



## State of Alaska Department of Law

### The Department of Law's Strategy to Promote Economic Opportunity in Alaska

The Department of Law's foremost priority is Alaskans' safety, including both their physical and financial well-being. We are also very focused on fostering the conditions that promote economic opportunity. Unfortunately, we have entered a period of unprecedented efforts by certain federal agencies and environmental groups to lock up Alaska's resources. In response, the Department of Law has instituted a strategy to vigorously defend Alaska's ability to develop and manage its own resources, protect its sovereignty and foster economic opportunity for our citizens.

This strategy emphasizes vigilance, collaboration when possible and litigation when necessary.

First, we closely follow the activities, decisions and litigation strategies of entities – whether federal agencies or environmental groups – that could infringe upon state sovereignty and the right of our citizens to create their own economic future. Second, when possible we work cooperatively with these groups to arrive at a mutually beneficial resolution. Third, we research our legal options in the meantime, build an evidentiary and administrative record, and prepare a legal strategy to protect Alaska's interests. And finally, when appropriate, we strike with litigation that is built on a solid foundation and first-rate legal arguments.

We have not hesitated to take action against federal government overreach when necessary to protect Alaska's interest. Nevertheless, it is important to recognize that we undertake litigation in some cases to support federal government actions and decisions, particularly when they benefit Alaska and are challenged by environmental groups. The common theme driving all of our actions and the ultimate goal of the Department of Law's strategy is the promotion of Alaska's interests by giving our citizens direct control over our resources, personal liberties and economic future.

The following list highlights some of the Department of Law's activities over the past few years in support of our strategy to promote economic opportunity in Alaska.

#### **I. State Sovereignty**

- *Suing to block imposition of the federal health care reform.* We joined a multi-state complaint challenging the constitutionality of several aspects of the federal Patient Protection and Affordable Care Act, particularly the law's "individual mandate." The Department of Law's memorandum discussing the

constitutionality of the act was welcomed by other states as providing in-depth analysis to support the lawsuit.

- *Challenging the EPA's "endangerment finding."* We sued the Environmental Protection Agency (EPA) over procedural deficiencies in its finding that greenhouse gas emissions endanger human health and welfare, a finding which, if upheld, will trigger substantial new federal regulation over business activity.
- *Challenging NPS regulation that infringes upon state sovereignty.* The National Park Service (NPS) has promulgated regulations that purport to give NPS enforcement authority over navigable waters within the exterior boundaries of national parks and preserves without regard to state sovereignty over those waters. We filed a petition for rulemaking, seeking to repeal or amend this regulation. If denied, we will take appropriate legal action. We also filed an amicus brief in federal district court to challenge the federal government's authority to prosecute an Alaskan for allegedly violating NPS rules while piloting his boat on the Yukon River.
- *Fighting for Second Amendment rights.* We joined several other states in urging the U.S. Supreme Court to hear a challenge to Chicago's total ban on handgun possession. When the Court heard the case, we supported Second Amendment advocates in arguing that this is a fundamental right that prohibits states from imposing overly restrictive firearms laws. In its landmark decision in *McDonald v. City of Chicago*, the Court agreed with the argument put forth by Alaska and other states.
- *Appealing an overbroad federal assertion of federal water rights in Alaska's rivers.* We appealed the district court's latest decision in the long-running litigation over federal reserved rights in navigable waters in Alaska. In our appeal, we challenge two decisions of the district court: the decision to uphold the federal government's use of administrative rulemaking to identify reserved water rights, which we argue can be identified only through a judicial process; and the decision affirming the federal government's selection of which waters contain federal reserved rights, which we argue is far too broad. The appeal is pending.

## **II. Oil and Gas Exploration and Development**

- *Opposing the federal offshore drilling moratorium.* We sued the Department of the Interior to challenge its *de facto* moratorium on Outer Continental Shelf (OCS) drilling off Alaska's coasts, arguing that the process by which that moratorium was adopted violates federal law.
- *Defending challenges to Chukchi and Beaufort Sea exploration plans.* We intervened to defend the federal government's approval of Shell's Beaufort

Sea and Chukchi Sea exploration plans in two appeals before the Ninth Circuit Court of Appeals. These plans, which environmental groups challenged, authorized Shell to conduct exploratory drilling in 2010. We prevailed in the Ninth Circuit, and Shell was set to begin drilling in the Arctic until the federal government refused to issue permits in the aftermath of the oil spill in the Gulf of Mexico.

- *Defending OCS lease sale 193 and related seismic activity.* We intervened on the side of the federal government in support of OCS lease sale 193, which was challenged by environmental groups. The district court denied the plaintiffs' summary judgment motion in large part but agreed with plaintiffs that the lease sale's environmental impact statement was deficient because it did not examine the impacts of natural gas development. The court enjoined activity related to the sale and remanded the case back to the agency. In conjunction with other parties, we successfully persuaded the court to clarify and narrow its injunction to allow seismic exploration activities to take place.
- *Defending challenges to 2007-2012 OCS five-year Lease Plan.* We filed an amicus brief in defense of the federal government's five-year lease plan, which environmental groups challenged. The D.C. Circuit Court of Appeals largely agreed that the five-year plan met regulatory requirements, but remanded the case because the agency failed to consider certain matters. The agency has not issued a revised five-year plan.
- *Opposing roadblocks to NPR-A exploration and development.* We filed briefs in support of ConocoPhillip's proposal for oil exploration in the National Petroleum Reserve-Alaska (NPR-A), which is still pending on appeal before the Army Corps of Engineers. If the Corps denies the permit, we will consider appropriate legal action.
- *Working to prevent a potential wilderness designation in ANWR's coastal plain.* In a legal memorandum submitted to the Department of the Interior, we argued that the department was likely in violation of the requirements of the National Environmental Policy Act in failing to solicit public comment on matters related to oil and gas development in ANWR. With these comments, we are building a foundation to oppose any potential wilderness designation for ANWR's coastal plain.

### **III. Endangered Species Act**

- *Fighting to keep the ribbon seal unlisted.* When the National Marine Fisheries Service (NMFS) declined to place the ribbon seal on the Endangered Species List, environmental groups sued to force a listing. We requested intervention to support NMFS' decision against the environmental groups' attack. The court granted the state permissive intervention on the issue of any remedies the court might order. The litigation is in its initial stages.

- *Challenging the polar bear listing.* We sued the federal Fish and Wildlife Service (FWS) over its decision to list the polar bear under the ESA. The case is in the final stages of summary judgment briefing.
- *Opposing the broad critical habitat designation for the polar bear.* We filed comments with FWS expressing the state's opposition to the overly broad designation of 200,000-plus square miles of critical habitat for the polar bear. The FWS is preparing its final rule on this matter.
- *Challenging the beluga listing.* We sued the federal government to challenge NMFS' decision to list the Cook Inlet population of beluga whales under the ESA. The lawsuit is in its initial stages. The listing and critical habitat determination is estimated to add hundreds of millions of dollars to the cost the port of Anchorage's expansion.
- *Opposing the critical habitat designation for the belugas in Cook Inlet.* We filed comments objecting to areas of Cook Inlet that have been designated as critical habitat by NMFS but that are not necessary to ensure the species' survival. The agency is preparing its final rule on critical habitat for this population of belugas.
- *Opposing a federal decision to close commercial fisheries in the Western Aleutians.* We filed comments opposing NMFS' proposed closure of mackerel and cod fisheries in the Western Aleutians. NMFS contends the closure is necessary to protect certain sub-groups of the Western population of Steller sea lions, which are protected under the ESA. We point out that the population overall is increasing and that the fisheries closures would severely harm nearby communities that rely on commercial fishing for jobs and revenues.
- *Petitioning to remove the Eastern population of Steller sea lions from the threatened species list.* In coordination with the states of Washington and Oregon, we petitioned the FWS to remove the Eastern distinct population segment of Steller sea lions from the list of threatened species under the ESA, because the population has significantly rebounded and appears to have met its recovery objectives. Removing the species from the list will lessen the regulatory burden imposed by the ESA.

#### **IV. Mining**

- *Defending the Kensington Mine before the US Supreme Court.* We intervened to fight a lawsuit brought by environmental groups to shut down the Kensington Mine. We joined the mine's owner, Coeur d'Alene Mines Corp., in taking the case to the U.S. Supreme Court, even after the federal agency with jurisdiction over the project declined to do so. In prevailing before the

Court, we helped save 200 well-paying jobs and local government revenues in Southeast.

- *Supporting favorable mining regulations.* We intervened in support of the Department of the Interior on regulations governing mining claims on federal lands against a challenge by environmental groups that, if successful, would make mining in such sites more expensive and onerous. The litigation is pending.
- *Developing regulations to keep Red Dog Mine in compliance with federal environmental standards.* We assisted the Alaska Department of Environmental Conservation (DEC) in promulgating new pollution discharge regulations for incorporation into a federal Clean Water Act permit for Red Dog Mine, to ensure that the mine operates in compliance with federal law. Environmental groups had sued the mine for alleged violations, and the mine was in jeopardy of closing. The regulations we assisted DEC in developing will enable the mine to stay open, preserving hundreds of jobs.

## **V. Timber**

- *Opposing last-ditch efforts by environmental groups to block a federally authorized timber sale.* We intervened to support the U.S. Forest Service's rule authorizing the Diesel timber sale on Prince of Wales Island and to oppose environmental groups' request for a preliminary injunction against the sale. The lawsuit placed over 100 jobs in Alaska and Washington at risk. We succeeded in persuading the court to dismiss the environmental groups' suit on the merits.
- *Supporting the "Tongass Exemption" to the USFS "Roadless Rule."* We intervened to support a U.S. Forest Service decision against attack by environmental groups. Although Forest Service rules generally ban logging in roadless areas of national forests, the Forest Service has created an exemption to those rules to allow logging in the roadless areas of the Tongass National Forest. Environmental groups challenged the so-called "Tongass Exemption," and we intervened on the side of the federal government to defend the rule.

## **VI. Fish and Wildlife**

- *Defending Alaska's predator control program.* We successfully defended the Alaska Board of Game's predator control program from a constitutional challenge by environmental groups. The Alaska Supreme Court ruled that the program is consistent with Article VIII of the Alaska Constitution. The program is an important tool for the state to fulfill its constitutional duty of managing wildlife populations for sustained yield.

- *Fighting to protect Unimak caribou.* We sued the FWS and requested a preliminary injunction to allow the state to conduct predator control on Unimak Island, in the Aleutian chain, in order to protect the island's caribou herd from possible extirpation. The herd's numbers have declined precipitously due to wolf predation. Our preliminary motion was ultimately denied, but the judge indicated he was favorably disposed towards the state's position. The FWS has filed its motion to dismiss, and the state is preparing its briefing in opposition.
- *Defending Alaska's fisheries management.* We moved to intervene on the side of the federal government in a lawsuit that attempted to force federal preemption of state salmon fisheries in Cook Inlet. The plaintiffs petitioned NMFS to preempt state management of salmon fisheries in state waters. When NMFS declined to do so, the plaintiffs sued to challenge NMFS' decision. Although our motion to intervene was denied without prejudice, a settlement requiring the plaintiffs to exhaust state remedies before filing suit on this issue in federal court appears imminent.

## **VII. State Fiscal Integrity**

- *Recovering damages to Alaska's pension funds.* We recovered \$500 million in a settlement of the state pension plans' case against Mercer, their former actuary. This was the largest actuarial malpractice settlement in national history. The plans sued Mercer for actuarial malpractice after the firm provided mistaken advice to the plans about the amount of contributions necessary to fund their future liabilities and then tried to cover up its mistake.
- *Fighting for Alaska's royalties and tax receipts.* We argued that the Federal Energy Regulatory Commission (FERC) should order the Trans-Alaska Pipeline System (TAPS) carriers to lower their tariff rates to avoid discrimination between interstate and intrastate tariffs. FERC lowered the interstate tariffs substantially, resulting in refunds that netted the state \$441.5 million in additional taxes and royalties. The TAPS carriers have appealed FERC's decision. We have also cross-appealed, arguing FERC should have further lowered the tariff rates. If our argument prevails, the state will be entitled to over \$200 million more in refunds.