



Generally Speaking

COMINGS and GOINGS

Assistant District Attorney **Jenel Domke**, a member of the Fairbanks DAO since 2002, died on Oct. 27. She was a strong prosecutor who spent much of her career focused on victims of child abuse and sexual assault. She had recently applied for and been offered a statewide position prosecuting internet crimes against children, but her illness and subsequent death intervened before she was able to assume that position. She will be sorely missed. A memorial service will be held at 2 p.m. Saturday, Nov. 7, at the University Community Presbyterian Church in Fairbanks. A potluck follows in the church social hall. In lieu of flowers, donations may be made to Stevie's Place Child Advocacy Center in Fairbanks.

Leina Silvira in the Collections and Support Section was promoted to Accounting Clerk I. **Londa Wright** joined the section as an Office Assistant I.

Jessica Harman, a paralegal in the Fairbanks Attorney General's Office resigned to move out of state.

The newest law office assistant in the Fairbanks DAO, **Amy Bollaert**, began during the month. The newest attorney, **Arne Soldwedel**, also started during the month, and on Oct. 30 learned that he had passed the bar exam.

R. Scott Taylor is the newest attorney in the Anchorage Oil, Gas, and Mining Section. Scott started on Oct. 1.

Laura Fox is the newest attorney in the Anchorage Opinions, Appeals, and Ethics Section. Laura started on Oct. 22.

Linda Reagan has returned to temporarily assist the Collections and Support Section.

Kelly Thibodeau is the new receptionist for the Anchorage office.

John Ptacin has transferred from the Nome Child Protection Section to the Anchorage Labor and State Affairs Section.

Mike Mitchell has transferred from the Anchorage Labor and State Affairs Section to the Anchorage Natural Resources Section.

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KUDOS

And congratulations to **Cassidy Nichols** on her promotion to Law Office Assistant II in the Torts/Worker's Comp Section.

CIVIL DIVISION

Child Protection

New CINA cases. New CINA cases of note received during since the last report, based upon allegations in OCS petitions:

OCS assumed emergency custody of a teenager at the mother's request. The mother was living with a sex offender and did not want the sex offender—who allegedly abused the teen—to leave. The teenager indicated she was scared to return to the home. No other relative placements could be identified.

OCS assumed emergency custody of three children after the mother refused to make arrangements for their safety. OCS had been working with the mother to locate relatives who could help her watch the children. Relatives were found and a plan was in place; however, the mother declined to participate. There were significant concerns about drug use and domestic violence as well.

OCS petitioned to assume custody of a toddler after it was determined that the mother had left the boy in the care of a sex offender who deprived the child of food, beating him if the child complained. The mother, while in contact with the department, would not provide them an address. The whereabouts of the father is unknown. The child is in foster care.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Collections and Support

The Collections Unit received over \$5.6 million in October from PFD garnishments. The unit was extremely busy in October answering phone calls, most of them regarding PFD garnishments. At the height of the PFD payouts, the unit received more than 100 voice mail messages a day, in addition to the phone calls answered.

Commercial and Fair Business

Sheldon Jackson found unfair to students

Sheldon Jackson College ceased operating on June 30, 2007, with only one day's notice to students. This closure prompted an investigation by the Alaska Commission on Postsecondary Education into possible claims by students due to the closure.

During the investigation, ACPE learned that in April 2007 SJC had awarded scholarships to 22 students for the 2007/2008 academic year. These scholarships were from outside donors. ACPE also discovered that SJC personnel had made statements to students that these scholarships would follow the students to the other schools they were forced to attend in order to continue and finish their college studies. In addition, SJC personnel made statements regarding the transfer of these scholarships at meetings held by ACPE and in email correspondence to ACPE staff and persons associated with the other educational institutions. Despite these statements, SJC never transferred funds to the other institutions on behalf of the SJC students attending those institutions.

ACPE staff concluded that SJC's action regarding the scholarships was a violation of a state statute that prohibits post-secondary institutions from engaging in a practice that is

false, deceptive, misleading or unfair. SJC appealed this determination.

A one-day hearing was held on this issue in September before the Office of Administrative Hearings. On Oct. 12, the administrative law judge concluded that SJC's actions violated the statute and amounted to an unfair practice akin to a breach of an agreement with the students. The ALJ further concluded that the conduct fell within the most reasonable interpretation of Alaska's statutory prohibition against false, misleading, deceptive or unfair practices. A second hearing is set for December to determine the amount SJC should be required to pay the students. The maximum amount involved is \$34,500, but the award might be less if any students were not eligible for the funds in the 2007/2008 academic year.

Action settled against concert promoter

On Oct. 1, the Office of Administrative Hearings (OAH) implemented a settlement agreement between concert promoter Albert Sakata and the Division of Corporations, Business and Professional Licensing, and dismissed a pending action against Sakata.

The division originally issued a cease and desist order against Sakata on June 12 for acting as a concert promoter without a license, in violation of AS 08.92.010. Sakata requested a hearing, and the case was referred to OAH. Rather than proceed directly to hearing, the parties agreed to mediation, which took place on August 13 with the assistance of an administrative law judge assigned solely to the mediation.

The parties agreed that Sakata would withdraw his request for a hearing and agree to a dismissal of the action if the Division granted his pending application for a concert

promoter's license. The license was issued on September 29, which resulted in the dismissal. AAG Robert Auth represented the division throughout this proceeding.

High court considers professional discipline

On Oct. 21, the Alaska Supreme Court heard oral argument in an appeal involving dentist Douglas Ness. Dr. Ness was the subject of discipline by the Board of Dental Examiners as the result of services that fell below the minimum standards of the profession.

Based on Dr. Ness's failed treatment of his patient, the board, after administrative hearing, ordered suspension of Ness's license for 120 days, payment of a \$15,000 fine, completion of eight hours of continuing education on ethics, and five years of probation with random audits of Dr. Ness's practice during the probationary period.

Dr. Ness appealed the decision to Superior Court. The court affirmed all of the board's findings of fact, and it affirmed all license sanctions, except for the license suspension. The court reversed the license suspension, calling it "punishment."

The state appealed to the Alaska Supreme Court to reverse the Superior Court's ruling on the suspension. The issue presented on appeal is whether the board has authority to impose a license suspension on Ness's license for the violations found. AAG Karen Hawkins has been representing the board in these proceedings.

On Oct. 22, the Alaska Supreme Court heard oral argument on Dr. Ann-Marie Yost's appeal of the State Medical Board's adoption of a settlement agreement she entered into in 2005 with the Division of Corporations, Business and Professional Licensing.

Under this agreement, Dr. Yost was granted a license to practice medicine but was also fined \$1,000 and reprimanded for failing to disclose on her license application that she had been investigated in another state. Because the agreement involved professional discipline, the division reported it to the National Practitioner's Database, as required under state law.

In 2007, Dr. Yost filed an original action in Anchorage Superior Court against the division, alleging that the agreement was subject to an oral condition precedent that precluded the board from adopting the agreement unless and until Dr. Yost was allowed to address the board. Dr. Yost sought a judgment whereby the agreement would be declared null and void.

After converting Dr. Yost's action to an administrative appeal, Anchorage Superior Court Judge Sharon Gleason issued a decision in 2008 finding that no such condition precedent existed and confirming the board's adoption of the agreement.

In the Alaska Supreme Court, Dr. Yost is challenging both the decision to convert the case to an appeal, as well as the decision affirming the board's adoption of the agreement. AAG Robert Auth has been representing the division and the board in these proceedings.

Post-secondary commission settles case

On Oct. 21, AAG Mary Ellen Beardsley, on behalf of ACPE, participated in a mediation in an adversary proceeding brought by Shelissa Thomas against ACPE and the U.S. Department of Education to treat her state and federal student loans as discharged in bankruptcy.

After lengthy discussions between the parties and the mediation judge, Judge MacDonald, a settlement was reached among all parties. Both ACPE and the Department of Education agreed to discharge half of their respective debts, and Thomas agreed to make regular monthly payments on the remaining half through voluntary wage assignments. However, should Thomas default under the terms of the agreement and fail to cure the default, ACPE has a confession of judgment before action for the full amount due and owing before mediation (currently a little over \$24,000) that can be filed in state court.

This matter arose out of the chapter 7 bankruptcy that Thomas filed in 2005 and in which she received a discharge. However, the discharge did not affect her student loans from ACPE or the Department of Education, which is owed more than \$54,000. After she failed to start making payments on her state student loans, ACPE began administrative wage garnishment and began receiving over \$500 a month.

In December 2008, Thomas filed an adversary proceeding in bankruptcy court seeking a ruling that her loans should be considered discharged because they create an undue hardship on her and her family. Both defendants (the student loan lenders) counterclaimed and further argued that she failed to meet the test for undue hardship because she never made a single voluntary payment on her student loans and because she could not show that her financial circumstances were such that she could not maintain a minimal standard of living and still pay her debts. Her husband, when employed as a pipe fitter, makes very good wages and his income must be considered by the court when determining if she is entitled to an undue hardship discharge.

After Thomas' deposition was taken, in which she stated she was willing to pay something to the lenders, the parties agreed to see if a settlement could be reached. The amount she was willing to pay was significantly less than what the lenders were willing to accept.

At the mediation conference, attended by both Mr. and Mrs. Thomas, the participants learned that Mr. Thomas is currently not employed. If he gets a job in the future, he could earn anywhere from \$16 an hour to \$24 an hour as an apprentice pipefitter and as much as \$40 an hour once he becomes a journeyman. But because of the recession, he does not know when he will get another job as a pipefitter. Hence, the judge persuaded the lenders to decrease their loan amounts so that Mrs. Thomas will be able to see some light at the end of tunnel as it relates to being able to pay off her student loans.

Human Services

Litigation update

No new cases were filed, but pending cases have been very active:

Carmichael v. Commissioner Hogan et al.

The employee of a certified Medicaid provider sued the Department of Health and Social Services alleging constitutional due process violations stemming from the department's determination that she was barred from this employment based on her previous convictions for child abuse. Plaintiff's criminal convictions constitute a barrier crime and thus prohibit her employment under state law.

Plaintiff moved for summary judgment, and the department cross-moved. Oral argument was heard on Oct. 2, and the court asked the parties for supplemental briefing on the

issue of whether the plaintiff was entitled to any pre- or post-deprivation due process. The parties supplemented their briefing and are awaiting the court's decision. AAG Rebecca Polizzotto is representing the department in this matter.

Akeela, Inc. v. DHSS. AAG Libby Bakalar completed a two-day administrative hearing related to the denial of a tobacco prevention and control grant award to a non-profit that was also acting as the technical assistance contractor on the same grant. The department's position was that the non-profit had information not available to the public in the formulation of the request for proposals and that assisting other grantees on the same grant presented a conflict of interest. This is the first time that the legal issue of whether procurement regulations can be applied by analogy to this DHSS-grants program has been considered. The hearing office ruled against the department on this legal issue, and the agency is evaluating its options.

Facing Foster Care in Alaska and M.B. v. DHSS.

AAG Libby Bakalar prepared significant briefing in this case over the past month related to pending motions to dismiss, motions for preliminary injunction, and motions to stay discovery.

In this case, a foster care advocacy group and one individual sued the state, seeking to invalidate the Alaska Medicaid program's regulation governing coverage for orthodontia services for youth under age 21. The department moved for judgment on the pleadings and opposed plaintiffs' contemporaneous motion for preliminary injunction, arguing *inter alia* that the named plaintiffs lacked standing based on the non-existence of a state action. The parties are awaiting decisions on all substantive motions.

Banner Health v. Commissioner Jackson.

This case is on remand from the Supreme Court to determine a single issue: whether Alaska Open Imaging Corporation (AOIC) is a physician’s office exempt from the Certificate of Need statutes. The Supreme Court ruled that whether AOIC is a physician’s office was a genuine issue of material fact and remanded for further proceedings. AOIC filed a motion for summary judgment arguing that procedurally the matter was resolved because Banner Health had never appealed the commissioner’s decision arguing it was a physician’s office. Both the commissioner and Banner Health argued that some fact-finding was required based upon the clear instructions of the court and that *res judicata* barred consideration of the issue of whether there had been no appeal because AOIC had failed to argue it previously at any level.

The Superior Court held oral argument on AOIC’s motion, and the judge indicated that while he was not inclined to avoid what he read as clear instructions from the Supreme Court on the factual issue, he needed to resolve the procedural argument and so took the matter under advisement.

Third-party liability / subrogation

In October, the subrogation unit opened 30 new cases and closed 27 cases. Overall, there are 987 open cases at this time. During the same period, the unit settled 16 cases and recovered a total of \$96,624.54. The year-to-date total recovery from January 2009 is \$685,188.02.

Other

AAG Kimberly Allen has been advising the Division of Senior and Disabilities Services

and is involved in hearings related to waiver, personal care services, and food stamps.

AAG Stacie Kraly worked with the Division of Public Assistance to resolve a threatened class action lawsuit related to food stamp overpayments. The state was able to avoid the litigation by working with the plaintiffs’ attorney (the Northern Justice Project) and the Department to make minor amendments to their notices and process. This was an excellent result for all parties.

AAG Libby Bakalar is assisting with a public records request made during the Palin administration.

Legislation and Regulations

The section edited legislation for consideration for introduction at the request of the governor for the 2010 session. The section also edited and legally approved for filing the following regulations projects:

1. Department of Environmental Conservation (drinking water and lead and copper requirements);
2. Department of Commerce, Community, and Economic Development (fees for Big Game Commercial Services Board; Architects, Engineers, and Land Surveyors; Dietitians and Nutritionists);
3. Board of Veterinary Examiners (courtesy licenses);
4. Board of Dental Examiners (collaborative agreements; continuing education);
5. Board of Chiropractic Examiners (continuing education and professional standards);

6. Commercial Fisheries Entry Commission (fees; administrative areas; permits);
7. State Board of Education and Early Development (Alaska School for the Deaf and Hard of Hearing; eligibility for special education);
8. Board of Fisheries (Bristol Bay/Tanana River Sport Fisheries).

Natural Resources

Nondalton Tribal Council v. State, DNR

There was considerable activity in this lawsuit, challenging the validity of the Bristol Bay Area Plan (BBAP).

On Oct. 8, AAG Anne Nelson argued the state's motion to dismiss at a hearing in Dillingham. Our position is that the case is time-barred as an original action for declaratory relief, because the plaintiffs never appealed DNR's final decision approving the BBAP in 2005. After telling the parties that he did not expect to rule for several weeks, Superior Court Judge Fred Torrisi issued a decision on Oct. 13, denying most of the state's motion on two related grounds.

First, the court found the BBAP to be a regulation (subject to judicial review under AS 44.62.300) based on the language of AS 38.05.020(b)(1), which requires DNR regulations to be adopted under the Administrative Procedure Act (AS 44.62) but states that "orders by the commissioner classifying land ... are not required to be adopted under AS 44.62." Second, the court ruled that under the language of the APA itself, at AS 44.62.640(a)(3), DNR area plans qualify as regulations.

On Oct. 23, we moved for reconsideration, arguing that AS 38.05.020 distinguishes between area plans and regulations and that the court's reading of the APA is so broad as to view all DNR land management plans, including those for parks and public use areas, as regulations. Because area plans and management plans are not adopted according to the procedural requirements of the APA, they would be susceptible to the argument that they are actually *invalidly* adopted regulations.

Even if all DNR land management plans were considered valid regulations the result would still be problematic, because under AS 41.21.950 violations of state park regulations carry criminal penalties, and DNR has adopted as discrete regulations only those park management guidelines that it has intended to enforce against the public, subject to misdemeanor citations. Our concern is that under the court's ruling, conduct merely inconsistent with park management guidelines would become criminalized.

AAG's Anne Nelson and John Baker represent DNR in this case.

Federal court issues "which waters" decision

On Sept. 29, U.S. District Court Judge H. Russel Holland issued an important 85-page decision on which categories of navigable waters in Alaska are subject to the federal subsistence priority provided for rural Alaska residents on federal lands under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The decision was issued in the consolidated cases of *Katie John, et al. v. United States*, Case No. 3:05-cv-0006-HRH, and *State of Alaska v. Salazar (USA)*, Case No. 3:05-cv-0158-HRH, which had been combined with an earlier case,

Peratrovich, et al. v. United States, Case No. 3:92-cv-0734-HRH.

The several parties challenged federal actions delineating the extent of federal subsistence jurisdiction in navigable water bodies throughout Alaska. Those federal agency declarations stemmed from two decisions of the Ninth Circuit Court of Appeals several years ago, which held that federal lands in which federal subsistence jurisdiction exists include certain navigable water bodies in which the United States holds federal reserved water rights. Those court decisions left it to subsequent proceedings to determine which water bodies qualify.

In this decision, the court upheld the geographic extent of the federal declarations in all respects.

The court rejected state claims that the federal agencies are unlawfully extending their subsistence jurisdiction into too many waters, including: (1) waters “adjacent to” but outside of the boundaries established by Congress for the federal reservations (such as national parks, refuges and forests), including long stretches of the Yukon River and the entire width of large lakes lying outside of those boundaries; (2) waters bounded (and in some cases surrounded) by non-federal lands within reservation boundaries, including private in-holdings and state and Native corporation land selections excluded under ANILCA; and (3) marine and tidal waters “headland-to-headland” within river mouths and bays.

On the other hand, the court also rejected the claims of the other plaintiffs that the federal government is asserting its subsistence jurisdiction over too few waters and fish. Judge Holland rejected their arguments that, under the law, the federal agencies were

required to claim the federal subsistence priority within all other waters in Alaska located (1) “upstream” and “downstream” of federal reservations; (2) within or next to the thousands of individual Native allotments in Alaska; and (3) in all marine waters, even those extending several miles seaward from the Alaska coastline.

Based on those decisions, the court entered final judgment against the *Katie John* plaintiffs and the state on Oct. 22. The Court delayed judgment in the *Peratrovich* lawsuit pending further proceedings. AAG Mike Sewright is the DOL attorney chiefly representing the state in this matter, together with outside counsel.

Endangered Species Act issues

Polar Bear listing cases. On Oct. 20, the State of Alaska filed for summary judgment in its case challenging the listing of the polar bear as a threatened species.

The motion was supported by a joint memorandum of points and authorities filed together with Safari Club International and Safari Club International Foundation, Conservation Force, et al., and California Cattlemen’s Association, et al. These parties jointly asked the court to set aside the final rule listing the polar bear because the U.S. Fish and Wildlife Service failed to comply with the listing standards under the Endangered Species Act and made arbitrary conclusions in violation of the Administrative Procedures Act. The state also filed its own, supplemental memorandum identifying five substantive instances in which the service did not comply with ESA section 4(i), a specific provision requiring that the service provide written justification for failing to adopt regulations consistent with the affected state’s comments.

The state is also a defendant-intervener in two cases brought by the Center for Biological Diversity and Defenders of Wildlife involving the special rule issued under ESA Section 4(d). The state's memorandum in support of the special rule is due in March of 2010. AAG Brad Meyen and outside counsel Holland & Hart LLP represent the state in these cases.

Ice seals. On Oct. 15, NOAA's Fisheries Service announced its decision to not list the two spotted seal populations in Alaska as endangered or threatened following an extensive status review. This conclusion follows a similar finding on December 30, 2008, that listing the ribbon seal is not warranted at this time. The Center for Biological Diversity and Greenpeace, Inc. sued the federal government to challenge the decision to not list the ribbon seal. This month, the state announced its intention to intervene in that case in support of the decision by the federal government.

Vandevere v. Lloyd

U.S. District Court Judge Timothy Burgess issued an order granting our motion for summary judgment in *Vandevere v. Lloyd*, an action brought by Cook Inlet commercial salmon fishermen arguing that the regulations that restricted their commercial fishing opportunities were invalid because they were unconstitutional uncompensated takings of the value of their limited entry permits and shore fishery leases.

The case was initially stayed while an identical case filed earlier in state court by the same attorney for different plaintiffs, *Vanek v. State*, 193 P.3d 283 (Alaska 2008), was resolved by the Alaska Supreme Court, which ruled in the state's favor. After the *Vanek* opinion, summary judgment briefing was completed in the federal case.

Judge Burgess agreed with every point in the *Vanek* opinion and our briefing, holding as follows:

1. Although the federal district court was not bound by the *Vanek* decision, it agreed with both its reasoning and conclusions, and incorporated it by reference.
2. Federal courts will generally defer to state courts to determine the nature of property interests, especially when those interests are creatures of state statute.
3. The plain language of the Limited Entry Act precludes an interpretation that limited entry permits are compensable property under the takings clause of the federal constitution.
4. Permits are use privileges or licenses subject to the police power of the state.
5. Shore fishery leases convey no interest in the water or the fish in the water.
6. Leases contained clear language allowing state regulation to affect the value of the lease without limitation.
7. Federal tax law interpretation cases were not applicable because they were based on federal preemptive law and are not controlling in property takings cases, and there is no federal interest in a takings case like this one.
8. No other Federal law preempts the *Vanek* decision.
9. Shore fishery leases are not contracts of adhesion, nor do they constitute waiver of any constitutional right because the plaintiffs never had any constitutional right to waive.

10. State law limitations on the scope of the interests in permits or leases were not arbitrary or capricious and did not otherwise violate due process.

The plaintiffs have filed a notice of appeal with the Ninth Circuit. AAG General Lance Nelson worked on the case.

Jensen v. Locke

The federal district court also ruled in another case, *Jensen v. Locke*, involving challenges to Board of Fisheries regulations in Prince William Sound and the Copper River as being inconsistent with the Magnuson-Stevens Act and the Federal Salmon Fishery Management Plan for Alaska.

Judge Burgess denied Mr. Jensen's motion for partial summary judgment against the state, ruling on all the legal issues in our favor, but leaving open the issue of whether the fishing he complains of occurs in the EEZ or only state waters as a genuine issue of material fact. The judge has yet to rule on our motion to dismiss or our cross-motion for summary judgment. A favorable ruling on either could result in full dismissal of the case. AAG Lance Nelson and former AAG Steven Daugherty worked on the case.

Oil, Gas, and Mining

On Oct. 27, Superior Court Judge William Morse issued an Order on Appeal affirming a Department of Natural Resources commissioner's decision defaulting the Arctic Fortitude Unit, which is located adjacent to the southern boundary of the Prudhoe Bay Unit.

The commissioner defaulted the unit, which is operated by James White, because he failed to deliver a drilling rig to a pre-existing well

pad on one of the unit's three leases, as required under the unit's DNR-approved Plan of Exploration (POE). White argued to the superior court that he was prevented by *force majeure* from fulfilling his POE obligation because of an Alaska Oil and Gas Conservation Commission (AOGCC) decision determining how many oil spill storage tanks must be made available for the well. White argued that the AOGCC decision, which he has also appealed to Superior Court, was too costly to comply with and made his performance of the POE obligation financially impossible.

Judge Morse concluded, among other things, that an increased cost of performance did not amount to a *force majeure* under White's oil and gas leases. The commissioner must now decide whether to terminate the unit. Senior AAG Jeff Landry represented DNR on appeal.

Opinions, Appeals and Ethics

Ethics and public records requests

Most of the ethics work is confidential. AAG Judy Bockmon addressed many informal ethics inquiries by email and phone, and settled one ethics complaint since the last report, which will result in the payment of a civil fine and restitution.

We received two complaints against state agencies, which we declined to accept as they did not state allegations of violations of the ethics act by state employees. We declined to accept two other complaints against a state officer also for failure to allege ethics act violations but referred them to the agency for possible further action.

We have three other open preliminary investigations and 10 pending complaints.

AAG Dave Jones continued to assist the Governor's Office with the backlog of public records requests. Many thanks to Libby Bakalar, Samantha Christenson, Jean Clarkin, Karen Ince, Michelle Melgar, Toby Steinberger, Tim Twomey, and Kamie Willis for their help.

Appeals and other litigation

Peterson v. State, DNR, Division of Forestry, S-13376: AAG David Jones filed a brief with the Alaska Supreme Court in a state employee's appeal about his employment conditions. The employee claimed that the state discriminated against him because of his age, sex, and alleged disability and violated the implied covenant of good faith and fair dealing. The trial court granted summary judgment to the state, based on briefing from AAG Mags Paton-Walsh. The state's brief on appeal defended the trial court's decision and explained why the evidence that the employee offered was insufficient to avoid summary judgment.

Smart v. State, S-13438: AAG Megan Webb filed an appellee's brief in this appeal involving the Medicaid provider audit program.

As a care coordinator participating in the state's Medicaid program, Keirsten Smart was aware that she must retain proper documentation for services provided and must disclose such documents to the department if selected for one of the annual audits of Medicaid providers. In early 2006, Smart was notified that she had been selected for just such an audit. She was subsequently provided several notices by the department's independent auditor, which helped guide her through the process. During the audit, in which approximately 10 percent of her payment claims for the relevant year were

reviewed, it was discovered that Smart had received five possible overpayments (*i.e.*, payment for a service not provided or for which reimbursement was not appropriate) totaling \$1,040. Smart admitted that she should not have received a \$240 payment, but provided supporting documents and explanations about why the other four payments had been appropriate. Adjusting its findings based on this information, the auditor prepared a final report, concluding that there had been only one overpayment in the claims reviewed. Applying a statistical sampling methodology, the auditor extrapolated the total overpayment for the year as \$2,370. The department provided Smart with a copy of this report, along with a notice of her rights of appeal.

Rather than appeal, Smart sued, seeking declaratory and injunctive relief on behalf of herself and similarly situated others. In doing so, Smart argued that the department had violated her procedural due process rights (based on insufficient notice and a lack of a hearing) and that it had violated the Alaska Administrative Procedure Act when it failed to promulgate a regulation defining the statistical sampling methodology used for Medicaid provider audits. But because Smart had failed to exhaust the administrative remedies available to her and because the department's selection of a specific methodology does not constitute a "regulation," the trial court dismissed her complaint. Libby Bakalar was the trial attorney.

Carrie S. v. State, DHSS, OCS (S-13344) & Jake H. v. State, DHSS, OCS

(S13362): The Alaska Supreme Court issued a memorandum opinion and judgment in this child-in-need-of-aid case in which a mother and father challenged the termination of the mother's parental rights to her son and

both parent's rights to their daughter. The Supreme Court affirmed the termination order.

Failure to remedy. The mother challenged only the failure-to-remedy finding against her, arguing that she had established sobriety and stability in her life since getting married. The Supreme Court rejected her argument, concluding that there was ample evidence to support the trial court's findings. The Supreme Court noted that throughout much of the CINA case, the mother had failed to comply with her case-plan requirements, which included substance abuse treatment; that although the mother had been sober for at least nine months before the termination trial, she had not completed substance abuse treatment; and that although the mother consistently participated in visits with her children, they tended to regress after such visits, demonstrating renewed mental injury.

The father challenged the failure-to-remedy finding against him, arguing that he tried to comply with his case-plan requirements but was hindered by his incarceration. The Supreme Court rejected this argument, noting that mere participation in services is insufficient to demonstrate remedy and that a recent history of substance abuse and/or incarceration (both of which the father demonstrated) may be sufficient to support a failure-to-remedy finding.

The court went on to note that the daughter's young age (she was five) and mental health issues heightened the importance of achieving permanency in this case, that reunification with the father could not occur in less than six months given all that he still needed to accomplish, and that the child had had almost no contact with her father in nearly two years and had only resided with him for a couple of months prior to his incarceration in late 2006. Under the

circumstances, the failure-to-remedy finding was appropriate

Reasonable efforts. The father also challenged the trial court's finding that OCS made reasonable efforts to reunify the family, asserting that the department did little or nothing for him after he was incarcerated. The court rejected this argument, noting that prior to his incarceration, OCS had made active (rather than just reasonable) efforts towards the father, that during his incarceration he was given an updated case plan that identified necessary services, and that the father was able to participate in some of these services through DOC.

Best interests. Finally, the father challenged the trial court's finding that termination of his parental rights was in the daughter's best interests. In rejecting the father's argument, the court focused on the harm the child had suffered while in her parents' care, the length of time she had spent in OCS's custody, the fact that reunification would take a minimum of six more months, the healthy bond the child had with her foster parents, who hoped to adopt her, and the progress she had made in their care.

Shanna Johnston represented OCS at the termination trial; Megan Webb handled the appeal.

Indian law

The Indian law group received a number of questions about pending federal legislation. Monica Jenicek and Peter Putzier made presentations about Indian law to the civil division supervisors and to the criminal division district attorneys. Peter attended a Western Federal Lands seminar on the Indian Reservation Roads program.

The Ninth Circuit denied a petition for rehearing in a case about whether the Bureau of Vital Statistics must recognize tribally issued adoption orders. The section helped review and respond to various tribal proposals and requests for Administration action.

The governor's Rural Action Subcabinet made a trip to Barrow on Oct. 16. The attorney general is the chair of this subcabinet, which is scheduled to submit a report to Governor Parnell in December concerning long-term strategies for lowering the cost of living and improving the quality of life in rural Alaska. The section assisted in preparing for the trip and performing follow-up work.

The Alaska Rural Justice and Law Enforcement Commission met on Oct. 19. The attorney general is a co-chair, and the Indian law section assisted in preparation for the meeting.

The Alaska Federation of Natives convention was held in Anchorage during the week of Oct. 19, and the section helped the attorney general prepare for a speech.

Section members met with representatives of Central Council Tlingit & Haida Indian Tribes and the Tanana Chiefs Conference.

On Oct. 26, Peter Putzier attended the first official meeting of a Joint Federal-State-Tribal Transportation Task Force.

Regulatory Affairs and Public Advocacy (RAPA)

Evidentiary hearing:

U-08-142, Enstar billing error surcharge

On Oct. 6-8, RAPA participated in the scheduled evidentiary hearing before the RCA related to the request by Enstar Natural Gas Co. to include amounts in its 2009 gas cost adjustment (GCA) for a billing error of about \$6.4 million for gas deliveries to the U.S. Department of Defense Fort Richardson. The overcharge to DOD resulted from Enstar's incorrect recording of the usage volumes of gas that the utility transported to DOD for Cook Inlet suppliers from 2004-2007. Enstar now seeks to recover the reimbursement to DOD from its other retail customers via a surcharge because the gas (not delivered to Fort Richardson) was purportedly consumed by them at a lower rate than would otherwise have been the case without the DOD volumetric error.

At the hearing, AAG Glenn Gustafson cross-examined witnesses from the utility and supplier Aurora Power Resources, and maintained that neither applicable GCA regulations nor Enstar's GCA tariff support Enstar's request for recovery through prospective rate increases in retail rates under the circumstances. The commission must issue its decision by Jan. 8, 2010.

Comments filed:

TA179-4, Enstar gas acquisition cost surcharge

On Oct. 10, RAPA filed Comments Recommending Suspension for Consolidation with Current Rate Case in response to public notice of Enstar's renewed proposal to recover \$2.4 million in costs associated with its last series of gas supply contracts from Cook Inlet producers.

Under the utility proposal, a \$.0186 per mcf surcharge would be applied to all retail gas sales billings for approximately four years until

the total is collected. Enstar previously filed TA 176-4 seeking to recover the same purported costs but the RCA rejected that filing for lack of adequate cost support subsequent to receiving AG/RAPA comments that recommended suspension of the proposal for consolidation with the utility's then-impending rate case.

The AG's recent filing by Chief AAG Daniel Patrick O'Tierney distinguished the renewed proposal from a previously approved surcharge, maintained that the proposal should be comprehensively evaluated within the context of the utility's current rate case, and urged careful scrutiny of the reasonableness of the cost support for the proposed surcharge amount consistent with generally accepted ratemaking principles. Commission action is expected by Nov. 13 under the applicable statutory deadline.

Refund decision rendered:

U-07-76/77, GHU/CUC refund methodology ordered

On Oct. 8, the RCA issued Order No. 15 requiring Golden Heart Utilities (GHU) and College Utilities Corp. (CUC) to refund customers according to the methodology advocated by RAPA in the case. As a result, each customer's refund will be based upon the actual amount over-collected from that customer ("rate-to-rate") as required by law, plus applicable interest.

The utilities argued that refunds should be calculated based upon the difference between total company-wide revenues versus revenues that could have been collected if sales had not decreased ("revenue-to-revenue"). In their recent petition for reconsideration of the RCA refund order, the utilities estimate an *additional* \$1.2 million in customer refunds will

be due as a result of the adopted "rate to rate" methodology.

GHU and CUC are investor-owned utilities that provide water and wastewater services in the Fairbanks service area. The subject docket is the third contested rate case filed by the utility in as many years. After an evidentiary hearing, the utilities were required to file a refund plan and they have since appealed the RCA's rate decisions to Superior Court.

Elements of two prior rate cases are also on appeal. The refunds in this docket are excess amounts collected by the utilities from 2007-2009. The total combined refund liability under current RCA Orders in all cases may exceed \$12 million, pending appeals. AAG Samuel Cason is handling the various related GHU/CUC matters.

New cases:

U-09-95, Sand Point electric

On July 17, Sand Point Generating LLC (SPG) filed TA207-230 seeking a 13 percent rate increase and proposing a rate redesign to convert recovery of fuel costs from an energy charge to a COPA adjustment. On Aug. 31, the RCA suspended the filing, granted a 9 percent interim/refundable increase, and invited AG/RAPA participation in the proceeding. RAPA filed an election to participate on Sept. 30. A procedural schedule has not yet been established. At the RCA's request, RAPA is also participating as a party in the review of the utility's related depreciation filing in Docket U-09-29.

U-09-96, TDX North Slope electric

On July 17, TDX North Slope Generating, Inc. (TNSG) filed TA143-227 seeking an 11 percent rate increase and proposing a rate

redesign to convert recovery of fuel costs from an energy charge to a COPA adjustment. On Aug. 31, the RCA suspended the filing, granted an 11 percent interim/refundable increase, and invited AG/RAPA participation in the proceeding. RAPA filed an election to participate on Sept. 30. A procedural schedule has not yet been established. The utility also has a related depreciation filing in Docket U-09-30 that is subject to RCA adjudication.

U-09-108/109, Mile 8 water/wastewater

On Aug. 14, Mile 8 Utilities, LLC (Mile 8) filed TA32-258 and TA12-259 seeking a 22 percent water rate increase and an 18 percent wastewater rate increase, respectively, for utility services offered in the Settler's Bay development in the Palmer area. On Sept. 28, the RCA suspended the filings, granted the requested interim/refundable rate increases, and invited AG/RAPA participation in the proceeding. RAPA filed an election to participate in the proceeding on Oct. 27. Although a standard first rate case for a small utility, the case is complicated by affiliated interest transactions. A pre-hearing conference is scheduled for Nov. 12.

[Torts and Workers' Compensation](#)

Petition for Certiorari Denied

The U.S. Supreme Court denied a petition for certiorari filed by Dan Reust challenging the constitutionality of AS 09.17.020(j), which provides that 50 percent of punitive damages awards shall be deposited into the state's general fund. After losing two Alaska Supreme Court appeals challenging the statute's constitutionality, Reust asked the high court to address the issue, but the court declined. AAG Ruth Botstein opposed the petition.

Alaska Supreme Court oral argument

The Alaska Supreme Court heard oral argument in *Diaz v. State, Department of Corrections, et al.*, on Oct. 21. This case involves a felony inmate who was participating in the Department of Correction's electronic monitoring (EM) Program. Though incarcerated, Diaz was living at home wearing an ankle monitor, and working in the community. When her employer accused her of embezzling money from the business, Diaz was transferred from the EM program to a secure correctional facility. Shortly before the transfer, a private investigator hired by the employer asked her questions about the alleged theft, and DOC officers accompanied her to the employer's place of business for the interview. Later, it turned out that the employer's accusations were false and in fact the employer was the embezzler.

Diaz filed suit against three DOC officers alleging a violation of her federally guaranteed constitutional rights. Her primary allegation was that her due process rights were violated by the transfer from the EM Program. She also alleged that being taken to the interview violated her Fourth Amendment rights. The officers claimed qualified immunity.

The trial court found that no federal right was implicated or violated by the officers' conduct and dismissed Diaz's claims against the officers. AAG Ruth Botstein argued the case and asked the Supreme Court to affirm the grant of summary judgment to the officers.

Medical malpractice case successfully defended

Summary judgment disposed of a lawsuit against the Department of Corrections for medical malpractice, alleging that medical personnel failed to properly treat an inmate's

right hand while he was incarcerated at the Anchorage Correctional Complex.

Prior to his arrest, the plaintiff received significant injuries as the result of an explosion in a meth lab, and he sustained third-degree burns on both of his forearms and hands. Two fingers on his right hand were also fractured. He underwent successful surgery on the fifth metacarpal, but he decided to remove the external surgical hardware himself rather than wait for the scheduled removal several weeks later, thereby causing an internal pin to move toward the tip of the finger.

The state denied liability and moved for summary judgment on behalf of the Department of Corrections. At a hearing on Oct. 5, Judge Patrick Hanley granted the state's motion and dismissed the case. As a result of its successful defense of the case, the state has moved for an award of costs and fees against the plaintiff. This case was successfully defended by AAG Susan West.

Workers' compensation hearing

An employee injured his back moving file cabinets in April 2003. Diagnostic images demonstrated a herniated disc. The employee continued to work and received conservative treatment. An updated MRI showed the herniation had largely resorbed.

The state, as employer, controverted benefits commencing January 2007, based on an independent medical evaluation that the ongoing symptoms were related to the employee's degenerative condition. (He was about 55 years old.) The employee filed a claim seeking ongoing medical care for his symptoms, contending that the work injury

was likely a substantial cause of the employee's condition and need for treatment.

At hearing, the employee, who continues to work, argued that he wanted his claim to be open in case he needed treatment in the future that was related to the work injury. The employee had not received medical treatment other than over-the-counter medication for over two years. The state argued the work injury was not the cause of the employee's current condition or symptoms and that even if the claim was compensable, the Workers' Compensation Board could not award future, unspecified medical care. A decision is pending. This matter was defended by AAG Chris Beltzer.

Other workers' compensation matters

Last month's report mentioned an appeal of the board's award of double an attorney's hourly rate to be paid by the state as employer. The first issue on appeal was whether the state was required to post a *supersedeas* bond to perfect the appeal. On this issue the Alaska Workers' Compensation Appeals Commission found it did not have the authority to order the state to post a *supersedeas* bond in order to obtain a stay of a money judgment. The Appeals Commission also held that the state would suffer irreparable harm if it had to pay the attorney fee award because there was no vehicle to recoup the award if it prevailed on appeal.

While the Commission held the doubling of the attorney's hourly rate on the basis that it was necessary to ensure representation to injured workers raised serious and substantial questions, it stayed only half of the money judgment on the theory that payment at the attorney's full (but not doubled) hourly rate did not raise serious and substantial questions.

The section received a favorable decision at the board level on an employee's petition to modify the board's prior order. The employee filed an affidavit of readiness of hearing (affirming discovery was complete and that he was ready for hearing) before obtaining discovery from the state. After filing the affidavit of readiness, a discovery dispute arose and the employee continued to hearing without resolving the dispute and obtaining discovery from the state.

The Workers' Compensation Board's decision from the hearing held in part that the employer did not owe a penalty that the employee alleged was owed. After the decision, the employee received discovery from the state. He petitioned the board for modification of the decision based on the "new discovery wrongly withheld." In response to the petition, the board adopted the state's position holding that the employee waived his right to rely on the "new discovery" by choosing to go to hearing without it. The board also held that even if the board had been presented with the "new discovery," it would not have changed the underlying decision. This issue is now before the Alaska Workers' Compensation Appeals Commission; the state's brief is due shortly.

Both of these matters were handled by AAG Chris Beltzer.

Transportation

In April, the U.S. District Court found that the environmental impact statement (EIS) for the Juneau access project failed to consider the alternative of improving transportation using existing ferry assets. DOT&PF appealed this decision to the Ninth Circuit Court of Appeals. This month, AAG Sean

Lynch prepared the state's brief to the Ninth Circuit, arguing the alternative was sufficiently considered.

CRIMINAL DIVISION

Anchorage DAO

Taylor Winston tried a young man for murdering and attempting to kill friends who he suspected were going to betray him, by, of all things, moving to another state to start a better life. The defense alleged "mistake" because the defendant claimed no memory of the killing events, just anger and disappointment that they were going to leave him behind after he had helped them in their time of need. This was Taylor's first murder trial.

John Skidmore closed out his tenure at the Anchorage DAO with lots of guilty verdicts involving sexual abuse and unlawful exploitation by former APD officer Sammy Cohen. The case involved conduct from 2000, so faded memories combined with a "good character" defense led the jury to deliberate for four days. The case was originally Terry Foster's and was handed off to John in June when Terry retired. John is moving to OSPA to head the special prosecutions section.

Regan Williams secured a guilty verdict in a serious fear assault in which a good Samaritan was threatened with a gun after he succeeded in stopping a man from beating his wife in a public parking lot. The wife left the scene and was never heard from.

Dan Shorey concluded an Ambien DUI case with a change of plea in the middle of trial.

Kodiak DAO

Six individuals were indicted or arrested for trafficking in methamphetamine. A single arrest at the beginning of the month resulted in the seizure of cash and about 33.5 grams of methamphetamine. Subsequent arrests during the month yielded a seizure of an additional 8.3 grams of the drug.

Beyond the narcotics trafficking cases, criminal filings with the court remain steady. An intoxicated Larsen Bay man was indicted for felony criminal mischief after throwing a rock through the window of his daughter's residence after she put him out of the home.

Palmer

Adam Cardwell was sentenced to a total of 56 months, with 49 months suspended, and five years of probation on seven counts of assault in the third degree. He was also ordered not to possess weapons and not to contact the Palmer District Attorney's Office and the victims.

Judge Kristiansen declined to find the aggravator that the defendant knowingly directed his conduct at an active law enforcement officer, despite the parties agreeing that *Blakely* did not apply and despite the facts that Cardwell threatened to hunt down Alaska state troopers, shoot them, kill them and skin them. ADA Paul Roetman prosecuted this case.

T.J. Gibbons and T.J. Hicks were sentenced in Glennallen at a unique "circle sentencing" held by Judge Eric Smith. Gibbons and Hicks were convicted of burglary in the second degree, vehicle theft in the first degree, criminal mischief in the third degree and criminally negligent burning. Gibbons

was also convicted of burglary in the first degree. They broke into a local fire department, stole a truck, then damaged and burned it. They also burned a track rig being used to lay local utility lines.

The circle sentencing took place at the Tazlina Village community hall and was attended by about 60 people. Judge Smith sentenced Gibbons to five years and Hicks to three years. Restitution in the case will exceed \$400,000. The defendants, who appeared stoic and detached in previous hearings, cried and apologized after hearing many locals and family members give their thoughts and insight into the matter. ADA Jarom Bangerter handled the case for the state.

On Oct. 12, Judge Greg Heath sentenced Dorothea Dupree to 11 years, with two suspended, on a charge of assault in the first degree. Dupree drove while intoxicated into the opposing lane of traffic, causing a head-on collision. One victim sustained a collapsed lung and broken neck, ribs, foot and toe. Another victim's legs were crushed. Dupree's blood alcohol level was .267 about three hours after the crash. Dupree had one prior misdemeanor DUI, but no previous felony record. ADA Trina Sears prosecuted this case.

On Oct. 23, Judge Eric Smith sentenced Kyle Bissonette to eight years, with three years suspended, five years probation and restitution of \$275,780 on charges of criminally negligent homicide of an unborn child, criminally negligent homicide and assault in the third degree. On Sept. 20, 20-year-old Bissonette was drinking heavily, snorting cocaine and smoking marijuana with three teenage friends at his home in Big Lake. At 4 p.m., the group decided to go to Wasilla to get more marijuana. Bissonette's 15-year-

old girlfriend was designated the driver because she was the only one not drinking.

While the car was going south on the Parks Highway, Bissonette grabbed the steering wheel and jerked it to the right. The driver lost control, crossed the center line and slammed into an oncoming car. The results were catastrophic. The people in the northbound lane, a woman and her stepfather, were seriously injured and trapped in their vehicle. The woman was nine months pregnant and lost the baby. The three backseat passengers in Bissonette's car were thrown from the car. All sustained serious injuries, and one of them, a 16-year-old girl, later died from her injuries. Adding to the senselessness of the loss, the girl who died was the only person in the vehicle wearing a seat belt. Bissonette did not have any prior criminal history. ADA Rick Allen was the prosecutor.

A Palmer jury convicted Michael Gerenday of misdemeanor eluding. Defendant turned his lights off during the pursuit and ended up in a ditch. He claimed he was intending to stop for the trooper but got delayed. The jury deliberated for 20 minutes before returning the guilty verdict. ADA Shawn Traini was the trial prosecutor.

Troy Gamber was sentenced to 36 years, with 10 years suspended, for sexually abusing his daughter from 1997 to 2001. He had three prior felony convictions. Tamara Robertson pled guilty to one count of assault in the third degree related to a reckless driving incident that resulted in injury to her boyfriend's arm. After the two were fighting, she started driving recklessly and lost control of the car. The victim's arm was out of the window at the time of the crash. Doctors originally thought that he may lose his arm, but fortunately, that did not occur.

These cases were handled by ADA Rachel Gernat, who was named Alaska's Prosecutor of the Year by the Department of Law - Criminal Division.