

**Alaska Department of Law
List of Federal Issues and Conflicts**

Dated: January 15, 2018

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 Ninth Circuit again upheld the NPS regulations. The State is not a party to the case but will continue to participate as an amicus. The plaintiff has filed a petition for writ of certiorari with the U.S. Supreme Court. The State will file an amicus in support of plaintiff in early February.
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 district court awarded the State \$582,629 in attorney fees and \$10,372.71 in costs, which the federal government has paid. The case is now closed.
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 district court found that the State was the prevailing party for purposes of costs. The case is now closed.

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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 - <i>State v. U.S.</i> (3:17-cv- 00090) AAGs J. Alloway; A. Naylor	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 settled the easement issue to preserve public access. On the navigability of the Knik River, the State filed a lawsuit in April 2017 challenging the navigability finding. BLM reversed its previous navigability determination and filed a formal disclaimer of interest. The State was awarded costs.
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.
ACCESS AND LAND			
Roadless Rule - <i>State of Alaska v. U.S. Dept. of Agriculture</i> (D.C. Cir., 17-5260) 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.	The district court upheld the roadless rule, and the State appealed. No briefing schedule has been set yet.

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ACCESS AND LAND CONT.			
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 originally intervened to challenge Secretary Jewell's decision under the prior administration 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.	King Cove moved for dismissal of its appeal, and the State joined in the motion. The appeal has been dismissed, which closes the court case. King Cove dismissed the case to pursue other alternatives.
R.S. 2477 Rights of Way - <i>State of Alaska v. U.S.</i> (4:13-cv-00008) AAGs J. Alloway, M. Schechter	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 where the State is seeking to condemn the rights-of-way across Native allotment lands. Once that is complete, the court will address the merits of the R.S. 2477 claims.
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 sought injunctions to prevent U.S. Forest Service's (USFS) Big Thorne Timber sale on Prince of Wales Island.	The court of appeals upheld the timber sale. This case is now closed.

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2016 Amendment to the Tongass Land Resources Management Plan (TLMP) AAGs T. Lenhart, S. Lynch	Not aligned.	The 2016 TLMP amendment fully incorporated both the Roadless Rule and the Secretary of Agriculture’s directive to rapidly transition timber harvest from old growth to young growth. The result will effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry is likely to be forced out of business while utilities, mining and other industries will be substantially harmed.	Senator Murkowski has introduced an amendment to the appropriations bill that would roll back the 2016 TLMP amendment to the 2008 plan and initiate a new rulemaking process to update the plan. The State continues to assess next steps, which could include the U.S. Congress rescinding the TLMP amendment under the Congressional Review Act, the Department of Agriculture directing the USFS to commence a new plan amendment process to undo the actions regarding the Roadless Rule and the transition to young timber, and the State and others filing a legal challenge to the TLMP amendment in federal court.
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 has concluded. In State’s suit against USFS, consolidated with the original lawsuit, the court denied the federal government's motion to dismiss. The opening brief in the State's lawsuit is due in February. Construction on the road continues while the case proceeds.

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ACCESS AND LAND CONT.			
Eastern Interior Resource Management Plan (BLM) AAG A. Nelson	Not aligned.	The EIRMP, adopted January 6, 2017, recommends unjustified mineral closures and conservation designations that are inconsistent with Alaska National Interest Lands Conservation Act (ANILCA) and Federal Land Policy Management Act's multiple use mandate. The EIRMP also fails to provide for lifting outdated ANCSA d-1 withdrawals unless new conservation withdrawals are implemented.	The Government Accountability Office determined in November that the EIRMP is a rule under the Congressional Review Act (CRA), which means Congress has a chance to repeal it. We are considering our options, including administrative action, litigation, or working with Congress to repeal it.
Lands into Trust AAG A. Cleghorn	Uncertain	After the district court in <i>Akiachak v. Dept. of Interior</i> 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.	The State has commented on six applications to date--one from the Craig Tribal Association, three from the Central Council Tlingit and Haida Indians Tribes of Alaska, one from the Ninilchik Traditional Council, and one from the Native Village of Fort Yukon. BIA has granted the Craig application, but has not acted on the other applications yet.
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 Arctic National Wildlife Refuge (ANWR). The State also objected to a survey plat of the area directly south of the area requested for conveyance.	IBLA denied BLM's motion to dismiss and has consolidated the State's two appeals. Briefing is underway.

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ACCESS AND LAND CONT.			
ANWR Section 1002 AAG M. Schechter	Not aligned.	Section 1002 of ANILCA set aside the coastal plain of the ANWR 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 recent tax legislation that passed Congress and was signed by President Trump included a provision to open the 1002 area to oil and gas exploration and leasing.
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. Bearded seal listing was reinstated by NMFS in May 2017. The State along with other petitioners filed a cert. petition with the U.S. Supreme Court. We are awaiting the U.S. Supreme Court's decision on whether to hear the case.
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. Oral argument occurred on December 4, 2017, and the appellate court notified the parties on December 5 that it would defer its decision until the U.S. Supreme Court rules on the cert. petition.

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ENDANGERED SPECIES ACT CONT.			
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. An amended complaint has been filed, and the case has been stayed to February 8, 2018 to allow the new federal administration time to review.
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. The U.S. Supreme Court denied the State and other plaintiffs' cert. petition. This case is now closed.
CLEAN AIR ACT			
Clean Power Plan (40 C.F.R. 60.5700-.5820) AAG E. Pokon	Uncertain.	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. President Trump signed an executive order calling on the EPA to review the Clean Power Plan and end the moratorium on coal mining on federal lands. The EPA proposed to repeal the Clean Power Plan in October and has not made a final decision.

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WATER			
<p>"Waters of the U.S." Rule - <i>North Dakota v. EPA</i> (ND Dist. Ct. 3:15-cv-00059) AAG C. Peloso</p>	<p>Uncertain.</p>	<p>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.</p>	<p>The district court action is currently stayed pending further decision by the U.S. Supreme Court on the proper venue for hearing the case. EPA proposed a rule to withdraw the current rule and reinstate the prior rule, while it works with states and stakeholders to develop a new proposal. EPA proposed another rule in November 2017 that would extend the effective date of the 2015 rule for two years, to ensure the status quo remains in place while the rulemaking process for a new rule is completed.</p>
<p>Stream Protection Rule - Targets Coal Mines AAG A. Brown</p>	<p>Not aligned.</p>	<p>DOI released the Stream Protection Rule, which was scheduled to go 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. The Attorney General also joined several other attorneys general in a letter requesting Congress to overturn the rule under the Congressional Review Act (CRA).</p>	<p>In mid-February, President Trump signed a resolution passed by Congress under the CRA overturning the rule, and plaintiffs voluntarily dismissed the lawsuit. This case is now closed. However, the litigation filed in the U.S. Fish and Wildlife Service matter below could impact this case.</p>

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FISH AND GAME			
<p>NPS and USFWS Rules on Management of Fish and Game - <i>State v. Zinke</i> (3:17-cv-00013) AAGs C. Brooking, J. Alloway</p>	<p>Not aligned.</p>	<p>The State is challenging regulations adopted by the National Park Service affecting hunting on preserve lands throughout Alaska and regulations adopted by the U.S. Fish and Wildlife Service restricting hunting on the Kenai National Wildlife Refuge (NWR). Three cases were filed and consolidated. The NPS regulations preempted state management of wildlife, prohibit several means of take for predators, and change public participation procedures for hunting and fishing closures. The USFWS regulations prohibit certain activities within the Kenai NWR and the State is objecting to the prohibition on taking brown bears at black bear baiting stations, a practice that is allowed under state regulations.</p>	<p>At the district court level. The State moved to supplement the administrative record. Summary judgment briefing is scheduled to begin in mid-January 2018 but the State requested an extension to allow the records to be supplemented. Meanwhile, NPS and USFWS were directed by the Acting Assistant Secretary to initiate rulemaking procedures to reconsider their rules, but no substantive actions have yet been taken.</p>
<p>Congressional Review Act Resolution on USFWS Rules - <i>Center for Biological Diversity v. Zinke</i> (3:17-cv-00091) AAGs C. Brooking, J. Alloway</p>	<p>Generally aligned.</p>	<p>The Center for Biological Diversity filed a lawsuit to challenge Pub. L. 115-20 which was adopted under the rules established in the Congressional Review Act. Pub. L. 115-20 revoked a rule adopted by the USFWS that would have restricted hunting and affected refuge closure procedures on all refuges throughout Alaska. The State and other groups intervened on behalf of the federal defendants.</p>	<p>At the district court level. The federal government and other intervenors filed motions to dismiss, which the State supported. Briefing was completed on the motions to dismiss in December 2017 and we await a decision from the federal district court.</p>

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FISH AND GAME CONT.			
<p>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</p>	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. The U.S. Supreme Court denied the State's request for review of the Ninth Circuit's decision. The district court has retained jurisdiction to oversee adoption of a new plan, and there continues to be litigation over attorneys' fees.
<p>NPS Subsistence Collection Rule AAG C. Brooking</p>	Not aligned.	NPS published a final rule on January 12, 2017 allowing the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade. This rule was developed over the course of more than eight years, and the State was generally supportive. However, the final rule included two provisions unrelated to subsistence collections (restrictions on the type of bait and prohibiting the take of live raptors) that were absent from earlier discussions and were not included in the environmental analysis.	The State is evaluating all options.
<p>Federal Subsistence Board/ Ninilchik AAG S. Beausang</p>	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) AAG 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 has been completed and oral argument was held on October 27, 2017. We are awaiting the court's decision.
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. The permits are currently still valid while the administrative process plays out. On remand, the federal agency ultimately found that the State had "good cause" to not take action because it needed additional time to come to a decision. The State is actively working on its decision, and there are no pending court cases or administrative proceedings at this point.

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OIL AND GAS			
Reversal of Ban on Offshore Development - <i>League of Conservation Voters v. Trump</i> (3:17-cv-00101) AAG J. Douglas	Generally aligned	Before leaving office, former President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all leases in certain off-shore areas, including large portions of the Chukchi and Beaufort Seas. President Trump issued an executive order rescinding the ban, and environmental groups have challenged the plan. BOEM is gathering comments on a new proposed five-year National Offshore Oil and Gas Leasing Program, for years 2019-2024. The State intervened in a lawsuit to support and defend the President's executive order.	At the district court level. Defendants brought a motion to dismiss. Oral argument was held on November 8, 2017. We are awaiting the court's decision.