Alaska Department of Law

Federal Laws and Litigation Report

In compliance with AS 44.23.020(h)

Dated: January 23, 2017

Foreword

Under AS 44.23.020(h), the Department of Law must submit a report to the legislature that identifies federal laws, regulations, or actions that impact the State of Alaska and that the department believes may have been improperly adopted or unconstitutional. This report provides a brief summary of each federal law, regulation, or action identified along with a description of any ongoing litigation. To provide a complete picture, this report also identifies cases in which the State intervened or filed or joined in an amicus brief relating to a federal action or law. For more information on any item discussed in this report, contact the Civil Division's legislative liaison, Cori Mills, at (907) 465-2132 or cori.mills@alaska.gov.

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I. Federal Laws or Actions that Conflict with, or Attempt to Preempt, State Management of its Lands and Resources

1. National Park Service (NPS) regulations that apply to "waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach . . . and without regard to the ownership of submerged lands, tidelands, or lowlands."

Citation to Federal Statute or Regulation – 36 C.F.R. § 1.2(a)(3)

Description of the Issues Identified – The State believed this regulation violated Alaska National Interest Lands Conservation Act (ANILCA) section 103(c) (43 U.S.C. § 3103(c)), which excludes state-owned lands (including submerged lands) and waters from national parks and preserves and prohibits application of NPS regulations to them. The State was involved in two separate cases relating to this regulation. The only remaining case is *Sturgeon*.

In a related matter, the Public Use Management Plan for the Togiak National Wildlife Refuge currently asserts jurisdiction over state navigable waterways in the refuge. The plan directs the U.S. Fish and Wildlife Service to adopt regulations limiting unguided use on the waterways. Regulations have not yet been proposed and will likely not be proposed until the *Sturgeon* case is completed. For now, the State continues to monitor the matter.

Litigation – *Sturgeon and State of Alaska v. Masica, et al.* (9th Cir., 13-36165, 13-36166)

Status of Litigation – The original lawsuit brought by Mr. Sturgeon challenged NPS' ban on the use of hovercraft on all navigable waters, including state-owned navigable waters. The State intervened in the case to challenge the authority of NPS to require Alaska Department of Fish & Game to obtain a research specimen collection permit to conduct salmon genetic sampling from the state-owned bed (a gravel bar) of the Alagnak River. The federal district court ruled in favor of NPS and the State appealed to the Ninth Circuit. The Ninth Circuit separated the two issues and ruled that the State did not have standing because the State's harm in obtaining the permit would not be remedied by a favorable decision. On the issue presented by Mr. Sturgeon, the Ninth Circuit held that the regulation did not violate ANILCA. The U.S. Supreme Court heard the case and overturned the Ninth Circuit's ruling. The matter is now back before the Ninth Circuit. The State submitted supplemental

briefing and sought to confirm its continued status as an intervenor. Oral argument was held before the Ninth Circuit on October 25, 2016. We are awaiting a decision.

2. BLM's refusal to recognize State's ownership in the land underlying portions of certain rivers

Description of the Issues Identified – Under the U.S. Constitution and federal law, the State of Alaska gained ownership to the beds of navigable or tidally-influenced water on the date of statehood. The only exceptions are waters expressly withdrawn by the federal government prior to statehood or waters determined to be "non-navigable." There are a number of ongoing disputes with the Bureau of Land Management (BLM) where the agency has refused to recognize the State's interest in the land underlying rivers that the State believes are navigable.

a. Mosquito Fork of the Fortymile River

BLM previously rejected evidence presented by the State that the Mosquito Fork is navigable. It instead labeled the river "non-navigable" and denied the State's ownership of the land underlying that river. BLM has since disclaimed any interest in the lands underlying the Mosquito Fork after the State filed litigation.

Litigation – *State of Alaska v. U.S.* (9th Cir., 16-36088, 17-35025)

Status of Litigation – On July 27, 2015, one day prior to oral argument on the State's motion for summary judgment and three weeks prior to trial, BLM filed a disclaimer of interest pursuant to 28 U.S.C. § 2409a(e). BLM disclaimed all interest adverse to the State in the submerged lands underlying the disputed portion of the Mosquito Fork. The Court confirmed the disclaimer on July 28. In response to the State's motion for an award of fees and costs, the district court found that the federal government had acted in bad faith during the case and awarded the State $582,629 in fees. The U.S. appealed the award and the State cross-appealed the district court's decision that expert fees and expenses are not recoverable. The amount at issue is $335,758.44. Briefing before the Ninth Circuit Court of Appeals is scheduled to begin in April.

b. Stikine River

State sought to quiet title to submerged land underlying the Stikine River by filing a lawsuit in federal district court. The federal government issued a disclaimer of interest in lieu of filing an answer.

Litigation – *State v. U.S.* (3:15-cv-00226)

Status of Litigation – The district court found that the State was the prevailing party for purposes of costs, and the federal government appealed. The appeal is related to legal issues in the Mosquito Fork appeal. Briefing is stayed pending the federal government obtaining final approval from the Solicitor General to pursue the appeal.

c. Kuskokwim River

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 BLM denied the request, and the State filed an administrative appeal to the Interior Board of Land Appeals (IBLA). Briefing is complete, and we are awaiting a decision by the board.

d. Knik River

In approving Eklutna, Inc.'s selection application, BLM did not preserve Alaska Native Claims Settlement Act 17(b) easements and purported to convey portions of the bed of the Knik River, which the State asserts is a state navigable waterway. The State appealed the approval of the land selection to the IBLA, but the issue of navigability has to be challenged in district court. The IBLA appeal is currently stayed pending ongoing negotiations. On the issue of the Knik River, the State is continuing to negotiate with BLM in an attempt to avoid litigation.

3. Application of 2001 Roadless Rule in areas like the Tongass National Forest

Description of the Issues Identified – The 2001 Roadless Rule prohibits road construction, reconstruction, and timber harvesting on inventoried roadless areas in national forests, including the Tongass National Forest in Southeast Alaska. The State believes that the rule was improperly adopted and incorrectly applied to Alaska. Although an exemption for Alaska was issued by the federal government, the court struck down the exemption. The Roadless Rule has greatly impacted the timber industry in Southeast Alaska as well as increased costs for developing hydroelectric and other projects.

Litigation – *State of Alaska v. U.S. Dept. of Agriculture* (D.C. Dist. Ct., 1:11-cv-01122)

Status of Litigation – After the Alaska District Court struck down the exemption, the State filed a separate lawsuit in D.C. District Court challenging the Roadless Rule and its application to Alaska. After various procedural challenges that were rejected by the D.C. Court of Appeals, the case is being heard on the merits by the D.C. District Court. We have completed supplemental briefing at the court's request, and we are awaiting a decision.

4. Izembek National Wildlife Refuge/King Cove to Cold Bay Road

Description of the Issues Identified – For many years, residents of King Cove have been trying to get a road from the village to the airport at Cold Bay, primarily for health and safety purposes, where large planes can land in the area's often poor weather conditions. A portion of the area the road would traverse is within federal wilderness in the Izembek National Wildlife Refuge. The State intervened in a case filed by Agdaagux Tribe of King Cove, and others, challenging the decision of Interior Secretary Jewell denying a proposed land exchange which would have allowed construction of a road. The State asserted that the secretary's decision violates the National Environmental Policy Act and the Omnibus Public Land Management Act, among other claims. The State is also continuing to explore the potential for asserting an R.S. 2477 right-of-way across the refuge based on the historical use of roads and trails in the King Cove area. In April 2014, the State provided the Department of Interior a 180-day notice of intent to sue, which is required before an R.S. 2477 lawsuit could be filed. In addition to further evaluating the R.S. 2477 claim, the State is also actively pursuing other legal alternatives to achieving construction of the road.

Litigation – *Agdaagux Tribe of King Cove v. Jewell* (9th Cir., 15-35875).

Status of Litigation – The district court upheld Secretary Jewell's decision refusing to build the road, and the plaintiffs, including the State, appealed. The briefing is complete, but oral argument has not been set.

5. Federal action, inaction, and management activities related to R.S. 2477 rights-of-way owned by the State

Description of the Issues Identified – The federal government refuses to recognize the State's interest in many rights-of-way that were granted to the State under Revised Statute 2477. If left unchallenged, the impact would be substantial. The State could lose its ownership interest and/or management authority over more than 600 identified and codified rights-of-way, encompassing over 20,000 linear miles of travel corridors. The State could also lose its ownership interest or management authority over numerous other

R.S. 2477 rights-of-way within Alaska that are known or believed to exist. Additionally, the federal government has imposed public use restrictions in some rights-of-way which are impacting citizen livelihoods. The State has filed litigation, identified below, asserting its rights to a portion of the R.S. 2477 rights-of-way.

Primary Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 4:13-cv-00008); *State of Alaska v. U.S.* (9th Cir., 14-35051)

Status of Litigation – The case involves rights-of-way crossing lands owned by the U.S. and others, including Native allotment owners. The district court granted a motion to dismiss brought by the Native allotment owners in relation to their properties. The State appealed, and the Ninth Circuit Court of Appeals held that the State needed to condemn the rights-of-way across any Native allotments. The State's case against the other defendants has been stayed pending condemnation of the rights-of-way across the Native allotments.

Other Related Litigation – A number of other cases address similar issues:

Ahtna, Inc. v. State, Case No. 3AN-08-6337 CI (Klutina Lake Road and Copper Center to Valdez).

Dickson v. State, Case No. 3AS-12-7260 CI (superior court held that a portion of the historic Iditarod Trail (Knik to Susitna) was in fact an R.S. 2477 that belonged to the State for public use).

Aubrey v. State, Case No. 3PA-13-02322 CI (involving an appeal of DNR management actions taken concerning the Chickaloon-Knik-Nelchina right-of-way).

In Re. Memorandum of Decision Concerning Chitina Cemetery Road, 43 U.S.C. § 932, RST File Number 1974 (involving an administrative appeal of DNR's decision concerning the Chitina Cemetery Road).

6. U.S. Forest Service failure to recognize 4407 easement for Shelter Cove Road in Ketchikan

Description of the Issues Identified – A small portion of the Shelter Cove Road project in Ketchikan crosses U.S. Forest Service land. The State has a 4407 easement for the Shelter Cove Road corridor, which means no Forest Service environmental review is necessary for the project. The Forest Service went forward with an environmental review anyway, and granted a permit

authorizing construction and has promised a limited easement for operation of the road.

Litigation – *State v. U.S. Forest Service (1:16-cv-00018); Greater Southeast Alaska Conservation Community v. Stewart (1:16-cv-0009)*

Status of Litigation – Environmental groups challenged the Forest Service's environmental review and permit, and the State intervened to defend the building of the road. However, the environmental groups' litigation did not directly address the scope or validity of the 4407 easement (*Greater Southeast Alaska Conservation Community*). The State then filed its own action in district court seeking to compel the Forest Service to issue the 4407 easement, which would confirm that environmental review and a federal permit were not necessary (*State v. U.S. Forest Service*). The first case, *Greater Southeast*, has been briefed, and we are awaiting the Forest Service's response in the second case.

7. Dispute over ANWR boundary with BLM

Description of the Issues Identified – It has long been the State's position that the western boundary of the Arctic National Wildlife Refuge is the Canning River and that land between the Staines and Canning Rivers should be conveyed to the State; the State's position on the boundary also impacts the State's rights to lease offshore lands adjacent to this area. The State recently issued leases that included this disputed offshore area and, separately, requested conveyance of the uplands from the Bureau of Land Management (BLM) to resolve the issue. BLM denied the State's request for conveyance of the uplands. The federal government indicated its disagreement regarding the offshore leases but has not taken formal action. The State filed an administrative appeal to the Interior Board of Land Appeals on the uplands conveyance, which is pending. Subsequently, the State protested a survey plat that includes additional area west of the Canning River that is also in dispute; BLM denied the protest. The State has also filed an administrative appeal of the survey plat to the IBLA and is seeking to consolidate that matter with the original IBLA appeal.

8. Federal action listing certain populations of the ringed and bearded seals as threatened or endangered under the Endangered Species Act by relying on speculative science

Citation to Federal Register – 77 Fed. Reg. 76706, 76740 (Dec. 28, 2012)

Description of the Issues Identified – Listings under the Endangered Species Act are to be made "solely on the basis of the best scientific and commercial data available" to the applicable federal agency. The National Marine Fisheries Service (NMFS) listed the ringed and bearded seals as threatened or endangered based on projections 100 years into the future. These projections lacked sufficient information supporting the finding and conflicted with the State's data and the best available scientific and commercial data. NMFS also proposed to designate approximately 350,000 square miles of waters off Alaska's coast as critical habitat for the ringed seal. Alaska's ability to manage its wildlife resources and develop appropriate mitigation and conservation measures for the bearded and ringed seals and their habitat within Alaska's lands and waters are displaced or limited by the federal government's actions.

Litigation – *Alaska Oil and Gas Association v. Pritzker* (AK Dist. Ct., 4:13-cv-00018; 9th Cir., 14-35811); *State of Alaska v. NMFS* (AK Dist. Ct., 5:15-cv-00005; 9th Cir., 14-35811)

Status of Litigation – In 2013, the State, along with the Alaska Oil and Gas Association and the North Slope Borough, filed a lawsuit challenging the listing of the bearded seal as threatened. The federal district court agreed with the State and overturned the decision. The Ninth Circuit then reversed the district court and upheld the listing. The State and other plaintiffs filed a petition for rehearing en banc and are awaiting a decision.

Based on the success with the case regarding the bearded seal at the district court level, the State filed a lawsuit challenging the listing of the ringed seal in March 2015. The district court again agreed with the State and overturned the listing. The case is now pending before the Ninth Circuit Court of Appeals. The State's responsive brief is due February 21, 2017.

9. New Rules on critical habitat adopted by federal agencies

Citation to Federal Statute or Regulation – 50 CFR Part 424.

Description of the Issues Identified – The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) adopted new rules concerning designation of critical habitat under the Endangered Species Act in

February 2016. The new rules greatly expand the types of areas that can now be designated as critical habitat and give NMFS and USFWS the purported authority to declare land critical habitat regardless of whether it is occupied or unoccupied, regardless of the presence or absence of the physical or biological features necessary to sustain the species, and regardless of whether the land is actually essential to species conservation.

Litigation – *Alabama v. NMFS* (AL Dist. Ct., 1:16-CV-00593)

Status of Litigation – The case was filed in November of 2016, and the federal government moved for dismissal. The plaintiffs are working on a response.

10. Federal action designating a large area in Alaska as critical habitat for the polar bear under the Endangered Species Act

Citation to Federal Register – 75 Fed. Reg. 76086 (December 7, 2010)

Description of the Issues Identified – Designation of critical habitat under the Endangered Species Act is to be made on the "…basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." For the polar bear critical habitat designation, the federal government's action did not follow the required process and failed to include sufficient record evidence justifying the designation. For example, the federal government included large areas of land in the designation without providing evidence demonstrating features essential to polar bears were present. If the critical habitat designation is upheld, 187,147 square miles of Alaska and territorial waters of the U.S. would be subject to Section 7 federal Endangered Species Act permitting requirements.

Litigation – *State of Alaska v. Salazar, et al.* (9th Cir., 13-35619)

Status of Litigation – Following the district court's decision in favor of the State and other plaintiffs vacating and remanding the final rule, the cases were appealed to the Ninth Circuit. The Ninth Circuit found in favor of the federal government and upheld the critical habitat designation. The State, along with other plaintiffs, petitioned the U.S. Supreme Court for certiorari and awaits the Court's decision on whether to hear the case.

11. Clean Power Plan Rule by the Environmental Protection Agency (EPA) Under Section 111(d) of the Clean Air Act

Citation to Federal Statute or Regulation – 40 C.F.R. §§ 60.5700-60.5820.

Description of the Issues Identified – The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. EPA contemplates that state plans required by the rule will include measures "beyond the fence" of the targeted power plants – e.g. statewide energy efficiency programs and new renewable generation. Because state plans would be federally enforceable, the rule effectively grants EPA new authority to regulate in areas traditionally within the state's jurisdiction. When the rule was first proposed, Alaska submitted comments explaining the severe impacts the rule would have on the delivery of electricity in Alaska and requesting an exemption. The EPA excluded Alaska and Hawaii from the final rule but indicated that this may only be temporary. Although Alaska was not included, the State continues to monitor the implementation of the rule and the lawsuits that have been brought by other states to challenge the rule.

12. Adoption by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) of the "waters of the United States" rule

Citation to Federal Statute or Regulation – The final rule would affect state and federal regulation across all facets of the Clean Water Act, including activities permitted under Section 402 (wastewater discharges) and Section 404 (dredge and fill); 33 CFR Part 328; 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

Description of the Issues Identified – Under the Clean Water Act, the federal government has jurisdiction over "waters of the United States." The EPA and the Corps adopted a new rule that attempts to define what is encompassed by the term "waters of the United States" for purposes of federal jurisdiction under the Clean Water Act. Among other things, the new rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within a certain geographic limit to downstream waters already covered by federal law. Additionally, if "adjacent" or "neighboring" water extends into the set geographic limit by even just a few feet, the entire water body or wetland is now subject to federal jurisdiction and permitting. By virtue of Alaska's unique and abundant water and wetland areas, many adjacent or neighboring waters will fall within the rule, regardless of their true "connectivity" to downstream waters.

Litigation – *North Dakota v. EPA* (ND Dist. Ct., 3:15-CV-00059)

Status of Litigation – Alaska joined a coalition of 12 states in filing a complaint in the federal district court in North Dakota challenging the rule. Among other claims, the states assert that EPA and the Corps failed to consult as required by the Clean Water Act in developing the rule; acted arbitrarily and capriciously in violation of the Administrative Procedures Act; and violated the National Environmental Policy Act by failing to prepare an environmental impact statement to assess the impacts of this significant rulemaking. The district court case is currently stayed pending further decision by the Sixth Circuit Court of Appeals or the U.S. Supreme Court to determine which court has jurisdiction. The Sixth Circuit has enjoined implementation of the rule until a decision is made.

13. Adoption by the Department of Interior, Office of Surface Mining Reclamation and Enforcement (OSM) of the Stream Protection Rule Targeting Coal Mines

Citation to Federal Statute or Regulation – 30 CFR Parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, 827

Description of the Issues Identified – The new regulations adopted by OSM set new requirements for testing and monitoring streams that could be impacted by nearby mining. The new regulations also set standards for protection and restoration of those waterways. The State submitted comments on the draft rule in October 2015. The State's comments expressed concern that the rulemaking process was not transparent, the draft rule was too "one size fits all," and the rule did not take Alaska's unique conditions into consideration. Ultimately, unless the new regulations are reversed either by a court action or litigation, the State would have to change its statutes to conform with the new regulations in order to maintain primacy over surface mining across the State. Alaska's congressional delegation has made statements about taking legislative action to overturn the rule, and Alaska's Attorney General joined several other attorneys general in requesting that Congress and the President overturn the rule through the Congressional Review Act.

Litigation – *State of Ohio v. U.S. Dept. of Interior* (D.C. Dist. Ct., 1:17-cv-00108)

Status of Litigation – The State joined a multi-state lawsuit challenging the rule on January 17, 2017. We are awaiting the federal government's response.

14. Preemptive exercise by the Environmental Protection Agency (EPA) of its Clean Water Act Section 404(c) authority to veto dredge and fill activities on state lands in the absence of a Section 404 permit application

Description of the Issue Identified – EPA announced in the winter of 2011 that, in response to certain petitions, it would prepare a Bristol Bay Watershed Assessment (BBWA) that would comprehensively look at the potential impacts of large scale development throughout 15 million acres in the Bristol Bay area. Later, EPA refined its assessment to consider only potential impacts of hypothetical large scale mine development. But EPA records show that as early as 2009, before any petitions were filed, EPA was discussing whether it would use its Section 404(c) authority to regulate State lands at the Pebble deposit in order to prevent or curtail mining at the site. The final BBWA was released in January 2014, and in February 2014 EPA announced it was conducting a Section 404(c) veto review. In July 2014, EPA published a proposed veto decision in the Federal Register proposing to significantly restrict dredge and fill activities for mining at Pebble. Throughout these events, the State voiced concerns about EPA's actions with respect to both the BBWA and commencement of the veto review process. EPA has not yet issued a final decision, in part, because of lawsuits brought by the Pebble Limited Partnership. The State continues to monitor the cases, which are currently stayed while the parties seek to negotiate a resolution.

15. NPS and USFWS regulations purporting to preempt state wildlife management on federal lands

Citation to Federal Statute or Regulation – 80 Fed. Reg. 64325 (October 2015); 81 Fed. Reg. 151 (August 2016)

Description of the Issues Identified – The National Park Service (NPS) and the U.S. Fish and Wildlife Service (USFWS) both adopted regulations that conflict with state management of wildlife on federal land. NPS adopted regulations that would allow the park superintendent to decide each year which state laws and regulations are contrary to park policies and should not be enforced. There would be no public comment process associated with making and enforcing the list. USFWS adopted regulations prohibiting several means of take for predators and changing public participation procedures for emergency, temporary, and permanent closures.

Litigation – *State v. Jewell* (3:17-cv-00013)

Status of Litigation – The State filed a lawsuit challenging the regulations on January 13, 2017. The State is waiting for the federal government's response.

16. National Park Service (NPS) issues subsistence collection rule

Description of the Issues Identified – Over the objections of subsistence users, the State, and others, NPS published a final rule on January 12, 2017 that would restrict the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade. The rule also limits the type of bait to be used at bear bait stations, and prohibits falconers from taking live raptors. These rules conflict with state fish and game management. The State is evaluating all options.

17. Federal Subsistence Board decision to allow gillnetting in federal waters outside of Kenai River

Description of the Issues Identified – 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.

18. President Obama's offshore development ban

Citation to Federal Statute or Regulation – Section 12(a) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1341).

Description of the Issues Identified – President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all drilling in certain off-shore areas, including large portions of the Chuckchi and Beaufort Seas. The State is evaluating all options, including whether there is any legal recourse.

II. Federal Litigation in Which the State Intervened in Support of a Federal Action

1. Taking Land into Trust for Tribes – *Akiachak Native Community v. Dept. of Interior* (D.C. Cir., 13-5360)

The Department of Interior had a regulation excluding Alaska from regulations that otherwise govern the creation of Indian trust land. Akiachak Native Community, along with other plaintiffs, challenged the regulation, and the State intervened in support of the federal government. The State and the federal government defended the existing regulation exempting Alaska. The

federal district court disagreed and found in favor of the plaintiffs. The federal government and the State appealed, but subsequently the federal government changed its regulations to remove the Alaska exemption. The appellate court dismissed the appeal on mootness grounds. Since the case ended, the State has received notice from the Bureau of Indian Affairs (BIA) of one land into trust application submitted by the Craig Tribal Association. The State submitted its comments to the application in December, and the BIA recently granted the application. It is the State's understanding from various news articles and word of mouth that other applications have been submitted by Tribes to the BIA, but it has not received official notice of those applications yet.

2. **Mining Claim Rules – *Earthworks v. U.S. Dept. of Interior* (D.C. Dist. Ct., 1:09-cv-01972)**

   Earthworks filed a lawsuit against the federal government challenging certain rules relating to mining claims. These rules generally benefit miners by eliminating certain fees and restrictions. The State intervened in support of the federal government. The case is pending before the federal district court.

3. **Wishbone Hill Mine – *Castle Mountain Coalition v. OSMRE* (AK Dist. Ct., 3:15-cv-00043)**

   Several environmental and citizen groups challenged the validity of the Wishbone Hill coal mine permits on the grounds that the permits should have automatically terminated under federal law. The district court agreed and remanded the matter back to the Office of Surface Mining Reclamation and Enforcement. Usibelli, the mine owner, recently filed a request to certify an appeal, which the State has joined.

4. **Salmon Fishery Management Plan – *United Cook Inlet Drift Association v. National Marine Fisheries Service* (9th Cir., 14-35928)**

   United Cook Inlet Drift Association (UCIDA) sued the National Marine Fisheries Service (NMFS) challenging the validity of Amendment 12 to the Fishery Management Plan for Salmon Fisheries in the Exclusive Economic Zone off the Coast of Alaska. Amendment 12 effectively removes federal oversight under the Magnuson-Stevens Act, thereby allowing state management, for three fishing areas beyond the three-mile limit from shore. One of these areas was the lower Cook Inlet, which is the focus of the lawsuit. The State intervened in support of NMFS to protect the State's interest in maintaining management authority over the area. The federal district court found in favor of NMFS, upholding Amendment 12. After UCIDA appealed, the Ninth Circuit reversed the district court and held that federal oversight is

required. The State is considering filing a petition for certiorari with the U.S. Supreme Court. In the meantime, the case has been remanded to the district court for determination of the terms of the judgment to be entered in favor of UCIDA.

5. **Big Thorne Timber Sale - *SEACC v. U.S. Forest Service* (AK Dist. Ct., 1:14-cv-00013; 9th Cir., 15-352332)**

   In three separate suits, plaintiffs are seeking injunctions to prevent the U.S. Forest Service's Big Thorne Timber sale on Prince of Wales Island. The State has joined with several other parties as intervenor-defendants in support of the Forest Service. The district court upheld the timber sale and plaintiffs appealed. The Ninth Circuit denied plaintiffs motion for injunction pending appeal, and the parties await the appellate court's decision on the merits.

III. Federal Litigation in Which the State Filed or Joined in an Amicus Brief

The following list summarizes the cases where the State either filed or joined in an amicus brief in 2016 involving the federal government or the potential preemption of state law.

1. ***U.S. Army Corps of Engineers v. Hawkes*** (Amicus Brief, Supreme Court). The state joined North Dakota's multi-state amicus brief, which argued that an Army Corps of Engineers decision that property contains a "water of the United States" for purposes of the Clean Water Act is a final agency action and should be subject to judicial review under the APA.

2. ***Kolbe v. O'Malley*** (Amicus Brief, Fourth Circuit En Banc). Alaska joined West Virginia's amicus brief which challenged Maryland's assault weapons ban on the grounds it violates the Second Amendment, and argued that the ban should be subject to strict scrutiny under Second Amendment.

3. ***American Building Industry Association v. Department of Commerce*** (Amicus Brief, Certiorari Stage, Supreme Court). We joined Alabama's multi-state amicus brief, which argued that the Secretary of Commerce's analysis of "economic impact" for critical habitat designation area should be subject to judicial review.

4. ***Markle v. U.S. Department of Commerce*** (Amicus Brief, Fifth Circuit En Banc). We joined Alabama's multi-state amicus brief, which argued that property which is unsuitable to a species cannot serve as "essential critical habitat" and that U.S.

Fish and Wildlife Service's decision to exclude areas from critical habitat from cost-benefit analysis is not discretionary and should be subject to judicial review.

5. ***New Mexico v. U.S. Department of Interior*** (Amicus Brief, Tenth Circuit). Alaska joined a multi-state amicus brief drafted by Colorado, Arizona, and Utah, which argued that the Fish & Wildlife Service must comply with state permitting requirements before releasing experimental populations pursuant to Endangered Species Act consultation regulations.