Deputy Commissioner Fogels did a phenomenal job of
20 explaining the ACECs. So I was able to cross out a little
21 of my testimony here.

22 But recently we've seen two, a newly proposed and then
23 an expanded one that was in existence in the 40 mile
24 region. And it really has that district very concerned.
25 It's hundreds of thousands of acres that are being proposed

1 for closure to mineral entry, an area that's known to be
2 highly mineralized.

3 There is an additional component within the land
4 managing process called rapid ecological assessment. And I
5 have to be honest with you, I'm still not totally sure what
6 it does or what it doesn't do. But these are all examples
7 of, frankly, what is a puzzle and us trying to understand
8 BLM's land management philosophy and how it applies to
9 placer mining on federal lands in Alaska.

10 When the National Director, Neil Kornze, visited
11 Chicken earlier this year which we profusely thank you for
12 your help on, I had the opportunity to talk to him. And I
13 told him that I think there are really good, intelligent
14 and hard working staff within the BLM Alaska offices here.
15 I firmly believe that.

16 They're all sitting in this row right here.

17 They are wonderful about communicating with me.

18 They're asking for different ways to provide outreach
19 to miners.

20 And what I told Director Kornze is that they've got a
21 lot of good ideas on how placer mining can be regulated and
22 the agency's objectives can still be established. And I
23 hope that the communication between the Alaska staff and
24 the national staff is a two way street and they're being
25 allowed to implement ideas and allowed, you know, I think

1 the best ones to understand placer mining in Alaska.

2 So switching to wetlands mitigation, we certainly do
3 have our struggles with jurisdiction over Section 404. But
4 one thing I can say at this time is kudos to that agency
5 for its recent internal review of how wetlands jurisdiction
6 and regulation is conducted in Alaska.

7 I know that they are evaluating the 1994 Alaska
8 Wetlands Initiative and is it a tool that is there for the
9 agency to manage projects specific to mining in Alaska.

10 I know that the agency has committed to reviewing
11 whether the entire suite of tools is being utilized to
12 regulate operations and wetlands in Alaska. And we saw
13 these words put into action with the recently released
14 general permit for placer mining. The agency went through.
15 They extended the existing permit because they readily
16 admitted we're not done. This is not a forum in which
17 we're happy with and ended up striking out the compensatory
18 mitigation for certain small placer mining projects.

19 So they really did put their money where their money
20 is, so to speak and ended up taking multiple stages of
21 revisions from placer miners into that final product. And
22 it's one that there are some things we don't like about it.
23 There's a lot of things we like about it. And I think they
24 did a great job of meeting us in the middle, if you will,
25 on that one.

1 So I think I've exceeded my time allotment. For that,
2 I apologize. But I thank you again for the opportunity to
3 testify for placer miners today.

4 [The prepared statement of Ms. Crockett follows:]

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1 The Chairman: Thank you, Deantha.
2 Joe, welcome.
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1 STATEMENT OF JOSEPH NUKAPIGAK, VICE PRESIDENT,
2 KUUKPIK

3 Mr. Nukapigak: Thank you.

4 Thank you, Senator Murkowski and Senator Sullivan and
5 the Committee for allowing me the opportunity to provide
6 testimony on federal mitigation requirements. I hope to
7 add local content and offer some suggestions for the
8 Committee to consider.

9 Kuukpik Corporation is the Alaska Native Land
10 Settlement Act Village Corporation for Nuiqsut, which is an
11 almost entirely Native Community on the North Slope of
12 Alaska. Approximately 90 percent of our residents of
13 Nuiqsut are shareholders in Kuukpik Corporation or are
14 married to Kuukpik Corporation shareholders or descendants
15 of Kuukpik shareholders.

16 Kuukpik is one of the largest private landowners in
17 the National Petroleum Reserve-Alaska, having received
18 title to approximately 74 thousand acres of ANCSA lands
19 surface estate. The balance of Kuukpik's lands, totaling
20 about 69 thousand acres are just east of the NPR-A in and
21 around the Colville River Delta.

22 Nuiqsut is the community most affected by oil
23 development on the North Slope to date. Alpine is only
24 eight miles away from the village and can be seen from the
25 village, day and night, increasing the fact that Nuiqsut

1 for a road project. Nuiqsut is a traditionally Inupiat
2 community where over 70 percent of households get more than
3 half their food from subsistence hunting.

4 The oil industry has been active on the eastern side
5 of Nuiqsut's traditional subsistence lands at Prudhoe Bay
6 and Kuparuk for over 50 years. But construction of the
7 Alpine field in 1998 put the oil field and the Nuiqsut in
8 close daily contact. Three new satellite oil fields have
9 been built around Nuiqsut since Alpine and at least two
10 more are planned. Impacts to subsistence activities and
11 resources are continuing and persistent issues.

12 Our challenge as a community and a corporation was to
13 realize the economic benefit of ANCSA land ownership
14 through development, of oil development, while protecting
15 our Native culture. Our leadership has consistently worked
16 to protect subsistence and our natural surroundings.

17 As oil development occupied more and more subsistence
18 lands to the east and north, Kuukpik decided that better
19 access to subsistence land to the west was the one part of
20 -- dealing with oil development impact, while the other
21 part was better access to jobs and training at Alpine oil
22 field.

23 Our solution was to build a Spur road from the village
24 to the industrial CD-5 road.

25 The road has three purposes.

1 One is to open up more area for subsistence to the
2 west.

3 Two is to allow Nuiqsut residents and shareholders to
4 drive to training and employment opportunities at home.

5 Three, expanded health, life, safety options.

6 Projects such as the Spur Road are a key part of
7 ANCSA's purpose to protect Native land and culture while
8 promoting economic development of Native land, jobs,
9 training for Alaska Natives. Yet the federal permitting
10 process has created substantial barriers to the project.

11 The Permit Process.

12 In January of 2013 Kuukpik submitted an application to
13 the U.S. Army Corps of Engineers. The proposed road was
14 5.8 miles long and called for placing gravel on 51 acres of
15 our land that we own. Over several months Kuukpik
16 submitted information to improve our application. In
17 August of 2013 the EPA commented on our application. Like
18 many 404 applicants they sent Kuukpik a letter stating that
19 they reserved the right to elevate our ANCSA project if
20 their concerns are not addressed, could not be addressed.

21 Specifically the EPA argued that mitigation for
22 Kuukpik's 51 acre road required that we set aside
23 additional 294.2 acres in permanent conservation status.
24 Under the EPA calculation the 51 acre footprint of our
25 community road would actually impact a minimum of 343.2

1 acres of Kuukpik owned property. The proposed mitigation
2 acreage would be almost six times the actual footprint.

3 Kuukpik continued to meet with the Corps of Engineers
4 and the EPA throughout the fall of 2013. We repeatedly
5 argued that the size of parcel needed as an offset for the
6 project was smaller than required by the EPA and that the
7 purpose of the road were an extension of our right as a
8 landowner under ANCSA and served to mitigate oil
9 development impacts.

10 Our negotiations lead Kuukpik to the conclusion that
11 despite the inherent conflict between ANCSA and the Clean
12 Water Act we needed to the 404 permit. We eventually
13 agreed to set aside a 127 acre parcel in the area known as
14 Fish Creek, so that the Spur Road's 51 acre footprint
15 impacts 178 acres of Kuukpik land. The mitigation acreage
16 is more than twice as much as the actual footprint even
17 though the mitigation acreage is made up of higher value
18 wetland than those occupied by the project footprint.

19 Kuukpik is still in the process of finalizing the
20 easement. One of the many byzantine requirements of the
21 Clean Water Act is that a qualified third party entity hold
22 the easement and that an entitlement be set up to fund
23 future costs of managing that easement.

24 We are in the process of identifying a qualified and
25 willing third party that can harmonize our need to continue

1 our lifestyle with the demands of the Clean Water Act.

2 Kuukpik supports continuing to use all the mitigation
3 related tools available under the existing rule, including
4 wetland mitigation banks, in lieu fee programs and
5 permittee responsible mitigation.

6 However, Kuukpik also supports expansion of the
7 options available to Alaska Native Corporation including
8 recent legislation introduced by our Congressman calling
9 for preservation leasing for tribal organizations including
10 Alaska Native Corporations. That legislation could more
11 closely tie mitigation acreage to the actual life of
12 project related impacts.

13 Finally we think that Alaska Native Corporations
14 should be exempt from Clean Water Act requirements where
15 the applicant is an Alaska Native Corporation and the
16 project is on Alaska Native land.

17 BLM Region Mitigation Strategy.

18 Department of Interior has now stepped into the
19 compensatory mitigation equation. BLM negotiated an eight
20 million dollar mitigation payment to offset impacts created
21 by GMT1. Decisions regarding the disposition of the funds
22 should be made by the NPR-A Working Group.

23 The NPR-A Working Group was created as part of the
24 Integrated Activity Plan for the NPR-A. The purpose
25 created, the purpose of the Working Group is to guide the

1 federal government's decision making process within the
2 NPR-A. The group has broad representation including
3 tribal, local government and corporate groups. It makes
4 perfect sense to allow that group to determine the use of
5 the funds.

6 Second, we recommend that funding community mitigation
7 be the highest priority for the funds.

8 We will continue to work with our families and our
9 neighbors including the City of Nuiqsut, Native Village of
10 Nuiqsut and the BLM on plans for utilizing the funds.

11 Thank you for your time.

12 [The prepared statement of Mr. Nukapigak follows:]

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1 The Chairman: Thank you and thank you for
2 representing Kuukpik.

3 Ms. Clark, welcome.

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1 STATEMENT OF THERESA CLARK, VICE PRESIDENT, OLGOONIK

2 Ms. Clark: Good afternoon. My name is Theresa Clark.

3 The Chairman: Theresa, you're going to have to bring
4 it way closer.

5 Ms. Clark: Good afternoon. My name is Theresa Clark.

6 The Chairman: Closer.

7 Ms. Clark: I am the Vice President of Lands and
8 Shareholder Services for Olgoonik Corporation.

9 Thank you, Senator Murkowski and Senator Sullivan and
10 members of the Committee for providing Olgoonik the
11 opportunity to testify today. I thank you for conducting
12 this public hearing here in Alaska on this very important
13 issue of federal wetlands, federal mitigation requirements
14 and the proposed legislation to address wetlands
15 mitigation.

16 Olgoonik Corporation is the ANCSA village corporation
17 for Wainwright. Olgoonik privately owns 175 thousand acres
18 of surface estate, all of which are within the NPRA. So we
19 are one of the closest communities to offshore development
20 in the Chukchi Sea. Offshore exploration, development and
21 production will require onshore based support services
22 which we are planning to deliver.

23 We received our full entitlement to our ANCSA lands.
24 It took BLM over 20 years to patent our lands to us. The
25 Clean Water Act was amended to address wetlands mitigation

1 just as we were receiving the balance of our full
2 entitlement which subjected our lands to new and additional
3 federal requirements.

4 Wainwright residents and Olgoonik Corporation will be
5 highly impacted by oil exploration and industry development
6 in both a positive and negative manner. We are trying to
7 minimize the adverse impacts that development brings to our
8 community, especially those affecting our subsistence way
9 of life. The positive impacts will be business and job
10 opportunities and a financial future for generations.

11 To minimize impacts and to capture benefits we are
12 planning and developing Olgoonik lands on the outskirts of
13 Wainwright. This will make development of Olgoonik lands
14 subject to wetlands mitigation rules.

15 We have our own land management plan to develop lands
16 and protect certain sensitive areas. Our strategy is to
17 keep development of our lands to a minimum by compacting
18 the development into a reasonably small footprint.

19 We are currently in the process of purchasing lands
20 formally utilized by the Air Force as Early Defense Warning
21 System, DEW lines. With your introduction of an amendment
22 to the 2015 NDAA and its passage, Senator Murkowski, thank
23 you, we are now in the process of purchasing those lands.
24 This property is within our ANCSA lands. Our plans for
25 this property is to build infrastructure upon the plans

1 already existing to provide essential support to oil and
2 gas industries. This will further minimize development on
3 wetlands within our ANCSA lands.

4 Full mitigation to protect wetlands is good and
5 needed. We recognize that fact. And we are also mindful
6 that this impacts are ANCSA lands or purchased lands, the
7 DEW line.

8 For example, there is a social deed in our community
9 to build new homes. We are subdividing lands for that
10 purpose. Roads will be needed for access. To build roads
11 we'll have to comply with the federal regulations. This
12 will drive up the price of development as the current
13 method we are leaning towards is paying an in lieu fee.

14 The current wetlands inventory data for Alaska's North
15 Slope is limited and out of date. The arctic coastal plain
16 is comprised of approximately 80 percent wetlands. This
17 determined by the State of Alaska in 1994. This places the
18 burden of more detailed delineation of our lands on us as a
19 developer. Currently the average cost per acre to develop
20 is approximately 12 thousand per acre.

21 Using this data, a majority, if not all of our land is
22 considered wetlands. The in lieu fee program is not
23 available or able to pre sell additional credits at this
24 time. Permittee responsibility is challenging in that we
25 are required to triple the size of the impacted area when

1 one adds together the project with a conservation easement.

2 We are certainly watching for and hoping that the
3 Arctic Slope Regional Corporation's bank will be certified.
4 In short we feel that having multiple mitigation options is
5 important from a permitting standpoint but also a financial
6 standpoint.

7 Finally, we do not desire to lock up any of our lands
8 in perpetuity to mitigate as we cannot predict the future.
9 Decisions made today in regards to our lands may not be
10 applicable 20 years down the road. As time change,
11 corporate leaders change, additional development will be
12 needed to take place. And we need to keep the options open
13 for our future generations to determine.

14 Therefore with these purposes in mind we support the
15 proposed legislation to one, provide ANCs exemption from
16 the Clean Water Act requirements where an applicant in an
17 ANC and the proposed projects are on ANC lands.

18 And two, to have the ability to enter into a
19 preservation easement as a mitigation option.

20 I thank you for the opportunity to be heard, Senator
21 Murkowski and Senator Sullivan and members of the
22 Committee. I request your support on this proposed
23 legislation.

24 [The prepared statement of Ms. Clark follows:]

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1 The Chairman: Thank you, Theresa.

2 And finally we will wrap up with Mr. Phil Shepard,
3 welcome to the Committee.

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1 STATEMENT OF PHIL SHEPARD, GREAT LAND TRUST

2 Mr. Shepard: Thank you.

3 Thank you, Senator Murkowski and Senator Sullivan.

4 My name is Phil Shepard. I'm the Executive Director
5 of Great Land Trust. And we're a private, non-profit, land
6 trust that operates here in Alaska. We're based in Alaska.
7 We have an all Alaskan board.

8 We were founded in 1995, so 20 years ago. We work
9 with willing landowners, agencies, communities, local
10 governments and other partners to conserve south central
11 Alaska's special lands and waterways. We have our service
12 area, the area that we work, is in south central, so from
13 Denali, down to Kodiak, Prince William Sound. Primarily
14 we've worked in Anchorage and Mat-Su. And we were asked in
15 1998 by the municipality of Anchorage, the State of Alaska,
16 various regulatory agencies to consider starting an in lieu
17 fee program in Anchorage.

18 So there's been discussion today about different
19 mitigation options. We happen to operate one that's called
20 an in lieu fee program. There are other options.

21 But so what I'm going to talk about today is this
22 public/private partnership that we happen to run as a land
23 trust to do some of the mitigation. I'm not going to weigh
24 in on why mitigation happens because that's not our
25 purview. We don't do advocacy work.

1 What we do is the mitigation after the fact.

2 So when the Army Corps has made the decision that
3 okay, here's a permit. You can't fill this wetland. Then
4 that permittee, whether it's a private developer or an
5 agency, it's DOT or some agency that's filling a wetland,
6 they decide that the mitigation is formed and the
7 mitigation options and the fee. And then that payment is
8 made to us. And we aggregate those funds and then we turn
9 around and we purchase those purchase properties to
10 permanently protect those wetlands.

11 And what we have to do in order to do that, in order
12 to operate this is in the fee program is we spend a great
13 deal of time using the current data on wetlands in
14 Anchorage and the Mat-Su to know, okay, well where are the
15 best wetlands to mitigate. And so what we've done to date
16 is partner with dozens of private landowners and agencies.

17 And we've created seven new parks.

18 We've built a number of trails.

19 We've conserved about 45 miles of salmon habitat here
20 in Upper Kuukpik arm.

21 We've provided six access points to public lands.

22 We've worked in eight different estuaries.

23 And one of the things that we've focused on is if
24 there's a wetland and it's privately owned and if we only
25 work with willing landowners. And the landowners that have

1 these wetlands and for whatever reason they decided they,
2 you know, they don't want them anymore. We purchase those
3 and then oftentimes they are adjacent to say, a state game
4 refuge or a state park. And then we add those to the park.
5 And then that way that property provides access to these
6 public lands.

7 So we are blessed with a lot of public lands in
8 Alaska. In some cases, especially around Anchorage, access
9 is very limited. And so, actually right near here we just
10 purchased property near Machtetanz Elementary School and
11 added it to Palmer Hayflats State Game Refuge and are
12 building a boardwalk for the kids at Machtetanz are helping
13 us. So that's an example of a project, a type of project
14 that we do.

15 When we try to figure out where to do the mitigation
16 we spend, I already said, a great deal of time with maps
17 and GIS to figure out the best possible mitigation to do.
18 And we work closely with the boroughs, the municipal
19 governments, state agencies, to find the best property.
20 When we get frequent feedback from these agencies and
21 resident experts that choose these properties we're really
22 proud of all of the projects we've done.

23 One of our -- several of our main partners have been
24 Native Corporations. We've got -- we've conserved almost
25 seven thousand acres of Native Corporation lands in Upper

1 Turnagain Arm that were mitigation from various projects
2 around Anchorage.

3 Obviously there's way more impacts to wetlands around
4 Anchorage and the Mat-Su just because there's more people
5 here. And so I can't speak to the North Slope and these
6 areas in the interior. We only operate or are in the fee
7 program in Mat-Su and Anchorage.

8 So in closing I'd like to thank the Senator, both
9 Senator Murkowski and Senator Sullivan for coming here and
10 having this hearing. And I'm sure everyone appreciates the
11 ability to understand this issue more fully. And just like
12 to close with we're a, you know, small, private, nonprofit
13 in a partnership between a private nonprofit and these
14 federal agencies and the public I think has resulted in
15 some really sound, high quality mitigation that has been
16 for the good citizens of this area.

17 [The prepared statement of Mr. Shepard follows:]

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1 The Chairman: Thank you.

2 Thank you, Mr. Shepard. And thank you to each of you
3 for not only your testimony here this afternoon, but the
4 work that you do within your respective communities, your
5 region and the state.

6 I think if I have heard a common theme here it is the
7 uncertainty that comes about with any level of requested
8 development whether it is housing, as you were talking
9 about in Wainwright, Ms. Clark, or whether it is mining
10 activities out in the 40 mile region. When you don't have
11 clear and consistent policies it's difficult to make that
12 business judgment decision as to how you move forward.

13 I have to just say to friends here at home I feel like
14 I have to apologize sometimes for the alphabet soup. I was
15 listening to Mr. Fogels and Ms. Crockett.

16 And we have APMAs.

17 We have ACECs.

18 We have RMPs.

19 We have REAs.

20 And that's just in the little BLM area. It kind of
21 boggles your mind. And unfortunately it just seems like
22 that this the acronym of the day, what's coming next? I
23 don't know that. I know and I'm not sure that our
24 regulators know. And it adds to the confusion and
25 complexity of what we are dealing with.

1 I'm concerned as we look at the impact to our
2 opportunities to develop. And Mr. Fogels, you mentioned
3 some of the big ticket items that we think about whether it
4 is the ability for Donlin Gold to bring affordable energy
5 to a project out there being limited by an ACEC. Whether
6 it's our Trans Alaska pipeline, whether it is further build
7 out and repair of our Dalton Highway after the washout,
8 whether it is what we're trying to accomplish in GMT1 and
9 recognizing that we're still trying to get things moving
10 within the NPRA. It really causes you to wonder how we've,
11 how we have, had the level of progress that we have had to
12 date.

13 Let me ask, specifically, about these areas of
14 critical environmental concern, these ACECs.

15 In 1986 my understanding is we had 16 across the state
16 and it encompassed about 2.7 million acres. Now, well in
17 2014, we had 52 ACECs overlaid across the state accounting
18 for approximately 8.7 million acres of additional
19 management. And I don't go anywhere without my map of
20 things that rile me up. And where's my rile me up map.

21 [Laughter.]

22 The Chairman: I got so riled I put it in another
23 file. Where's my colored maps?

24 Those, you have them.

25 For those who do not have the areas of withdrawals of

1 Alaskan lands, it's not just things like ACECs and the
2 withdrawals within each of our public lands. It's what we
3 also see withdrawn off of our coastline, with critical
4 habitat designations. And at the end of the day, Senator
5 Sullivan has seen this chart through videos. But it's a
6 colored patchwork that just, kind of, reinforces the
7 situation that we are in and trying to access what we're
8 dealing with here in this state.

9 So we're seeing this growth in ACECs. We're seeing
10 this growth, this expansion, if you will.

11 I'm going to ask you, Mr. Fogels. You've been with
12 the Department of Natural Resources for some time. Are
13 these regulatory measures increasing the health and the
14 welfare to Alaskans? Is it helping us in terms of
15 management? Are we gaining any benefit by these additional
16 designations?

17 Mr. Fogels: Senator Murkowski, I think, in my
18 professional opinion, of these most recent proposals that
19 we have seen, do not add to the health and welfare of the
20 Alaskan people.

21 We, I should say, that these are all, the ones out in
22 the eastern interior management plan that totals up about
23 713 thousand acres. And then there's another large one
24 that we're watching. We're very concerned about the
25 Donnelly project with many hundreds of thousands of acres.

1 Those are all still in draft. I know those have been
2 finalized.

3 All of those plans are still in their planning
4 process. So we're strongly commenting on these, on all of
5 these ACECs. And we do not believe they're warranted.
6 They're way too big. They don't have the justification.

7 In addition, we believe that the BLM already has the
8 ability to manage those resources properly with existing,
9 with their existing tools. They don't need to create these
10 areas of critical environmental concern. I think it's --

11 The Chairman: Let me interrupt and ask you, though,
12 even if it has not been finalized, what is the impact of
13 this proposed designation? What does that do to any
14 potential development?

15 Mr. Fogels: Well, Senator, that's a good question.
16 That's one that we see in a number of different venues in
17 Alaska when an agency typically is studying something,
18 let's say, for wilderness, then they're apt to treat it and
19 manage it like a wilderness while they're studying it. So
20 while we do not have direct experience with that in these
21 instances, I would imagine that's a significant concern on
22 these areas of critical environmental concern.

23 And the BLM is doing a good job with their planning
24 process. I've got high hopes that reason will prevail and
25 the public will comment on these things. Until that

1 happens, I don't know.

2 The Chairman: But until such time as there's a final
3 designation it is managed as de facto withdrawal there,
4 effectively?

5 Mr. Fogels: Well, Senator, I think you might, I think
6 in your next panel you might have BLM folks. You might ask
7 them about that.

8 It's important to note that wherever these ACECs are
9 proposed now, as we understand it, there are already
10 withdrawals under those ACECs. And that's one of the
11 things that concerns us is that those existing withdrawals,
12 many of those, were put in place for a purpose that is no
13 longer valid. And so with the layering of the ACEC on top
14 of that we argue that that's essentially repurposing that
15 original withdrawal that underlies it.

16 And that would be contrary to provisions on ANILCA
17 which prohibits the designation, the withdrawal of more
18 than five thousand acres without Congressional approval.

19 The Chairman: Let me ask you, Ms. Crockett.

20 Representing the miners in the 40 mile area and
21 Mosquito Flats, 40 mile is the area where over 700, what
22 did you say? Seven hundred and?

23 Ms. Crockett: 18.

24 The Chairman: 19 thousand acres will be put under
25 this designation. Even though it has not been finalized

1 what impact is that having on a small placer miner out
2 there?

3 What -- when was the last time we saw a new mine
4 permitted out there in the 40 mile region or really
5 anywhere in the state?

6 Ms. Crockett: Senator Murkowski, that's an
7 interesting question. I actually don't know the answer to
8 when the last time a placer mine was permitted in the 40
9 mile mining district.

10 The Chairman: But it's been long enough that you
11 can't remember.

12 [Laughter.]

13 Ms. Crockett: I should be a little fair admitting
14 I've only been there for three years. So I would -- I will
15 research that and get back to you.

16 The Chairman: Okay.

17 Ms. Crockett: And maybe the BLM folks have an answer
18 to that. But I have not had one been brought to my
19 attention in the last three years. So I will find that
20 out.

21 [The information referred to follows:]

22 [COMMITTEE INSERT]

23

24

25

1 Ms. Crockett: You also asked me about the impact.
2 And I think it has just, it's made a lot of them very
3 scared.

4 And looking in terms of how did we get here? If you
5 talked about the number of ACECs that are in place or
6 proposed now, how many more there are. And the number is
7 certainly alarming. But I think what's more alarming for
8 me is learning about the ACEC nomination process is how
9 exactly it works.

10 So the two that are within the 40 mile region in one
11 meeting with BLM, it was explained there were individuals
12 that nominated these, that proposed these ACECs. So
13 anybody can, any member of the public can nominate for an
14 ACEC. And when they were put into, under the Eastern
15 Interior Resource Management Plan there was an ACEC
16 nomination process so that individuals could then forward
17 that generally had hunting and fishing interests and
18 foreclose that as needed caribou habitat or moose having
19 habitat, etcetera.

20 And when the proposal came out with public comment
21 there was no information whatsoever about the mineral
22 potential of the area. It was a lot of information about
23 ecological aspects, about wildlife aspects. And we brought
24 that to their attention and they said, bring it to us.

25 And so we did. We said, okay, we'd like to provide

1 you with some information. Here is a known, very large
2 deposit here in a number of areas where placer mining
3 activity could really increase and diversify and
4 strengthen. And that was generally not available to the
5 general public that may have been interesting comment --
6 interested in commenting on this.

7 And so I think that process of how they're brought to
8 the public, those of us that are trying to just understand
9 this better, and information they don't include, is more
10 alarming to me than anything.

11 And I hope that kind of answers your question.

12 The Chairman: Well, it does.

13 And I know that Senator Sullivan will go to the issue
14 of specific authorization under the law. And I think what
15 we would question is whether or not much of this can move
16 forward without Congressional authority under the
17 parameters of ANILCA.

18 Ms. Crockett: Yes, absolutely.

19 And the proposals, as they stand now, do designate
20 closure to mineral entries. So no mining activity would
21 occur if these become effective.

22 The Chairman: Again, contrary to ANILCA.

23 Ms. Crockett: Yes.

24 The Chairman: Senator Sullivan?

25 Senator Sullivan: Thank you, Madam Chair.

1 Mr. Fogels, I wanted to follow up on a couple
2 questions.

3 You talk about OPMP. And I agree with you, the state
4 has done a good job of coordinating on large projects.
5 There was an executive order by the Obama Administration a
6 few years ago that tried to replicate that, but from my
7 perspective it didn't seem to go anywhere.

8 How is the coordination at the federal level and is
9 there a need, do you think, from the federal legislative
10 standpoint to mandate that kind of coordination?

11 Because right now whether it's the Shell project,
12 whether it's a different Alaska natural gas AK LNG project,
13 it seems like federal agencies come in with all kinds of
14 different requirements, completely uncoordinated. What do
15 you think needs to happen there and is that Executive Order
16 doing enough?

17 Mr. Fogels: Senator Sullivan, I would have to say
18 that, in my opinion, I see where the coordination can, on
19 the federal level, have flashes of where it actually starts
20 working. But it's pretty inconsistent. We've seen places
21 where we tried at a local level to improve that
22 coordination. We have excellent regular meetings with EPA
23 and the Corps to discuss large projects around the state
24 trying to avoid blow outs like we have with CD5 to head
25 those off at the pass. So that's working.

1 I think on a broader scale with President Obama's
2 interagency working group, I think our frustration there
3 was that, I think as you know, we were never invited to sit
4 at that table.

5 Senator Sullivan: Yeah.

6 Mr. Fogels: That was purely a federal table.

7 Much to our pleasant surprise the local federal
8 leaders decided to build their own mirror group of that and
9 they invited us to sit at the table here in Alaska.

10 Senator Sullivan: Let me ask you, let me follow up on
11 that in terms of the invited to the table.

12 You know, in the Clean Water Act, you agree the Clean
13 Water Act, we're supposed to be a co-regulator. I mean, on
14 an equal basis with the federal government. That's the way
15 the Clean Water Act was set up.

16 And yet on compensatory mitigation are we at all
17 involved in the process in terms of laying out these random
18 and, I think, arbitrary numbers and amounts that the, and
19 the dollar figures. Are we at all a part of that process
20 even though that's under the Clean Water Act?

21 Mr. Fogels: Senator, in my experience we are really
22 not involved in that process at all.

23 Senator Sullivan: So you think that clearly goes
24 against the spirit if not the actual rule of the law of the
25 Clean Water Act?

1 Mr. Fogels: Well certainly the spirit, Senator.

2 I think in years past we've also tried to evaluate
3 whether the state should seek primacy for the 404 process.
4 And almost every state in the nation has primacy over the
5 404-2 discharge program. But only two have primacy over
6 the 404 program. And when you read the Clean Water Act and
7 even early EPA guidance documents, it clearly says the
8 states should be ultimately getting primacy and they should
9 take the lead.

10 And that has not happened.

11 Senator Sullivan: Let me ask another kind of related
12 question with regard to mitigation.

13 I actually spent a lot of the day yesterday at the
14 Chena Hot Springs Alternative Energy Fair which was a great
15 event. I had a lot of time to talk to the governor,
16 Governor Walker, about a number of these issues. Told him
17 we had this hearing coming up.

18 And we were both discussing, both of us were, kind of,
19 you know, wondering to what degree the federal government
20 can require mitigation with regard to the state. So
21 coequal sovereign under our Constitution and I didn't think
22 the federal government could require if the State of Alaska
23 is building the road do we have to mitigate that under the
24 federal rules?

25 And so I took a look at this. I think the answer is

1 not only yes, but heck, yes. Three point, almost 3.4
2 million dollars in 2014 we had to pay to the federal
3 government for mitigation to build roads in Alaska. I
4 think that violates the tenth amendment or any other aspect
5 of the Clean Water Act. It certainly seems to me kind of
6 an outrageous example of the federal government claiming
7 way too much authority.

8 What's your thought on that?

9 Mr. Fogels: My thought?

10 Well, I would think a former attorney general to kind
11 of know more about that than I probably do.

12 [Laughter.]

13 Senator Sullivan: So Madam Chair, I have a number of
14 more questions.

15 The Chairman: Well, we'll go back and forth, yeah.

16 Because the question, you know, I think most Alaskans
17 would be stunned --

18 Senator Sullivan: Stunned.

19 The Chairman: To know that, for instance, on the
20 rebuild of the Dalton Highway after the substantial
21 flooding. What we need to do is we need to elevate that
22 road. We're going to have to do something a little bit
23 different than what we had before or we will have a repeat.
24 And in order for us to move forward with that a level of
25 mitigation is and I'm not sure what the dollar amount is,

1 but we do know that the state is basically going to be
2 paying the federal government for those mitigation costs.

3 And then it speaks also to the issues that Mr.
4 Nukapigak and Ms. Clark have spoken to whether it's coming
5 from Wainwright or Nuiqsut.

6 The fact that these are your ANCSA lands that were
7 conveyed to you as part of a settlement and for you to
8 access these lands whether it is a road that will allow for
9 additional subsistence opportunities for you or whether it
10 is for the folk, the people, in Wainwright to be able to
11 access additional area for housing that is necessary. That
12 they too, they also, will be paying the federal government
13 and whether it is six times the amount or whether it's
14 negotiated down to just twice the amount of the footprint,
15 I think most would be very shocked to find that from your
16 native lands that were conveyed upon settlement that you,
17 as tribal entities, have a requirement now to pay the
18 federal government.

19 I was in Craig on Prince of Wales last week. And they
20 too are looking to build additional housing. And the
21 compensation that they have to then pay, again, to access
22 their lands and what I was told was that the issue of where
23 these mitigation dollars go to is of great concern.

24 Mr. Fogels, you mentioned that there are, there's, an
25 issue right now with the availability of mitigation banks

1 that can accept these dollars to move forward. I
2 understand that up north there was an effort to expand or
3 build out a hangar in the area. They're all ready to move
4 on the project. And there's nobody that can take the
5 mitigation dollars because of this audit that you
6 acknowledged.

7 What do you do then?

8 You need to build the hangar. You need to repair the
9 road. You need to build housing or a connector road.

10 Mr. Shepard has mentioned the in lieu system, but he
11 also mentioned that's just down here.

12 Are we to believe that we're not able to move on
13 anything up in the North Slope because we don't have a
14 place to even bank it if we can agree that a two to one
15 mitigation ratio is reasonable and not extortion?

16 Mr. Fogels: Well, Senator Murkowski, yeah, as we
17 understand it there's a situation that's developed that one
18 of the main mitigation banks in the in lieu of fee programs
19 is no longer accepting money to further the program. I
20 think it's a fairly recent development. I think, I know,
21 that is a huge concern to us.

22 What we're doing right now is, even with the tight
23 budget situation the state has right now, we received a
24 small legislative appropriation this year to start
25 investigating forming a state in lieu fee program or

1 possibly even a mitigation bank.

2 So that's something that, I think, the state can have
3 a bigger role in this whole process. And that's one place
4 we're really looking at trying to put some energy and
5 hopefully help.

6 The issue is if for every acre we develop now we have
7 to go and protect ten or five or whatever it is. That is
8 just an untenable situation. It's just, I mean anyone can
9 see that's just not workable.

10 So we'd like to use that money as much as possible to
11 do environmental good things, right? I mean, it's kind of
12 ironic when Point Thompson thought he was being permitted,
13 you know, Exxon wrote some huge multimillion dollar check
14 for that's probably going to go and protect a block of land
15 somewhere.

16 And at that same time when we're talking about how do
17 we clean up these legacy wells, you know, which all have
18 wetlands in house. Wouldn't it be nice if we could just
19 have just used that money to clean up a legacy well? I
20 know that's kind of a reach for the Clean Water Act, but I
21 mean, that's what we need to do. We need to reach. We
22 need to think outside of the box. Figure out how to use
23 these dollars to fix real environmental problems.

24 The Chairman: Mr. Fogels, can you explain what
25 happens there then if so, for instance, in Wainwright the

1 mitigation dollars, the concerns you're under, which are
2 the organization is that is not able to accept funds now.
3 Is there any requirement that these mitigation dollars be
4 used to help either in the regions so the North Slope
5 Borough or even within the State of Alaska?

6 The mitigation dollars the Great Northwest paid are
7 they required to be directed somewhere in the region that
8 is impacted or even the state that is impacted?

9 Mr. Fogels: Well, Senator, you know, our
10 understanding is that those dollars should be used to be as
11 close as possible in areas related as possible to the area
12 of the impact.

13 I think you might have some folks coming in the next
14 panel that you may actually get a more clear answer of what
15 the latitude is to move those dollars around to other parts
16 of the state. I'm not sure I would have been the best
17 person to answer that with very much precision.

18 The Chairman: Well know that for the next panel that
19 is something that I would like to drill down on because
20 it's my understanding that while it is recommended that
21 that happen, that there is no certainty to that. And in
22 fact, these dollars go places that you and I may have never
23 heard of.

24 I think what Great Land Trust has done to make it be
25 very localized is the model that we would like to pursue

1 and recognize. You can see that benefit going there.

2 But I'm afraid that the system that we currently have
3 does not allow for an assurance that we're seeking.

4 Senator Sullivan?

5 Senator Sullivan: Mr. Nukapigak, I'd like to follow,
6 I thought your testimony was very powerful in a couple of
7 ways. You talked about some broader themes, kind of the
8 clash of ANCSA and the Clean Water Act which I think is a
9 really important issue.

10 But could you unpack that a little bit more?

11 Essentially what you are saying is under the Alaska
12 Native Claims Settlement Act, regional and village
13 corporations receive the allotments of land they own and be
14 simple, to develop with their shareholders. And yet when
15 you're trying to develop these for your shareholders you
16 have to actually give up more land. You literally have to
17 give land back. And it's not one for one.

18 What I'm interested in is, you know, when you talked
19 about the EPA and you said it wanted a 300 acre easement to
20 make it 50 acres. And then they came back and say, ah,
21 maybe we'll do a little bit less here, a little bit more.
22 I mean, were they giving you any kind of sense of where
23 they were coming up with these numbers?

24 I mean, you mentioned six to one initially then it
25 came down to two to one. What was the basis of these

1 negotiations?

2 And so, I guess, that's one question. But the broader
3 question is do you think that what's going on here
4 undermines the spirit and again, the letter of the law,
5 what the federal government is trying to do in regard to
6 ANCSA?

7 The more you develop your land, the more you're going
8 to lose your land. And I don't think that was part of the
9 deal.

10 Mr. Nukapigak: Well, Senator Sullivan, there are
11 times that my corporation had to contend with some of the
12 issues that here, all afternoon. You see the Tenement Act
13 was allowed us to select land to then determine what then
14 the population on the village.

15 And so when we finally, when Alpine was finally
16 discovered some years ago and what not, so we had, there
17 was two ways that we had to set aside or come up with 1.4
18 million which is hard earned money.

19 Senator Sullivan: 1.4 million dollars?

20 Mr. Nukapigak: 1.4 million of our hard earned money
21 or set aside certain piece of land that the EPA want us to.
22 And, you know, that's kind of a, that's kind of
23 contradictive of what the purpose of ANSCA was for.

24 And you know, what can we do?

25 I don't know, here we're trying to make a pact

1 betterment for our people, you know, to make our life
2 easier by having access to the Alpine for jobs. And so,
3 it's only eight miles away and some of our locals and
4 without that, we've got no roads, for a road.

5 I don't think the men of our villages would be willing
6 to spend three weeks at a time at eight miles away for as
7 they'd be able to come home every night and spend the night
8 with the family.

9 You know, these are the environments that we strive to
10 make better.

11 Senator Sullivan: And when they came to you initially
12 with this six to one proposal did they give you a sense of
13 why they chose six to one?

14 Mr. Nukapigak: Well, they, I don't know how that
15 number came up but they gave to us some sort of a
16 calculation that, I don't like, maybe, of course, somebody
17 might be able to answer that --

18 But how they calculated that is something that I don't
19 know, probably I think it would be, might be easier, might
20 even be able to answer that might be a person in this room.

21 Senator Sullivan: Okay, well we can, I mean, maybe we
22 can take that for the record and if you guys could get back
23 to us on it on answering that question that would be very
24 helpful.

25 [The information referred to follows:]

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[COMMITTEE INSERT]

1 Senator Sullivan: Ms. Clark, I was going to ask you,
2 I mean, you kind of watched that whole episode. And I
3 would imagine that that also sends a bit of a concern.
4 It's kind of random, right, six to one and then down to two
5 to one and then all over the map?

6 You guys, as you mentioned, are looking at a whole
7 number of important issues with regard to the potential
8 developments in your community. I wanted to ask you a
9 question.

10 You know, the mitigation rule that we're talking about
11 here encourages permittees to first avoid and then minimize
12 impacts on wetlands but when that cannot be done you have
13 to mitigate. Is it geographically possible to avoid
14 wetlands in your region?

15 Ms. Clark: No, no. What we're doing right now
16 because the 1994 delineation, you know, if you go to the
17 outlet you go to probably the Corps of Engineers website.
18 You'll see that the wetlands are delineated there in our
19 area. They're not delineated.

20 And so we're having to take, to have, a consultant
21 come in and delineate what is wetlands and what isn't
22 wetlands because if we don't do that then we will, they'll
23 all have to be considered wetlands which would either cost
24 us more dollar wise or more land wise.

25 So we're trying to save, you know, some money and some

1 land by getting our land delineated and determining what is
2 wetlands and what isn't wetlands near our community.

3 Senator Sullivan: But right now it's looking like
4 pretty much?

5 Ms. Clark: Wetlands.

6 Senator Sullivan: Everything.

7 Ms. Clark: Right.

8 Senator Sullivan: So you are, again, stuck with a
9 conundrum that as you want to develop you lose land.

10 Ms. Clark: Yes, that's correct.

11 Senator Sullivan: Again, I'm not sure of the federal
12 law whether it's the Clean Water Act or the ANCSA should
13 create such a black and white choice. It seems to me that
14 that's completely at odds with both the goals of both of
15 those statutes.

16 So I made a reference to Mayor Brower's comments
17 about, you know, the essentially the trade offs. So they
18 expanded their land bill, had to pay over a million
19 dollars. Are your communities struggling with similar
20 payoffs? You're having to contemplate right now whether
21 it's payment of 1.4 million or the loss of lands that, in
22 essence, is making you make a very difficult decision how
23 you're going to do this because you really have no choice
24 whether it's the wetlands or whether it's payment that
25 could cost millions that takes away from all your potential

1 effective use of that kind of money.

2 Ms. Clark: We're struggling with that right now.

3 Senator Sullivan: What do you think would be an
4 answer to address that?

5 Mr. Nukapigak: What was the question again, sir?

6 Senator Sullivan: With regard to the trade off, not
7 only in terms of money for the ability to develop but also
8 lands like we were talking about that if you're developing
9 your land, you're losing your land because all your land is
10 wetlands.

11 The exemption you talked about in terms of your
12 testimony.

13 Mr. Nukapigak: Well, um, it's, you know, I don't know
14 what the purpose of this ANCSA was supposed to be was to
15 keep land for the ancient land that we have taken from the
16 path.

17 But mitigation may not mean mitigation. Things like
18 that is, here, you wanted to hold up one. Your own land
19 but, you know, when your hands are tied by EPA or somebody
20 what can you do it to come up with money more or lose that
21 land that is highly valued such as ancient land?

22 But how you value, in terms of money, monetarily or
23 how you compensate for it is another manner.

24 Senator Sullivan: Yeah.

25 Mr. Brand, I wanted to ask you a question.

1 First, commend you for your company's willingness to
2 actually challenge this because that takes a lot of guts
3 and a lot of money and a lot of time and a lot of
4 uncertainty. And you won in the 9th Circuit, of all places
5 which is kind of a miracle.

6 [Laughter.]

7 Senator Sullivan: But, well done, from my
8 perspective.

9 But can you talk about, I mean, you're an example of a
10 small business, not one of the large companies that has had
11 to not only litigate but seen the different increases in
12 these regulatory and permitting requirements.

13 Can you give just us a sense of how that has grown?
14 Your testimony touched on it. You said several years ago,
15 hey, you only had to do one thing. And now it looks like
16 it's layer upon layer upon layer.

17 Can you give us a little bit of sense of that in
18 addition to the kind of litigation that you undertook?

19 Mr. Brand: I'll try.

20 As I mentioned in my testimony it used to be 25 years
21 ago or so all you had to do was submit a written plan along
22 with purpose and need and you were granted the permit. And
23 then the littoral zone came in. And anybody that doesn't
24 know what littoral zone is that it's a shallow area if
25 you're digging relative to the water. They instituted a

1 plan where we needed to create a littoral zone for fish and
2 bird habitat, I believe, that for the first 20 feet from
3 the shoreline you couldn't get much more than like three
4 feet deep.

5 So that created a bit of a restriction where we were
6 only able to mine a portion of our property rather than the
7 entire property because we had to set aside a littoral
8 zone. And if you take it at best at a full 150 feet it's
9 700 thousand dollars worth of gravel that you have to leave
10 in the ground to comply with this new restriction.

11 And then we've all been talking about the compensatory
12 mitigation as well as the time factor. It's a huge amount
13 of time to submit and go through the process to get your
14 wetlands permit, if you can. And right now in Fairbanks
15 because of the Conservation Fund debacle we couldn't even
16 do that.

17 Senator Sullivan: And you mentioned in your testimony
18 that you just found out that other land that you own,
19 private land, was recently found to be Clean Water
20 jurisdictional by the Corps of Engineers.

21 How did that happen and then what does that, what are
22 the implications for any plans you had for that private
23 land that you own?

24 Mr. Brand: That's a very good question. I don't know
25 how that happened.

1 But a little bit of history on our situation. The
2 Great Northwest property was deemed to be the closest water
3 was the Tanana River. And we were successful on our
4 argument because they cannot claim wetlands that are
5 adjacent to adjacent wetlands and in our situation that's I
6 think from the -- decision that you can't, you know, keep
7 on going forever out through the water calm. You have to
8 stop at wherever there's a barrier.

9 And our property was separated by two barriers from
10 the Tanana River.

11 The first was the flood control dike built by the
12 Corps of Engineers many, many years ago.

13 And then the second barrier was the railroad
14 embankment, for the railroad spur that runs out to the
15 Fairbanks International Airport.

16 So those two embankments separated our property from
17 the Tanana River and that was the whole argument in court.
18 Therefore our wetlands were adjacent and they couldn't be
19 considered jurisdictional wetlands. They are or were
20 wetlands, but they're no longer jurisdictional wetlands
21 until this new rulemaking becomes effective.

22 And the properties that I and others own personally
23 are further removed from the Tanana River upstream, if you
24 will, from The Great Northwest project. So with The Great
25 Northwest property is non jurisdictional wetlands because

1 of these barriers anything further removed from it should
2 also be non jurisdictional wetlands. But the government
3 has ignored that and continues to assert jurisdiction over
4 the wetlands.

5 The Chairman: Why don't you go ahead?

6 Senator Sullivan: So, Ms. Crockett, I had a question
7 and I know that you're very familiar with the state of the
8 amount of wetland we, in Alaska, which is about 40 percent
9 of the state which I think comes to about 60 percent or
10 over 60 percent of all the wetlands in the United States
11 which is why this is such an important issue for us.

12 But if you add state lands, you remove Alaska Native
13 lands, we're only left with and of course, 60 percent of
14 Alaska is federal land. If you look at that whole menu of
15 lands we're only left with about one percent of Alaska's
16 land base that's in private hands. So when we look at
17 mitigation requirements where is industry supposed to find
18 private land mitigation?

19 And isn't that part of the huge conundrum that a one
20 size doesn't fit all for Alaska when it comes to the Clean
21 Water Act as we are literally so different from every other
22 state and country?

23 Ms. Crockett: Senator Sullivan, yes.

24 I'd answer that question I have no idea. It's just
25 something that we're grappling with every single day. And

1 I think Deputy Commissioner Fogels touched on this a bit
2 earlier, but we even struggle with that purpose whatsoever.

3 And it's not as though the people I represent and
4 companies I represent are being forced to just write a
5 check to be able to do something. We are being forced to
6 write a check to go close up land that could, I mean, we
7 are literally denying our future generations or maybe not
8 that far away, the potential to develop something in the
9 future. We could, hypothetically be blocking up the next
10 red dog or access to the next red dog for no significant
11 purpose.

12 And you know, I don't know how we got that way, down
13 that road, instead of doing things that are actually good
14 for the environment, that are actually, you know, why isn't
15 like you said with the Exxon example, why isn't the
16 company, if you do want to talk about the disturbance
17 that's going into wetlands and access a dollar amount then
18 do something good with it. Don't just lock up land. Do
19 something good, you know, enhancement is something that we
20 talk about all the time and really do think outside the
21 box. And I don't think this is a naïve statement.

22 I know there are liability issues and there are things
23 that agencies disagree with. But we should find a way to
24 get around that. And we should find a way to say, okay,
25 company x you'd like to develop this project. We would

1 like to figure out a fair reasonable amount to assess you.
2 We want you to bring a project to us, propose to us
3 something good you can do to enhance the environment or
4 enhance someplace that's on the State of Alaska and do
5 something for the greater good verses denying us future
6 opportunities.

7 Senator Sullivan: Right.

8 Thank you, Madam Chair. I think we've got a lot of
9 good ideas from this panel.

10 The Chairman: There really are. And we could be
11 stick to this panel all afternoon. Believe me, I've got a
12 lot more questions.

13 But I do think in the interest of getting to the next
14 panel we will wrap up.

15 I want to ask, though, Mr. Fogels, has the state taken
16 a position on the proposal that has been introduced, at
17 least in the House by Congressman Young, for the
18 preservation easements for tribes and Native Corporations?

19 Mr. Fogels: Senator Murkowski, I do not know. I'm
20 not familiar enough with that legislation. I haven't been
21 involved in it. So I don't think I can answer that
22 question right now at this time.

23 I can look into it, see if I can get you a response.

24 The Chairman: Well, I would appreciate it because it
25 is something that as we listen to some of the on the ground

1 examples of what we're dealing with whether it's Wainwright
2 or Nuiqsut or out in Craig. These are very real, very
3 immediate issues. And it's something that I'd like to look
4 at, perhaps dealing with legislation in the Senate
5 following Congressman Young on this.

6 I'd appreciate knowing where the state is on it as
7 well.

8 The exemption allowing our even exemption for Clean
9 Water Act on ANC lands is perhaps another matter to, again,
10 consider. But I think that these are very direct and
11 immediate issues that we can look to as we're trying to
12 figure out a path forward here.

13 [The information referred to follows:]

14 [COMMITTEE INSERT]

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1 The Chairman: So again, I thank you all for what you
2 have provided to us today by way of not only your input
3 here, but that there is follow up to your comments that you
4 have made today that you would like to have presented as
5 part of the record.

6 We again, will keep this record open for another
7 couple weeks and would welcome them.

8 So thank you. Thank you for being here and thank you
9 for making the trip to be here. We appreciate it.

10 Next we will go to the second panel here.

11 Okay, we would -- we want to keep moving here.

12 You can take a stretch break, but do so quietly.

13 We have a diverse group of administration panelists
14 before us this afternoon. And appreciate them being here
15 and providing their comments and their input to us.

16 The panel will be led off by Mr. Ted Murphy. Mr.
17 Murphy is the Alaska Associate State Director of BLM. He's
18 here to give us a perspective on BLM's regulatory process,
19 internal practices such as how it's determined whether
20 guidance and policy should receive public comment. And
21 then talk a little bit about the evolution of the
22 regulatory framework.

23 So, Mr. Murphy, we welcome you.

24 Next to Mr. Murphy is David Hobbie, who is the Chief
25 of Alaska's District Regulatory Division of the Army Corps

1 of Engineers. He's here to inform us about what tools are
2 available to the Corps and how he intends to employ those
3 tools going forward in his new role as the Chief here.

4 And we also have Dr. Mary Anne Thiesing, who is the
5 Regional Wetland Ecologist and Wetlands Coordinator of
6 Tribal and Public Affairs for EPA. She is here to speak to
7 the inner agency cooperation coordination of EPA and the
8 Corps as well as engagement of EPA with individual project
9 stakeholders.

10 So again, thank you for being here. And thank you for
11 the courtesy that you have given in allowing the first
12 panel to proceed and offer specific cases of the concerns.
13 And again, my hope is that that will better frame whether
14 your opening comments or certainly your responses to
15 questions that Senator Sullivan and I will have.

16 So we thank you for being here.

17 And Mr. Murphy, if you would like to lead off with
18 about five minutes or so. And again, your full statement
19 will be included as part of the record.

20 Thank you.

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1 STATEMENT OF TED MURPHY, ALASKA STATE DIRECTOR,
2 BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR

3 Mr. Murphy: Thank you.

4 Chairman Murkowski and Chairman Sullivan, thank you
5 for the opportunity to discuss the Bureau of Land
6 Management's efforts to facilitate responsible --

7 The Chairman: Can you move that just a little bit
8 closer. We want to make sure people in the back can.

9 Mr. Murphy: Let's try this again here. Responsible,
10 responsible economic development of public lands while
11 protecting the natural and cultural resources that
12 Americans cherish. I'm Ted Murphy, the BLM Associate State
13 Director for Alaska and I look forward to discussing these
14 issues with -- from the BLM experience here in Alaska.

15 Mitigation is central to the BLM's successfully
16 carrying out our multiple use and sustained yield mission.
17 It is something we have done for decades and its legal
18 basis comes straight from our governmental authorities
19 under FLPMA.

20 When you think about mitigation at the BLM you think
21 about what is a three step process, avoidance, minimization
22 and compensation. Through this process accounts are first
23 divided through careful siting that will minimize by using
24 innovative design features and best management practices.
25 And then sometimes they are compensated for their

1 corresponding offsets elsewhere.

2 Mitigation programs have been used to solve some of
3 our most significant resource challenges and partnerships
4 with states, tribes and other federal entities have been
5 central to their success.

6 For example, in the early 2000s the BLM faced a major
7 challenge with permitting large scale oil and gas projects
8 in Wyoming. In response to concerns about impacts to state
9 managed game species the BLM, the State of Wyoming and the
10 oil and gas companies came together to develop innovative
11 solutions that worked for the companies and helped mitigate
12 impacts to those state managed species. This approach was
13 championed by the previous Administration as a breakthrough
14 for balancing the development and conservation and it has
15 served as a model for our agency.

16 While recently in Nevada BLM issued mitigation to
17 speed the approval of a solar project through Western Solar
18 Plan. The plan avoided sensitive areas by establishing
19 focused areas for development. They identified key design
20 features and called for regional mitigation strategies to
21 direct compensatory investments. By identifying mitigation
22 responsibilities up front BLM was able to provide certainty
23 to private developers and increase the efficiency of its
24 environmental review. Innovative mitigation approaches are
25 helping the BLM conserve greater safeguards to habitat and

1 support system while economic development on portions of
2 public land in ten states across the West.

3 A recent landmark agreement among the U.S. Fish and
4 Wildlife Service, the BLM and Barrick Gold of North America
5 established a conservation bank that gives fair certainty
6 for the company's planned future mine expansion on public
7 lands. Other states are leading efforts to develop similar
8 systems and the BLM is working hard to support these
9 efforts.

10 Chairman Murkowski and Chairman Sullivan, I know you
11 both are familiar with the Greater Mooses Tooth Project in
12 Alaska. As you know this project is the first oil and gas
13 development project on federal lands in the National
14 Petroleum Reserve in Alaska. As part of our public review
15 of the project the BLM identified significant impact to the
16 subsistence resource provided by -- of ANCSA. In the final
17 project approval the BLM included a suite of best
18 management practices approved to by the company to avoid or
19 minimize project impacts as well as an eight million dollar
20 fund to directly address the subsistence impacts. As part
21 of the planning for that project BLM is also moving forward
22 with regional mitigation strategies for Mooses Tooth with
23 -- development units that will provide certainty to
24 developers coming into these areas in the future. We
25 believe this sort of up front planning is good for

1 subsistence resources and good for developers.

2 With all of these promising efforts underway on public
3 lands, the BLM is recognizing the need to set common
4 standards and consistent expectations for mitigation across
5 our lands and program areas. Since 2005 BLM has developed
6 a series of increasingly detailed policies to assist BLM
7 staff in their mitigation work. The latest of these was
8 released in 2013. We released this policy on an interim
9 basis which has allowed us to gather important lessons as
10 we continue to execute these programs on the ground with
11 states and companies. We anticipate issuing a final policy
12 in the coming months.

13 Chairman Murkowski and Chairman Sullivan, thank you
14 again for the opportunity to present this testimony and I
15 would be glad to answer questions you may have.

16 [The prepared statement of Mr. Murphy follows:]

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1 The Chairman: Thank you, Mr. Murphy.
2 Mr. Hobbie, welcome to the Committee.
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1 STATEMENT OF DAVE HOBBIE, CHIEF OF ALASKA DISTRICT'S
2 REGULATORY DIVISION, U.S. ARMY CORPS OF ENGINEERS

3 Mr. Hobbie: Thank you. Thank you.

4 Is this close enough?

5 The Chairman: I think so, yeah.

6 Mr. Hobbie: Okay.

7 Good afternoon, Chairman Murkowski, Chairman Sullivan.
8 Thank you for the opportunity to testify today. My name is
9 David Hobbie. I am the Chief of the Regulatory Division of
10 Alaska's District U.S. Army Corps of Engineers.

11 I've served at the Corps for approximately 25 years
12 and have worked around the globe, predominantly in the
13 Regulatory Program and I am very happy to be back in
14 Alaska. In my career with the Corps and its Regulatory
15 Program, I have witnessed many changes over the past
16 quarter century, while gaining an understanding and
17 appreciation for the complexity of this mission.

18 There are some special challenges that come with
19 applying the Regulatory Program in a state as varied and as
20 unique as Alaska, including identifying and implementing
21 compensatory mitigation requirements. Natural resources in
22 Alaska are abundant and include a huge percentage of
23 wetlands. Alaska is also an extremely large landmass with
24 a low population base and a large percentage of the land
25 are publicly held.

1 I have been back in Alaska for approximately seven
2 months as the Chief of the Regulatory Division. One of the
3 first issues I was asked about following my arrival was
4 compensatory mitigation. Compensatory mitigation is a key
5 component of the Regulatory Program. And reviewing these
6 practices in the state has been one of my top priorities.

7 The fundamental objective of compensatory mitigation
8 is to offset environmental losses resulting from
9 unavoidable impacts to waters of the United States caused
10 by activities authorized by Clean Water Act permits.
11 Compensatory mitigation enters the analysis only and only
12 after the proposed project has incorporated all appropriate
13 and in implementing compensatory mitigation requirements.
14 The Alaska Regulatory Program has sought opportunities to
15 be more flexible when possible, while at the same time
16 protecting aquatic resources to the maximum extent
17 practicable.

18 One example involves the Alaska Department of
19 Transportation replacing culverts fully to increase fish
20 passage and assist with fish resources.

21 Additionally, we are looking at ways to improve
22 communication and collaboration, not only with agency
23 partners at the state and federal level, but also with the
24 public in order to better understand their issues. These
25 efforts have involved meetings with leadership from the

1 Department of Natural Resources, the U.S. Environmental
2 Protection Agency, Bureau of Land Management, National
3 Marine Fisheries, Alaska Oil and Gas and CIRI which is an
4 Alaskan Native Corporation, just to mention a few. During
5 these meetings we discuss mitigation and the opportunities
6 that exist for the federal family and our non federal loan
7 partners to work more closely together.

8 Compensatory mitigation is a complex issue. Our goal
9 which is a national goal within Corps, is to ensure no net
10 loss of wetlands functions and values, while remaining as
11 flexible as possible to allow reasonable and sustainable
12 development. It is also our goal to be transparent, as
13 transparent as possible in our decision making process.

14 Every project is unique. No two projects are exactly
15 identical. Although the structures may look the same, the
16 areas and types of impacts associated with individual
17 projects are nearly always different. Therefore, the
18 quantity and type of compensatory mitigation required will
19 vary depending on the site specific nature of each project.

20 Before I close, I would like to offer a little general
21 information about the Regulatory Program in Alaska. So far
22 in Fiscal Year 2015, which starts on October 1st of 2014,
23 the Alaska District has authorized 431 projects under the
24 Nationwide/Regional General Permit Program. General
25 permits streamline the process of meeting the requirements

1 of the Clean Water Act for projects with no more than
2 minimal environmental impacts.

3 Of the 431 projects authorized, 17 required
4 compensatory mitigation, approximately four percent. We
5 have completed 75 Standard Permits/Letters of Permission
6 for larger, more complex projects where the impacts were
7 determined to be more than minimal, of which 12 required
8 compensatory mitigation, approximately 16 percent. I
9 believe the number reflects the Corps' ability to work
10 closely with the applicant and partner agencies to avoid
11 and minimize impacts so that compensatory mitigation is not
12 always a requirement for the authorization of a project.
13 At the same time, the Corps remains flexible, so that when
14 compensatory mitigation is required, we are able to work
15 with the applicant and other agencies to achieve a
16 successful outcome.

17 Thank you again for the opportunity to speak here
18 today. I look forward to questions.

19 [The prepared statement of Mr. Hobbie follows:]
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1 The Chairman: Thank you, Mr. Hobbie. Welcome to
2 Alaska or welcome back.

3 Mr. Hobbie: Thank you.

4 Ms. Thiesing, Mrs. Thiesing, excuse me, Doctor, I
5 believe it is, Dr. Thiesing.

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1 STATEMENT OF MARY ANNE THIESING, PH.D., REGIONAL
2 WETLAND ECOLOGIST AND WETLANDS COORDINATOR, OFFICE OF
3 ECOSYSTEMS, TRIBAL AND PUBLIC AFFAIRS, U.S. ENVIRONMENTAL
4 PROTECTION AGENCY, REGION X

5 Dr. Thiesing: Yes.

6 Can everyone hear me?

7 Good afternoon, Chairman Murkowski and Chairman
8 Sullivan. I'm Mary Anne Thiesing, Wetland Coordinator for
9 the Office of Ecosystems, Tribal and Public Affairs in
10 Region Ten, EPA. I'm pleased to be here to discuss the
11 Clean Water Act, Section 404 Mitigation program,
12 compensatory mitigation banking and EPA's coordination with
13 the Corps.

14 As you know the Clean Water Act was promulgated in
15 1972 to restore and maintain the physical, chemical and
16 biological integrity of the waters of the U.S. The act
17 established the Section 404 permit program which authorizes
18 the discharges of dredged and fill material to waters in
19 the U.S. discharge that can degrade or even destroy those
20 waters.

21 The Corps is given responsibility under the act to
22 issue the Section 404 permits. In Alaska permits often are
23 associated with activities such as road construction or
24 energy development.

25 To offset the impacts from permitted activities, the

1 404 program is built on the concept that when impacts to
2 waters, including their loss, are unavoidable, they shall
3 be compensated by establishing, restoring or preserving
4 waters at the impact site or at another location, generally
5 within the same watershed as the impacts. Consideration of
6 mitigation occurs throughout the permit application process
7 and includes avoidance and minimization. However, there
8 may still be unavoidable impacts to waters. Those require
9 compensatory mitigation but it is only considered after a
10 proposed project has first looked to trying to avoid and
11 minimize adverse impacts.

12 Individual permits that are associated with activities
13 with more than minimal adverse effects to the aquatic
14 environment may include special conditions that require
15 compensatory mitigation. And that's to offset degradation
16 or loss of waters of the U.S. when avoidance or
17 minimization is not practicable.

18 There are basically three mechanisms that will allow
19 permittees to offset the aquatic impacts resulting from
20 their projects.

21 They can purchase credits from a mitigation bank.

22 They can purchase credits from an in lieu fee program.

23 Or they can conduct a compensatory mitigation project
24 on their own.

25 A mitigation bank is a site that has restored,

1 established, enhanced and/or preserved aquatic resources
2 and the Corps, in consultation with an Interagency Review
3 Team, approves for the use of compensating the losses from
4 future permitted activities. The bank approval process
5 establishes the number of credits and the bank sponsor is
6 responsible for the success.

7 With in lieu fee mitigation, a permittee provides
8 funds to an in lieu fee program. Those are sponsored by
9 either a government or a nonprofit entity or a tribe that
10 conducts compensatory mitigation projects consistent, again
11 with an agreement, with the Corps in consultation with an
12 interagency review team. Typically the in lieu fee
13 mitigation projects are started only after they pool the
14 funds from multiple permittees. And the in lieu fee
15 program sponsor is the one who is responsible for the
16 success of the sites.

17 The third option, permittee responsible, is basically
18 the responsibility of the permittee to conduct and ensure
19 the success of mitigation. It's usually, it can occur
20 either at the project site or in a different one,
21 preferable within the same watershed.

22 EPA works closely with the Corps and the Interagency
23 Review Team that oversees the review, approval and
24 management of mitigation banks and in lieu fee programs.
25 For proposed permittee responsible mitigation, the EPA

1 provides comments to the Corps in the review process.

2 Congress directed in 2004 that the Corps and EPA
3 publish regulations. And they did so in 2008 to revise and
4 clarify compensatory mitigation requirements.

5 It ensures a level playing field among providers of
6 compensation because it holds all the providers to the same
7 standard regardless of whether it's a bank, an in lieu fee
8 program or by the permit applicant. It also increased
9 consistency and predictability in compensatory mitigation
10 requirements through a number of timing of the contents of
11 mitigation plans and also the timelines for review. It did
12 not change when compensation is required but rather focuses
13 on how and where mitigation is planned, implemented and
14 managed to improve its ecological success and
15 sustainability.

16 Although careful attention is given to compensatory
17 mitigation requirements when they are necessary, most of
18 the 404 authorizations don't require mitigation.
19 Permitting data from 2010 through 2014 show the Corps
20 nationally issued approximately 56,400 written
21 authorization per year under its permit authorities, about
22 ten percent required compensatory mitigation. This
23 reflects a number of factors, the Corps' ability to
24 successfully work with the applicants and also with the
25 agencies to try and avoid or minimize any impacts. Most of

1 those authorizations occurred under the general permit
2 process and they have no more than the minimal adverse
3 impacts.

4 Compensatory mitigation is a basic component of the
5 Section 404 permit program. It is consistent with the
6 act's goals of trying to restore and maintain the chemical,
7 physical and biological integrity of the nation's waters.
8 We work together to ensure that this provision is applied
9 consistently, predictably and effectively so that the
10 applicants can proceed with projects to achieve their needs
11 while at the same time protecting public health and water
12 quality.

13 Thank you very much for the opportunity to be here. I
14 will be happy to answer any questions you may have.

15 [The prepared statement of Dr. Thiesing follows:]

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1 The Chairman: Thank you, Doctor. And I apologize
2 that I mispronounced your last name there.

3 You kind of wrapped up your statement by saying that
4 the goal here is a level of consistency, predictability and
5 effectiveness. And I think what you heard with the panel
6 just before you is that this process, when it comes to
7 compensatory mitigation, is anything but consistent,
8 predictable and in many cases, effective.

9 I want to ask you a question.

10 You mentioned that nationally that with the 404C
11 permits that are issued about ten percent are required to
12 be mitigated. Is that correct?

13 Dr. Thiesing: Yes, about ten percent of them are,
14 correct.

15 The Chairman: How does that compare then, here in
16 Alaska?

17 Those are national figures. We recognize that things
18 are just entirely different down there. When you're up in
19 the North Slope and 90 percent of the area around you is
20 determined to be wetlands, what percentage here in Alaska
21 of those 404Cs require a compensatory mitigation?

22 Dr. Thiesing: Not 404Cs, 404 permits, Ma'am?

23 I believe Mr. Hobbie actually answered that in his
24 testimony.

25 Mr. Hobbie: Yes, Ma'am.

1 If you look at our numbers as a total I wrote my
2 pertinent individual permit information and information GPs
3 because the small ones would be less. If you combined our
4 new totals we issued 431 nationwide GPs and 71 IPs. If you
5 combine those two totals about six percent of the time we
6 require mitigation in the State of Alaska.

7 The Chairman: And does that hold true then for the
8 North Slope?

9 Mr. Hobbie: I do not break the numbers down that way
10 and I'd have to get back to you. I can't tell you things I
11 don't know about the North Slope.

12 [The information referred to follows:]

13 [COMMITTEE INSERT]

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1 The Chairman: Well it's something that, I think that
2 would be interesting to drill down on because when you have
3 an area that is effectively almost all wetlands and the
4 extent of the wetlands I would be curious to know exactly
5 what we're talking about here.

6 Mr. Hobbie: What I would say is most likely the
7 percentage is almost always going to be greater. The
8 reason is, percentage wise, because of course we, the North
9 Slope is not the area of our most predominate permitting.
10 It's typically the Anchorage Borough area and Juneau,
11 Wasilla so many of the permits also the impacts in the
12 North Slope tend to be much greater.

13 A lot of oil and gas, it probably has too many,
14 hundreds of acres in size where a lot of the projects
15 within the municipality of Anchorage, Wasilla, Juneau are
16 sometimes tens of acres, half acres or an acre. So the
17 impacts are much larger on the North Slope, typically
18 speaking therefore it would drive more compensatory
19 mitigation while other areas may not.

20 The Chairman: I look forward to that break down.

21 Mr. Hobbie: Will do.

22 The Chairman: I want to bring up with you an issue
23 that was just presented to me this morning. I had an
24 opportunity to meet with the Mayor of the Mat-Su Borough,
25 the Palmer Mayor and the Mayor here in Wasilla. And they

1 alerted me to what they are entitling here the Wetland
2 Mitigation Bank Concern.

3 They apparently received some information that they,
4 that was disclosed just as a result of a FOIA request
5 regarding some changes in policies that relate to
6 compensatory mitigation. The fact that the guidance letter
7 was developed and implemented without public input which is
8 something that I think we're going to have a little bit
9 longer conversation about here. And the concern that we
10 have that so much of what we're seeing coming out is not
11 with full public comment.

12 But the concern that they have raised and I will read
13 from their document here. They provided, "The Corps new
14 policy requires ownership of wetland banks, requires
15 ownership of the surface, subsurface rights or an agreement
16 with subsurface right owners to not impact the service --
17 surface even in those cases where the possibility of
18 mineral exploration or extraction is remote. Municipal
19 entitlements for boroughs and municipalities from the state
20 only convey the surface estate to municipalities."

21 So this is an issue here in the Mat-Su. It's also an
22 issue out in the Ketchikan Gateway Borough. I was asked to
23 bring this to your attention.

24 I'm going to not only provide this to you, Mr. Hobbie,
25 but it will become part of the record.

1 [The information referred to follows:]
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1 The Chairman: The Borough is essentially laying out
2 that they could potentially lose millions of dollars in
3 wetland mitigation credit. So this is something that was
4 new to me this morning. And I'm still learning more about
5 it. But I would like you to be able to respond to not only
6 the people here in the Mat-Su Borough but Ketchikan Borough
7 because I understand that they have a similar concern, an
8 issue, as it relates to the mitigation bank.

9 Mr. Hobbie: Okay, Senator.

10 I'm not familiar with that particular letter.
11 However, we are struggling right now. And when I say we,
12 Alaska District, and it's nationwide typically when a
13 mitigation bank is established the land is reserved into
14 perpetuity or any other sort of mitigation. Typically that
15 requires some surface rights.

16 The rationale behind that is locking up the surface
17 may be fine, but that doesn't exclude people coming in
18 individually and mining the area because in most states
19 people -- the subsurface rights are not bound by any
20 restrictions. So therefore the easement really doesn't
21 mean much.

22 The Chairman: Understood, but if you don't have the
23 subsurface rights?

24 Mr. Hobbie: Totally understand.

25 The Chairman: Yeah.

1 Mr. Hobbie: What we're trying to do is make sure the
2 policy has some kind of consistency across the nation.
3 Alaska is sure where it's not, the only state that has some
4 sort of issues. So we want to make sure we're trying to be
5 as consistent as possible across the nation.

6 I'm not saying that that means that will never happen.
7 However, it's something we're investigating to try to
8 ensure that we are applying the rules as fairly as we can.

9 The Chairman: Well, and I'm going to turn to Senator
10 Sullivan here. But one thing that I think is important to
11 keep in mind here in this state is we are unique. We have
12 some laws here that, federal laws, that apply to our lands
13 that don't apply in other states.

14 ANILCA is applicable only in Alaska. And I want to
15 talk about it ANILCA when we do next round.

16 Senator Sullivan?

17 Senator Sullivan: Thank you, Madam Chair.

18 And I want to thank the witnesses here. I really
19 appreciate, you know, some of you flying in from out of
20 town.

21 But also what Ms. Crockett mentioned in her earlier
22 testimony is it's been my experience, as attorney general
23 in Alaska, as the DNR Commissioner is closer the federal
24 officials are to Alaska, when they live here, when they
25 work here, they see our issues. I think the working

1 relationship is oftentimes a lot stronger because you get
2 it.

3 The problem is when Washington, DC dictates certain
4 policies with, kind of, a one size fits all mentality. And
5 then they try to apply it here. So I just appreciate you
6 being here. I know that you guys are working hard on these
7 issues.

8 But as you did see and as Senator Murkowski mentioned,
9 we also appreciate you letting the panel go first, the
10 Alaskan panel go first, because I think it was good for all
11 of us to see what the issues are. Clearly there is a lot
12 of frustration. And that's a sampling of what's going on
13 in the state. But that was not some kind of handpicked
14 group that that is very representative of the sense in
15 Alaska whether you're a small, private landowner or a big
16 company in terms of what is going on with mitigation.

17 And a lot of is the sense of, you talked about
18 transparency and predictability, it almost seemed like it's
19 the opposite where it's random. So I want to get into some
20 of those kind of questions.

21 I also, if you can and if you can't do it here, one of
22 the things I mentioned in my opening statement, authority,
23 authority, authority, authority. If you're a federal
24 agency and you're taking action or issuing a reg, do you
25 agree that you have to have a basis either in federal

1 statute or the U.S. Constitution?

2 Do you agree with that?

3 Do you?

4 The answer is yes, if you're wondering.

5 [Laughter.]

6 Senator Sullivan: It's not even a close question.

7 So, just for the record, it should be yes. You take
8 an action as a federal agency, your action or your reg has
9 to be based in statute or the U.S. Constitution.

10 Just for the record, do you agree with that?

11 Mr. Hobbie: Yes, sir.

12 Senator Sullivan: Okay.

13 Mr. Murphy: Yes.

14 Dr. Thiesing: Of course, of course it does.

15 Senator Sullivan: Okay.

16 Dr. Thiesing: We take the same oath that you do, sir.

17 Senator Sullivan: Oh, I know. I'm just checking
18 because as I mentioned, now this is a really important
19 issue because there's a lot of things where on the actions
20 that you're taking I know you have some discretion and the
21 Corps allow some discretion.

22 But as I mentioned in my opening statement in the last
23 two terms of the U.S. Supreme Court they have found that
24 the EPA has not done that. And one of those cases actually
25 started here, the Utility Air Regulator Case verses EPA.

1 It wound its way to the U.S. Supreme Court. Two years in a
2 row the U.S. Supreme Court has stated that you have not
3 abided by the statute or the Constitution.

4 So your record on this is not terribly good. And I
5 think it's an area that, in terms of Congressional
6 oversight, that's important.

7 And I also wanted to start, you know, the Deputy
8 Commissioner, Mr. Fogels, raised a really good issue. And
9 as you guys know when you look at the structure of the
10 Clean Water Act, just like the Clean Air Act, it is
11 supposed to be co-regulator relationship between the states
12 and the feds. It's in the, actually, preamble of the law.

13 So why is it that in terms of mitigation which has
14 such a big impact here which we have so many concerns
15 about, that you guys do not invite the State of Alaska in
16 with regard to your mitigation decisions? And we asked
17 Commissioner Fogels whether you do that. His answer was
18 no.

19 So why don't you do that?

20 Mr. Hobbie: Well, sir, I would say two things.

21 One, through our permitting process, you know, we do
22 invite responses, information, from all agencies, state and
23 federal, you know. The state does have an opportunity.

24 When it comes to the Interagency Review Team for
25 mitigation, the Department of the Environmental

1 Conservation which is a state agency, does sit on that
2 Interagency Review Team with regards to mitigation banks
3 and such.

4 Senator Sullivan: So you're thinking, so you think
5 that Deputy Commissioner Fogels' response was incorrect
6 that the state does actually have a co-regulator role with
7 regard to the mitigation decisions?

8 Mr. Hobbie: Senator, what I'm stating is the DEC does
9 sit on the Interagency Review Team. And I'm stating that
10 it's a practice they do come into our projects, a good
11 majority of them with regards to mitigation.

12 Senator Sullivan: Okay.

13 Dr. Thiesing: Senator, if I might add to that?

14 I believe that the commissioners of all the state
15 agencies were signators to the State Interagency Review
16 Team document. They're not?

17 Senator Sullivan: Okay. But I think like, for
18 example, I was very involved with regard to the Corps and
19 the permitting on Point Thompson, right?

20 At the end of that permitting process, wham, there was
21 a huge dollar figure that you put with regard to the
22 permittees in terms of compensation that we had no idea,
23 right?

24 So I know from personal experience that we are not
25 that involved because we were the lead agency doing that

1 but we didn't have a clue.

2 So, I think if you say you're doing it, you need to do
3 a much, much better job of doing it because you have a
4 Deputy Commissioner who just talked about and my
5 experience. We're getting blindsiding by this. And I
6 think it's important to go back and look at the statute.
7 We're the co-regulator. We're the co-sovereign here. And
8 I think that that's a really important issue and it's a
9 part of the frustration.

10 Let me ask another question that came up.

11 Do you see this tension that became very apparent in
12 the previous panel between ANCSA and what's required in
13 terms of the Clean Water Act mitigation? And if so, how do
14 you address it? And again, I'll just summarize it.

15 It's if our Alaska Native Corporations, regional
16 corporations, village corporations want to develop the land
17 that they were given by the federal government and the
18 state to develop to take care of their shareholders, their
19 people they're responsible for, to do that they have to
20 give up land. They actually have to give up land in a way
21 that's more than one for one.

22 The EPA wanted six for one which I have a question for
23 on that too.

24 But do you see the tension there? And how do we solve
25 that? What's your recommendation to solve that? To

1 develop land you've got to lose land.

2 Mr. Hobbie: Sorry about this microphone.

3 Senator, there's a couple things I was, there are a
4 couple ways to respond to that.

5 First of all with regards to compensatory mitigation,
6 again, I do believe there's a low percentage of times where
7 we do require. When we do though --

8 Senator Sullivan: Not on the North Slope, though.
9 We'll be, I mean, we'll be very curious about your numbers
10 on the North Slope. I think we see it everyone on almost
11 everything, roads, developments and you know, that's a lot,
12 in many ways the heart and soul of our economy.

13 So I'd like to see those numbers.

14 Mr. Hobbie: We'll provide those, sir, to the
15 Committees.

16 [The information referred to follows:]

17 [COMMITTEE INSERT]

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1 Mr. Hobbie: The other thing is the mitigation banks
2 or in lieu fee programs have become a way to allow
3 applicants an easier access to mitigation. There's nothing
4 that precludes them from not tying up land.

5 And Mr. Fogels talked about legacy wells and stuff.
6 When I met with the different agencies those were some of
7 the things we were trying to do, trying to be flexible.

8 Are there other areas in the state that can actually
9 be cleaned up or rehabbed versus just setting aside land?

10 Senator Sullivan: Well what if you're a corporation
11 like Kuukpik that said they don't have 1.4 million dollars
12 for just an eight mile road, 1.4 million dollars. They
13 didn't have that money.

14 Their only option, you heard it, their only option was
15 to give up their land. I mean, they were in a, they're in
16 a, you heard the testimony. They're in a conundrum.
17 Develop the land. Give up the land.

18 It seems to me, squarely undermining the intent of
19 ANCSA.

20 How do you respond to that?

21 Mr. Hobbie: Again, sir, they may have chosen that
22 route, but again, I'm not for sure --

23 Senator Sullivan: But I don't think they're choosing.

24 Mr. Hobbie: Um, well --

25 Senator Sullivan: You don't have the money what's the

1 opposite.

2 Mr. Hobbie: If the determination was the impacts were
3 more than minimal, mitigation is required by statute.
4 That's a requirement. You know, I can't change that.

5 The cost of that, the Corps of Engineers nor EPA, that
6 I'm aware of, apologize if I speak for you, regulates the
7 amount of fees that the in lieu banks with mitigation banks
8 charge and in lieu programs charge.

9 Senator Sullivan: Let me ask a question that I think
10 you might, where you have more flexibility than you think
11 you might have.

12 So, in May, on May 13th, 1994 the Army Corps and the
13 EPA jointly issued a memorandum entitled, "Statements on
14 the Mitigation Sequence and No Net Loss of Wetlands in
15 Alaska."

16 And what this states and it's still a memo that's good
17 to go according to your guy's website. It states there are
18 areas of the State of Alaska because of high, of a high
19 proportion of wetlands in a watershed or region
20 opportunities for compensatory action may not be available.
21 I think they're clearly referring to places like the North
22 Slope.

23 In addition there are situations in this state where
24 the technology for restoration enhancement or creation of
25 wetlands is not available or are otherwise impracticable

1 where compensatory mitigation is not practicable it is not
2 required of Section 404 permit applicants.

3 So isn't the North Slope a perfect example of what
4 this memorandum is talking about? Have there been
5 situations where the Corps and the EPA under this authority
6 that you guys have, that you stated, have said, look, it's
7 not going to work. You pick, we get it. You don't have
8 1.4 million and you shouldn't be required to give up land
9 to develop lands so we're not going to require anything.

10 Have you ever used the authority given to you by this
11 memorandum between the EPA and the Corps?

12 Ms. Thiesing: Sir, the memorandum was dated 1994. We
13 have since come out with a rulemaking which applies
14 something over or a different set of standards which are
15 clearer intended to try and make, put everything on an even
16 playing field.

17 Kuukpik was the one that offered an area of
18 preservation as compensation for the impacts that they had.
19 And when a conservation easement was written or identified
20 in the Corps' permit and the permit that was ultimately
21 granted to Kuukpik there are a number of uses of that land
22 that remain theirs.

23 They are, they can use it for subsistence purposes.
24 There are a whole bunch of other things that are listed as
25 part of the conservation easement which is not ordinarily

1 something that is done. But --

2 Senator Sullivan: Alright Ms. Thiesing, I just want
3 to, for the record, in the preamble to your 2008
4 compensatory mitigation rule it references the 1994
5 memorandum. And it says, therefore it does not, the new
6 rule, change the May 13th, 1994 statements on mitigation
7 sequencing no net loss of wetlands in Alaska.

8 So to say that the 2008 rule overrode the 1994 memo,
9 giving you way more flexibility than you're utilizing is
10 not correct.

11 Ms. Thiesing: But I believe that the preamble is
12 addressing itself to is the no net loss. We understand
13 that there will be loss of wetlands in Alaska.

14 Senator Sullivan: And again, to say Kuukpik had an
15 option. I think that's stretching the situation that you
16 just heard from them. They didn't really have an option to
17 build a road because they didn't have the 1.4 million
18 dollars.

19 You see, I think that what you need to do is look at a
20 lot more flexibility for the state. And I think you have
21 that. You're just not using it.

22 So Madam Chair, I'm sorry I kind of went a lot over.

23 The Chairman: Well, no, this is the line of inquiry
24 that I think most of us here in Alaska are interested in
25 because I don't think that we have received satisfactory

1 responses from the agencies.

2 Pretty tough words are used when we hear whether it's
3 from Wainwright or Nuiqsut or Craig or the folks at Great
4 Northwest. But the word is extortion. Now that's pretty
5 tough.

6 And I think we can understand why it's important to
7 allow for mitigation, why those regulations are in place.
8 But I think there also is an expectation and this goes back
9 to your words, that there be a level of predictability,
10 that it be fair and reliable. And this is where the
11 concern is because it's almost as if there is a bargaining
12 that goes on and we'll figure out what it is that we can
13 settle on. And instead of a six to one ratio you settle on
14 a two for one because that was what people finally agreed
15 to.

16 It's not really an option when you have no other
17 alternative. And yet, you want to be able to provide for
18 the health and safety of the people in your village. You
19 want to be able to get to work which is effectively what
20 they're looking for there at Kuukpik. And you want a road
21 open for subsistence.

22 So I don't mean to be not asking a question, but I
23 think you need to put yourself into the shoes of those that
24 are working really very, very hard to try to provide for a
25 level of access, a limited level of development and a

1 willingness to do so and work within the laws. But we want
2 to know that you're working within the laws and not
3 sometimes making it up as you go. And sometimes that's how
4 it feels.

5 And again, these are pretty harsh words for you. But
6 that's how it feels.

7 Mr. Murphy, I don't want you to get off the hook.

8 [Laughter.]

9 The Chairman: The compensatory mitigation is
10 certainly one thing within our Corps, but we do have other
11 issues within our BLM lands. And the Federal Land Policy
12 Management Act, FLPMA as it lovingly call it, throughout
13 FLPMA we have the principles of multiple use defined,
14 pretty consistently, pretty clearly. And I think you in
15 your comments referred to the fundamental authorities that
16 come from FLPMA to BLM.

17 So Secretary Jewell in her Secretarial Order stated
18 that, "Through the development of comprehensive mitigation
19 strategy we can ensure that our national wildlife refuges,
20 national parks, other federal lands and waters are managed
21 for conservation purposes with sound stewardship and a
22 commitment to conserve habitat and fish in wildlife
23 mitigation corridors."

24 She goes on to lay out the following mitigation
25 priorities. And this is what she says in her Executive

1 Order.

2 She says, "To avoid potential environmental impacts
3 where impacts cannot be avoided require projects to
4 minimize impacts to the extent practicable and where
5 projects cannot be avoided DOI should seek offset or
6 compensation."

7 But she taking, she's effectively taking this
8 language, borrowing this language, if you will, from the
9 Clean Water Act. And regarding the avoiding, the
10 minimizing and the compensating, do we really have
11 authority within FLPMA that gives to BLM the authority to
12 borrow this language, if you will or these priorities, that
13 the Secretary has included within this order?

14 How do we get to this level of authority? It goes to
15 Senator Sullivan's earlier question. Do we have that
16 authority within FLPMA because that's your fundamental
17 authority?

18 And it seems to me that what you're doing is you're
19 taking language from another authority and utilizing it to
20 expand yours.

21 That's my question.

22 Mr. Murphy: Well, as I pointed out in my comments
23 looking through our handbook and manual -- it's, well
24 mitigation in general. And we do have a long history of
25 arguing with proponents at development all over the United

1 States and that's built upon the challenges and we realized
2 in the lower 48 over time development that have impacts we
3 couldn't sustain there. And as we moved into Alaska and we
4 started to see opportunities for development, particularly
5 in the National Petroleum Reserve, we didn't want to think
6 of going down that same road, fragmenting habitat and
7 precluding multiple use -- resource economically and
8 sustaining the resources, the natural resources that are on
9 land.

10 So, yes, we feel that our authority emanates from
11 FLPMA. But within the National Petroleum Reserve we also
12 have the National Petroleum Reserve Protection Act which
13 also reinforces that level of mitigation necessary to
14 sustain ourselves and the public land.

15 The Chairman: So let me ask you about this draft
16 guidance, this manual.

17 It's my understanding that it's, it was Secretary
18 Hayes that began the process for this draft Regional
19 Mitigation Manual. And that was when Secretary Salazar was
20 in office. So it's about five years ago.

21 And that that draft manual hasn't been even something
22 issued. It's not been rescinded. So we're sitting here
23 with a situation where BLM is effectively drafting guidance
24 and then before it's been finally issued, before it's been
25 vetted you're implementing those. And it goes to the

1 comment that I made earlier about the lack of public
2 comment afforded through BLM.

3 You heard the concerns. You've -- we've had
4 conversations about it in the past. And yet it still seems
5 to me we're in the same situation where you're moving
6 forward with draft provisions that haven't been vetted,
7 haven't received the public comment and yet you're moving
8 forward to implement them.

9 And even though they're not yet fully in place you
10 heard Ms. Crockett's comments about the impact then that
11 these proposed guidance and designations has on the ability
12 to invest, the ability to permit, the ability to really do
13 anything in any area. So at the end of the day you may get
14 your desired effect if the desired effect is to limit
15 further development in the area because everybody is put on
16 hold.

17 So how are we at that place where we are allowing
18 these draft, unvetted guidance documents to be controlling
19 without public comment?

20 Mr. Murphy: The -- of that draft that, I believe is
21 2013. And that draft mitigation policy was vetted with the
22 public. And yes, we are implementing portions of that as
23 we move forward.

24 The Chairman: Even though it's still in draft?

25 Mr. Murphy: Even though it's still in draft, in close

1 coordination, we're developing with FOIA, with the states
2 and to be sure that we're not overlapping each other, if
3 you will, as well as making sure that we're on program as
4 we move forward.

5 And again, it all emanates from, you've heard it time
6 and time again, the transparency aspect that we're trying
7 to achieve that we can provide some assurances to those
8 developers as we move forward and as they move forward to
9 develop other lands in Alaska.

10 The Chairman: One of the things that we did hear from
11 Mr. Fogels though is a concern that you have overlapping,
12 duplicative. So if in fact you are working with the state
13 to ensure that that is not the case, it seems to me we need
14 to be doing a little bit better coordination.

15 Let me go to Senator Sullivan.

16 Senator Sullivan: Madam Chair, I'm going to send my
17 comments or with a couple more questions on authority
18 because I think it goes to the fact, again, to this
19 critical question so many of us are concerned about. And
20 it's clearly an oversight role of the Natural Resource on
21 Energy Committee, the EPW Committee on pinning down where
22 you have authority to take the actions that you do.

23 Mr. Murphy, I know this is not, you're not driving
24 this policy, this is actually driven by Secretary Jewell.
25 But I still think your answers to this, with regard to

1 mitigation, are not sufficient. I would request that, for
2 the record, you get the Department of Interior General
3 Counsel's Office to give detailed answers, citing specific
4 statutes on where you get the authority to require eight
5 million dollars in mitigation on GMT1. It's not sufficient
6 to say the Secretary has a draft letter that provides us
7 that authority.

8 That's worthless. The authority has to derive from
9 the Congress. You have to be able to point to a statute.

10 We've heard rumors that there was at one point
11 officials from DOI saying hey, they can afford it. So
12 we're going to require mitigation.

13 Last time I checked that was not a proper authority to
14 require that kind of level of mitigation. And we heard,
15 once again, it started at a real high number, again, not
16 sure why, and then started to come down throughout this
17 negotiation. And then what you're actually going to do
18 with the funds?

19 Who made that decision? What are you going to do with
20 those funds? You're just randomly coming up with the idea
21 that now we have eight million dollars and we're going to
22 use it for whatever purpose we want without any direction
23 from the Congress of the United States?

24 I don't think you're answering these questions. I
25 would respectfully request that the headquarters back at

1 the Department of Interior come back with detailed,
2 detailed, legal authority on what gives you the authority
3 for the GMT1 mitigation and the spending of that money on
4 whatever you feel like? I don't think that's a proper
5 answer.

6 [The information referred to follows:]

7 [COMMITTEE INSERT]

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1 Senator Sullivan: So I'd like to ask a question that
2 came up and this could be for all three of you.

3 In terms of mitigation required by the state, so the
4 State of Alaska wants to build a road. We're required, I
5 guess, last year to pay almost 3.5 million dollars in
6 mitigation.

7 Do you have a statutory provision that you can provide
8 us that allows federal agencies to require compensatory
9 mitigation of a co-equal sovereign to pay mitigation?

10 I was very surprised by that. I actually did not know
11 the answer until this morning.

12 Mr. Hobbie: I'll take the first stab at it, Senator.

13 As far, I mean, under the Clean Water Act of course,
14 there's regulations that have been promulgated. Part of
15 that is, of course, the 2002 rule.

16 Senator Sullivan: But remember, we're a co-equal
17 regulator under the Clean Water Act. So you're charging us
18 compensatory mitigation.

19 Mr. Hobbie: We didn't charge the state a dime. The
20 state chose to pay that in a third party, in lieu fee
21 holder.

22 Again, like replacing the fish culvert.

23 Senator Sullivan: So we could have just not done
24 anything?

25 Mr. Hobbie: You would not have got a permit, sir.

1 [Laughter.]

2 Mr. Hobbie: Sir, if the state was exempt --

3 Senator Sullivan: Come on there, Mr. Hobbie.

4 Mr. Hobbie: If the state was exempt --

5 Senator Sullivan: You're playing with the words.

6 So we had to do it. No equal regulator under the

7 Clean Water Act became the subservient sovereign.

8 Mr. Hobbie: Yes, sir, just like the federal agencies

9 have to mitigate also.

10 Senator Sullivan: Okay, so where -- can you do the

11 same thing? Provide the statutory authority detail on

12 where that authority rests?

13 Mr. Hobbie: Yes, sir.

14 [The information referred to follows:]

15 [COMMITTEE INSERT]

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1 Senator Sullivan: Okay, thank you.

2 Ms. Thiesing, I wanted to ask, this is a little more
3 detailed, but again it goes to authority issues.

4 It's my understanding that the lands that are set
5 aside in compensatory mitigation are supposed to be under
6 an imminent threat of development.

7 Dr. Thiesing: That's correct.

8 Senator Sullivan: So, why is this a requirement?
9 Where do you derive your authority for that?

10 So, for example, the EPA initially dismissed when
11 Kuukpik was working with you, the location of their initial
12 easement that they wanted to provide as inadequate because
13 that land was not under the imminent threat of development.

14 I just don't even understand that.

15 So you're looking at, that's like, that's taking --
16 that's not just taking acreage, the six to one or two to
17 one or whatever, but you're actually making sure it's
18 acreage that is really, really valuable for them.

19 So again, where do you get the authority in the
20 statute to say that the acreage that you want has to be
21 extra valued, extra valuable to them?

22 Do you see how it's extra valuable?

23 Dr. Thiesing: Senator, I think you're not correctly
24 characterizing what the rule says.

25 The authority for requiring measures to evaluate a

1 permit comes from Section 404B of the statute, the 1972
2 Federal Water Pollution Control Act also known as the Clean
3 Water Act. And Section 404B, Section 404A authorizes the
4 Corps to, the Secretary of the Army acting through the
5 Chief of Engineers or his designee, to authorize discharges
6 to fill, dredged of full material to waters of the West.

7 Section 404B authorizes the administrator to develop
8 guidelines, the substantive criteria, by which the Corps
9 will evaluate its authorizations for against the criteria
10 that the administrator develops. Okay?

11 So, in other words, EPA has responsibility to develop
12 the guidelines while the Corps evaluates all of its permits
13 applications because --

14 Senator Sullivan: Let me just, I mean, you're not
15 really answering my question.

16 Dr. Thiesing: No, sir.

17 Senator Sullivan: Why is this a requirement?

18 Why is the compensatory land that you're seeking --

19 Dr. Thiesing: I'm getting to that.

20 Senator Sullivan: Have to be under the imminent
21 threat of development?

22 Dr. Thiesing: Okay, that's where the authority comes
23 from.

24 Now the rule which is part, the 2008 final mitigation
25 rule, is part of the, has become part of the 404B

1 guidelines. And in laying out criteria for using
2 preservation as a means of offsetting unavoidable losses,
3 okay?

4 If you preserve an area you're still incurring a loss
5 of function and services that that area provides to the
6 environment and to the human population. However, if an
7 area is particularly valuable ecologically or provides
8 important services and it is under threat of destruction or
9 degradation then preserving that area provides an important
10 -- it provides, it preserves those important functions and
11 services to the environment and to the human population
12 using it.

13 Senator Sullivan: Actually I think you can make the
14 opposite argument.

15 If you talked to the Kuukpik members who were here
16 earlier that's very important to that population because of
17 the fact that and you're putting up, you're focusing on it
18 in a way that actually is going after even more high value
19 land for them. And again, I just don't understand why this
20 is a requirement and where you have the authority to make
21 it a requirement.

22 Dr. Thiesing: It is a criteria by which, it's a
23 criteria laid out in a rule by which the Corps can consider
24 a net loss of wetlands if an important area, an area that's
25 ecologically important and performs important functions is

1 preserved.

2 Senator Sullivan: Okay, if you can, again if you can
3 take the opportunity to provide more detailed comments with
4 the general counsel from the EPA on the statutory basis for
5 this requirement, if there is any. I'm doubtful there is.
6 It would be very useful, I think, as again, to be
7 respectful here, as a follow up to this hearing.

8 Dr. Thiesing: I can, sir.

9 [The information referred to follows:]

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1 Dr. Thiesing: But the important thing is that
2 valuable is, you know, in terms of when we look at
3 preservation, our analysis of its value is how important is
4 this to the area in terms of providing ecologically
5 important services.

6 Senator Sullivan: How about how important it is to
7 the people of the area?

8 Dr. Thiesing: Well, but that's the thing. One of the
9 reasons the Kuukpik proposed this area for preservation was
10 that it was very important to them for subsistence and for
11 other uses for hunting, for fishing --

12 Senator Sullivan: But you initially dismissed
13 Kuukpik's --

14 Dr. Thiesing: No, what we said in our comment letter
15 was that we did not see the basis for them preserving.
16 There was no information provided in the public notice that
17 identified what the values of this parcel were. I mean, it
18 did not have information available either from the public
19 notice or from our discussions with the Corps as to what
20 the basis for this parcel's ecological value was.

21 Senator Sullivan: Okay.

22 Well Madam Chair, I'm sorry, just to wrap up.

23 I do think, again, even on that it would be very
24 useful. And this is something I've asked the administrator
25 a number of times in hearings, in Washington, about getting

1 back to the Committees of oversight with detailed statutory
2 reasoning on how you have the ability to take these kind of
3 actions. And if you don't you can admit that as well, but
4 she's not been very good about getting back to us. And I
5 think it's something that we need to start instilling as
6 part of the agency oversight.

7 Where are you getting your authority? And you need to
8 show us, you need to show the American people, the people
9 of Alaska and the Congress. And I think that if you can do
10 that, provide that for additional follow up to some of
11 these questions, I think it would be very useful and we
12 would really appreciate that.

13 Thank you, Madam Chair.

14 The Chairman: Thank you, Senator Sullivan.

15 And I think the whole discussion about where the
16 authority stems from and some of the comments that have
17 been made by this panel are important, again, in the
18 context of where we are because we are not in Iowa. We're
19 in Alaska.

20 And we have some provisions, some federal laws, ANILCA
21 most specifically, ANCSA certainly, but certainly ANILCA
22 that recognizes that our federal land managers who work all
23 over the country and manage all kinds of federal land all
24 over the country that we all have existing federal statutes
25 but within Alaska ANILCA allows, ANILCA provides that there

1 is a difference that in order to accommodate a viable
2 social and economic future that respects Alaskan needs,
3 Alaskan traditions, participation within the state. This
4 is laid out in federal statute that is unique to Alaska.

5 And yet it seems that that's just yet one more federal
6 law that we can overlook in an effort to say, well where
7 we're working on one all of these other land management
8 policies for BLM across the country. And so we'll just
9 lump Alaska in but for ANILCA.

10 I have questioned you, Mr. Murphy, on where the
11 authority rests to allow for an ACEC in the 40 mile area
12 that would encompass over 700 thousand acres when within
13 ANILCA it specifically limits, specifically limits, to five
14 thousand acres any withdrawal or deferral without
15 Congressional authority. And so we can talk about whether
16 it's EPA compensatory mitigation or BLM, the issues that
17 you are dealing with in terms of some of these proposals
18 and land designations and within the Corps. But I think it
19 is imperative to understand where you are operating.

20 And I would assume that Mr. Murphy and Mr. Hobbie, you
21 have had ANILCA training that you require ANILCA training
22 of all of your staffs here in Alaska. I would hope that
23 that's the case. If it's not, we need to make sure that
24 that's the case.

25 Mr. Murphy: It's the case.

1 The Chairman: But further to that that anybody who is
2 sitting back in Washington, DC working out these
3 regulations and reading through the records and the
4 comments, that they too have an understanding and an
5 appreciation of that because there's something that is
6 clearly missing. And I think part of it is bypassing some
7 of the fundamental federal statutes that relate specific to
8 the State of Alaska.

9 We are well over our time and I apologize to those of
10 you that have been very patient with us as we have tried to
11 gain more information. I appreciate not only the testimony
12 provided today, but what you'll be able to provide us with
13 follow up.

14 As we have additional comments that may be presented
15 again by the public for the record, know that we'll keep
16 this Committee record, these Committee records, open for an
17 additional couple weeks.

18 [The information referred to follows:]

19 [COMMITTEE INSERT]

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1 The Chairman: I think that this has been very
2 important for Alaskans to be able to understand some of
3 what we're dealing with and perhaps some of the more
4 constructive paths forward.

5 It's probably the bigger part of our jobs representing
6 Alaska back in Washington, DC to try to lend some air of
7 predictability or certainty within the federal regulations.
8 And this is one area where, I think, you can see we're not
9 able to give that certainty because we don't have that at
10 this point in time.

11 So the request for greater cooperation, greater
12 collaboration is an imperative and hopefully we'll be
13 making some progress moving forward.

14 But Senator Sullivan, thank you for --

15 Senator Sullivan: Thank you, Madam Chair.

16 The Chairman: Your leadership on these issues within
17 EPW. It's really important that we're working together as
18 a team.

19 And for those of you who gathered here today, thank
20 you for your interest and your concerns as well.

21 And with that, the Committees stand adjourned.

22 [Whereupon, at 5:30 p.m. the hearing was adjourned.]

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