

Alaska Department of Law
List of Federal Issues and Conflicts

RC 018

Dated: January 23, 2017

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
NAVIGABLE WATERWAYS			
Navigable Waterways - <i>Sturgeon v. Masica (and Dept. of Interior)</i> (Alaska intervened in support of plaintiff; after State's case dismissed, filed amicus) (9th Cir., 13-36165; 13-36166) AAGs R. Botstein, J. Hafner	Not aligned.	State intervened to challenge the U.S. Department of Interior's (DOI) application of National Park Service (NPS) regulations to state navigable waterways. The Ninth Circuit originally ruled in favor of the DOI and dismissed the State's independent challenge for lack of standing. State filed an amicus brief supporting Sturgeon's challenge at the U.S. Supreme Court. The Supreme Court reversed the Ninth Circuit's decision and remanded for further proceedings.	On remand to the court of appeals, the State submitted supplemental briefing and sought to confirm its continued status as an intervenor. Oral argument was held before the Ninth Circuit on October 25, 2016. We are awaiting a decision.
Mosquito Fork - <i>State of Alaska v. U.S.</i> (9th Cir., 16-36088, 17-35025) AAGs J. Alloway, M. Schechter	Not aligned.	State sought to quiet title to submerged land underlying Mosquito Fork of the Fortymile River. Ultimately, the U.S. disclaimed its interest in the Mosquito Fork, but the court also found the U.S. had acted in bad faith. The case is now on appeal on the issue of attorneys fees.	The U.S. appealed the award of \$582,629 in attorney fees and \$10,372.71 in costs to the State. The State cross-appealed the district court's decision that expert fees and expenses are not recoverable. The amount at issue is \$335,758.44. Briefing is scheduled to begin in April.
Stikine River - <i>State v. U.S.</i> (3:15-cv-00226) AAG J. Alloway	Not aligned.	State sought to quiet title to submerged land underlying the Stikine River. The U.S. issued a disclaimer of interest in lieu of filing an answer.	The U.S. appealed the district court's finding that the State was the prevailing party for purposes of costs. The appeal is related to legal issues in the Mosquito Fork appeal. Briefing is stayed pending the U.S. obtaining final approval from the Solicitor General.

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NAVIGABLE WATERWAYS CONT.			
Kuskokwim River/IBLA Appeal AAG J. Alloway	Not aligned.	The State requested a recordable disclaimer of interest on the Kuskokwim River to resolve a dispute over ownership of a portion of the riverbed. The Bureau of Land Management (BLM) denied the request, and the State appealed to Interior Board of Land Appeals.	Briefing is complete and we are awaiting a decision by the IBLA.
Knik River/Eklutna, Inc.'s Selection Application/IBLA Appeal AAG J. Alloway	Not aligned.	In approving Eklutna, Inc.'s selection application, Interior Board of Land Appeals and BLM did not preserve ANCSA 17(b) easements and purported to convey portions of the bed of the Knik River, which the State asserts is a state navigable waterway.	The State appealed the approval of the land selection, but the issue of navigability has to be challenged in district court. The IBLA appeal is currently stayed pending ongoing negotiations. On the issue of the Knik River, the State is continuing to negotiate with BLM in an attempt to avoid litigation.
Navigable Waterways/ Togiak Public Use Management Plan (PUMP) AAG A. Nelson	Not aligned.	The PUMP asserts jurisdiction over, and directs USFWS to adopt regulations to limit unguided use on, state navigable waterways in the Togiak National Wildlife Refuge.	The USFWS has not proposed the regulations yet and will likely not do so until the <i>Sturgeon</i> case is decided.
ACCESS AND LAND			
Roadless Rule - <i>State of Alaska v. U.S. Dept. of Agriculture</i> (1:11-cv-01122-RJL) AAG T. Lenhart	Not aligned.	State challenged the application of the roadless rule in Alaska. The roadless rule prohibits the building of roads in wilderness areas, which essentially shuts down resource development in many areas of the Tongass.	At the district court on the merits. We are awaiting a decision.

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King Cove Road - <i>Agdaagux Tribe of King Cove v. Jewell</i> (State intervened in support of plaintiff) (9th Cir., 15-35875) AAG T. Lenhart	Not aligned.	State intervened to challenge Secretary Jewell's decision to not allow the building of an emergency road out of King Cove. The State is also working on other options to get the road built.	At the court of appeals, after the district found in favor of Secretary Jewell. The briefing is complete and oral argument has not been set.
R.S. 2477 Rights of Way - <i>State of Alaska v. U.S.</i> (4:13-cv-00008) AAG K. Sullivan	Not aligned.	State sued the U.S. and others to quiet title to a number of R.S. 2477 rights-of-way near Chicken, Alaska.	At the district court following an appellate court ruling that State must seek to condemn parts of rights-of-way over property of Native allottees. State is seeking to condemn the rights-of-way.
Big Thorne Timber Sale - <i>SEACC v. U.S. Forest Service</i> (Alaska intervened in support of defendant) (1:14-cv-00013) AAG T. Lenhart	Aligned.	Plaintiffs are seeking injunctions to prevent U.S. Forestry Service's Big Thorne Timber sale on Prince of Wales Island.	At the court of appeals after the district court upheld the timber sale. We are awaiting the decision.
Shelter Cove Road - <i>State v. U.S. Forest Service</i> (1:16-cv-00018); <i>Greater Southeast Alaska Conservation Community v. Stewart</i> (State intervened in support of defendant) (1:16-cv-0009) AAG S. Lynch	Aligned on end result but not on justification.	The State intervened to defend the building of Shelter Cove Road in Ketchikan. Contrary to the federal government's position, the State asserts that it has a Section 4407 easement for the road. This would mean no environmental review is needed. Despite recent legislation shepherded by Senator Sullivan, the federal government still refuses to recognize the 4407 easement. To ensure the 4407 issue is addressed, State brought a separate lawsuit on that issue. The lawsuits have been consolidated.	Briefing on the lawsuit challenging the State's project concluded on December 14. On the second complaint filed by the State and consolidated with the original lawsuit, we are awaiting the federal government's response.

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Lands into Trust - <i>Akiachak Native Community v. DOI</i> (D.C. Dist. Ct., 1:06-cv-969) AAGs A. Nelson; D. Wilkinson	Aligned at the district court.	State intervened to maintain the prohibition against taking land into trust for Alaska Natives. After the district court found in favor of plaintiffs, DOI changed its regulations to permit lands in Alaska to be taken into trust. Moving forward, the Bureau of Indian Affairs must give the State an opportunity to comment on an application.	Case closed. The court of appeals dismissed case on procedural grounds. The State has commented on one application from the Craig Tribal Association for a one-acre parcel in downtown Craig. The Bureau of Indian Affairs granted the application.
ANWR Boundary IBLA Appeal AAGs M. Schechter; A. Brown	Not aligned.	BLM denied the State's request for conveyance of 20,000 acres, based on dispute over western boundary of ANWR. The State also objected to a survey plat of the area directly south of the area requested for conveyance.	The State has moved to consolidate the two IBLA appeals. The initial conveyance appeal has been fully briefed.
ANWR Section 1002 AAG M. Schechter	Not aligned.	Section 1002 of the Alaska National Interest Lands Conservation Act (ANILCA) set aside the coastal plain of the Arctic National Wildlife Refuge for further investigation of its oil and gas potential. Any oil and gas production activities as well as exploratory drilling in the 1002 area cannot occur until authorized by an act of Congress. The investigations in the late 1980s recommended that the 1002 area be opened to production, but Congress has failed to pass a bill implementing the recommendations.	Senators Murkowski and Sullivan introduced Senate Bill 49, the Alaska Oil and Gas Production Act, on January 5, 2017, that would allow exploration and production in a portion of the 1002 Area.

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ENDANGERED SPECIES ACT			
Bearded Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (9th Cir., 14-35811) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future.	The court of appeals reversed the district court's decision that found in favor of the state. The State, along with other appellees, filed a petition for rehearing en banc, and we are awaiting a decision on the petition.
Ringed Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (9th Cir., 16-35380) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the ringed seal as threatened under the ESA based on climate model projections 100 years into the future.	At the court of appeals after the district court found in favor of the state. The State's responsive brief is due February 21, 2017.
Critical Habitat - <i>Alabama v. NMFS</i> (AL Dist. Ct. 1:16-CV-00593) AAG B. Meyen	Not aligned.	The State joined 17 other states to challenge two new rules regarding the designation of critical habitat. The new rules greatly expand the types of areas that can be designated, without much, if any, connection to the presence of the protected species. The Attorney General also joined a letter with several other attorneys general asking the new federal administration to review and withdraw these rules.	At the district court level. The federal government has moved for dismissal, and the State is working on its response.

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ENDANGERED SPECIES ACT CONT.			
Polar Bear Critical Habitat - <i>State of Alaska v. Jewell</i> (9th Cir., 13-35667) AAG B. Meyen	Not aligned.	State challenged the final designation of critical habitat for the polar bear.	The court of appeals reversed the district court's decision and upheld the designation of critical habitat. State and other plaintiffs filed a petition for certiorari with the U.S. Supreme Court and await a decision.
CLEAN AIR ACT			
Clean Power Plan (40 C.F.R. 60.5700-.5820)	Not aligned generally.	The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. EPA excluded Alaska and Hawaii from the final rule, but EPA indicated that they would likely include Alaska in the future after accruing more evidence.	Other states sued challenging the rule, and the State continues to monitor.
WATER			
"Waters of the U.S." Rule - <i>North Dakota v. EPA</i> (ND Dist. Ct. 3:15-cv-00059) AAG A. Brown	Not aligned.	State joined a coalition of 12 states challenging the new "waters of the U.S." rule. Among other things, the new rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within certain geographical limits to downstream waters already covered by federal law.	The district court action is currently stayed pending further decision by the Sixth Circuit Court of Appeals or the U.S. Supreme Court.

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WATER CONT.			
Stream Protection Rule - Targets Coal Mines AAG A. Brown	Not aligned.	DOI released its final Stream Protection Rule, which goes into effect January 19, 2017. The rule directly impacts coal mines. State submitted comments on the draft rule objecting to the "one size fits all" approach and the failure to consider Alaska's unique conditions.	State joined a multi-state lawsuit challenging the rule on January 17, 2017. We are awaiting the federal government's response. The Attorney General also joined several other attorneys general in a letter requesting Congress to overturn the rule under the
Bristol Bay Watershed Assessment AAG A. Brown	Uncertain.	In July 2014, EPA published a proposed Section 404(c) veto decision based on the Bristol Bay Watershed Assessment that would preemptively restrict resource development in the entire watershed. The State has submitted comments on numerous occasions. EPA has not yet published its final decision.	Pebble Limited Partnership is currently in litigation with the federal government over some procedural issues. The State is not involved.
FISH AND GAME			
Salmon Fishery Management Plan - <i>United Cook Inlet Drift Association v. National Marine Fisheries Service</i> (Alaska intervened in support of defendants) (3:13-cv-0104) AAG S. Beausang	Aligned.	UCIDA challenged Amendment 12 to the Salmon Fishery Management Plan in Alaska that ensured Alaska retained full authority over salmon management in three historical areas beyond the three-mile limit, as it has since statehood. The court of appeals found in favor of the plaintiffs, reversing the district court's decision upholding state management.	The State is considering filing a petition for certiorari with the U.S. Supreme Court. The case has been remanded to the district court for determination of the terms of the judgment to be entered in favor of UCIDA.

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FISH AND GAME CONT.			
NPS and USFWS Rules on Management of Fish and Game - <i>State v. Jewell</i> (3:17-cv-00013) AAGs C. Brooking, J. Alloway	Not aligned.	The State is challenging regulations from both the National Park Service and the U.S. Fish and Wildlife Service that impact state fish and game management. NPS adopted regulations that would allow the park superintendent to decide each year which state laws and regulations are contrary to park policies and should not be enforced. USFWS adopted regulations preempting state management of wildlife when the federal agency determines the state action relates to predator control, prohibiting several means of take for predators, and changing public participation procedures for hunting and fishing closures.	The State filed the lawsuit on January 13, 2017 and is awaiting a response from the federal government.
NPS Subsistence Collection Rule AAG C. Brooking	Not aligned.	Over the objections of subsistence users, the State, and others, National Park Service published a final rule on January 12, 2017 that, among other things, would restrict the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade.	The State is evaluating all options.
Federal Subsistence Board/ Ninilchik AAG S. Beausang	Not aligned.	The Federal Subsistence Board is allowing the community of Ninilchik to use a gillnet to harvest salmon in the federal waters of the Kenai River. The State believes this will endanger the populations of king salmon and rainbow trout.	The State has filed a request for reconsideration with the board and is awaiting a decision.

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MINING			
2008 Mining Claim Rule - <i>Earthworks v. U.S. Dept. of Interior</i> (Alaska intervened in support of defendant) (D.C. Dist. Ct. 1:09-cv-01972) AAGs E. Romerdahl, A. Brown	Aligned.	Plaintiffs challenged the 2008 Mining Claim Rule. State intervened to support the federal rule, which eliminated some of the regulatory hurdles for miners.	At the district court level. Briefing schedule has been set with the State's brief due in May 2017.
Wishbone Hill Mine - <i>Castle Mountain Coalition v. OSMRE</i> (State intervened in support of defendant) AAGs A. Brown, J. Hutchins	Not generally aligned.	The State intervened to defend the validity of the state-issued mine permits, which plaintiffs asserted had automatically terminated. The district court found in favor of plaintiffs and remanded the decision back to the agency.	In the court case, Usibelli moved to certify a question for appeal and the State joined the motion. Responses are due January 19, 2017. On remand, the federal agency issued a decision finding the State's determination that the permits were valid arbitrary and capricious. The State is evaluating options for seeking review of the decision.
OIL AND GAS			
Ban on Offshore Development AAG C. Moore	Not aligned.	President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all drilling in certain off-shore areas, including large portions of the Chuckchi and Beaufort Seas.	State is evaluating all options, including whether there is any legal recourse.