# Alaska Department of Law

## Federal Laws and Litigation Report

*in compliance with AS 44.23.020(h)*

**January 15, 2023**

# Forward

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 related ongoing litigation in which the State intervened or joined. For more information on any item discussed in this report, contact Assistant Attorney General Parker W. Patterson, at (907) 465-6544 or parker.patterson@alaska.gov.

# Contents

## I. EDUCATION

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| **Education *Bostock* Guidance**<br><br>Federal Dept. of Education and the Equal Opportunity Employment Commission intend to apply the *Bostock* decision to educational facilities, infringing rights of Alaskans and the sovereignty of the State. | Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*<br><br>86 FR 32637 | Pursuant to EO 13988, the federal DoE and EEOC issued guidance applying the SCOTUS *Bostock* ruling to Title IX of the Education Amendments of 1972 with respect to discrimination based on sexual orientation and gender identity<br><br>Adherence to the guidance will require implementation of expensive and onerous new procedures and obligations, including potentially ending sex-separated facilities and athletics and mandating the use of preferred pronouns.<br><br>AS 14.18.040(a) requires that a school that provides "showers, toilets, or training-room facilities for athletic or recreational purposes shall provide comparable facilities for both sexes, either through the use of separate facilities or by scheduling separate use by each sex."<br><br>DoE and EEOC's Offices of Civil Rights will enforce Title | The guidance is arbitrary and capricious and was adopted without compliance with the Administrative Procedures Act. It violates the Spending Clause, the Tenth Amendment and the First Amendment to the US Constitution, and the separation of powers. | • *Tennessee, et al. v. U.S. Dep't of Education*, 3:21-cv-00308 (E.D. Tenn)<br><br>A coalition of 20 states, including Alaska, filed a complaint in September 2021 followed by a motion for preliminary injunction. On July 15, 2022, the district court denied the federal defendants' motion to dismiss and granted the plaintiff states' request for a preliminary injunction. |

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| | | IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance. | | |
| **SNAP Benefits *Bostock* Rule**<br>New USDA memorandum and rule apply SCOTUS *Bostock* ruling regarding sexual and gender identity discrimination to SNAP benefits program | Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement<br>87 FR 35855 | The new memorandum and rule require implementation of expensive and onerous new procedures and obligations, including potentially ending sex-separated facilities and athletics and mandating the use of preferred pronouns.<br>AS 14.18.040(a) requires that a school that provides "showers, toilets, or training-room facilities for athletic or recreational purposes shall provide comparable facilities for both sexes, either through the use of separate facilities or by scheduling separate use by each sex." | Alaska s does not deny benefits based on a household member's sexual orientation or gender identity. The memorandum and rule violate the Administrative Procedure Act, and the non-delegation doctrine, the major questions doctrine, the separation of powers doctrine, and the anti-commandeering doctrine. | • *Tennessee et al. v. USDA*, 3:22-cv-00257 (E.D. Tenn.)<br>The State joined a Tennessee-led coalition against the USDA memorandum and rule. Plaintiffs seek a preliminary injunction. Defendants filed a motion to dismiss on December 6, 2022. |

## II. ENVIRONMENT

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| **EO on Climate Change**<br>EO 13990 requires federal agencies to consider social costs of climate change in future actions and regulations | EO No. 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis<br>86 FR 7037 | Pursuant to EO 13990, the federal Interagency Working Group published "interim" social costs of greenhouse gases without notice or comment. They require federal agencies to monetize costs of greenhouse gas emissions based on projections that purport to predict the next 300 years.<br>Alaska cooperatively administers many federal programs directly affected by the Working Group's actions. The Executive Order and the Working Group's Interim Values will directly impact the actions Alaska must take in its participation in these cooperative-federalism program. | The IWG's interim social costs of greenhouse gases violated the APA because they were published without notice or comment. The Federal executive may not use an "interagency working group" to avoid the requirements of the APA. | • *Missouri et al. v. Biden,* 21-03013 (8th Cir.)<br>On October 21, 2022, the Eighth Circuit upheld the district court's dismissal of the case on the basis that the plaintiff states lack standing. Plaintiff states filed a petition for rehearing en banc on December 5, 2022. |
| **EPA Haze Rule Amendments**<br>2017 Environmental Protection Agency (EPA) haze rule changes require states to amend their state plans relating to air quality | 2017 Regional Haze State Implementation Plan Rule;<br>82 FR 3078 (Jan. 10, 2017) (codified at 40 C.F.R. 51.308) | The State is concerned about having international contributions to haze that are beyond the State's control count against Alaska and other states. The State also objects to the EPA shifting its modeling | EPA's 2017 haze rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, because it converts the statutory discretion that states have in considering the conclusions of a federal | • *Texas et al. v. EPA,* 17-1074 (D.C. Cir.)<br>The State, along with North Dakota, Texas, and Arkansas, challenged the 2017 Regional Haze State Implementation Plan Rule. This case is at the appellate court level. Briefing is currently |

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| | | responsibilities and modeling costs to Alaska. | land manager into a mandatory requirement that states must respond through costly formal revision of their regional haze state implementation plan. | on hold, while EPA revisits aspects of the rule and engages in a new rulemaking process. |
| **<u>EPA Vehicle Emissions Rule</u>**<br>New EPA climate rule will force car manufacturers to transition to electric vehicles | Revised 2023 and Later Model Year Light Duty Vehicle Greenhouse Gas Emissions Standards,<br>86 FR 74,434, 74,493 (Dec. 30, 2021) | EPA's standards infringe on state regulatory authority, threaten electrical grid reliability, Alaskan interests in oil & gas, mining, national security, and freedom of choice.<br>Car manufacturers will be required to produce more electric vehicles.<br>Increasing need for batteries will increase U.S. reliance on foreign sources of rare minerals.<br>Sulfur and cobalt will become far more expensive as a result of decreased production and increased demand.<br>Gasoline consumption will decrease or at least rise more slowly. | EPA's new vehicle standards violate the Clean Air Act, the Energy Independence and Security Act, 42 U.S.C. § 17001 et seq., and the major questions doctrine, and are arbitrary and capricious under the APA. | • *Texas et al. v. EPA,* 22-1031 (D.C. Cir.)<br>In 2019, EPA and NHTSA acted to preempt California from issuing its own fuel economy and greenhouse gas standards and were sued. Alaska and others intervened in support, while other states intervened in opposition, but Alaska eventually withdrew due to other states focusing their arguments on an equal state sovereignty viewpoint that the State disagreed with. That case is *Ohio v. EPA*.<br>The Biden EPA and NHTSA withdrew the Trump-era rule that the State supported and split it into two individual rulemakings, which were themselves immediately challenged or are in the process of being challenged.<br>The State joined *Texas v. EPA*. That case is currently pending before the D.C. Circuit |

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| **<u>EPA WOTUS Rule</u>**<br><br>The EPA interpreted certain wetlands to be "waters of the United States" subject to the Clean Water Act (CWA), infringing the State's sovereignty | EPA intends to apply the Clean Water Act to wetlands in Alaska, even when they might lack discernable surface connections to traditional navigable waters.<br><br>The Obama Administration's 2015 rule expanded what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within certain geographical limits to downstream waters already covered by federal law.<br><br>80 FR 37053<br><br>Under the 2020 rule, the Trump administration narrowed federal jurisdiction with respect to adjacent waters and wetlands.<br><br>86 FR 69372<br><br>The Biden Administration has proposed to extend federal CWA jurisdiction over any waters having a "significant nexus" to traditionally navigable waters. Concurrently, the WOTUS rule as applied to wetlands is being challenged in SCOTUS | The power to control navigation, fishing, and other public uses of water is an essential attribute of state sovereignty. By too broadly interpreting the CWA's key jurisdictional phrase—"waters of the United States"—the 9th Circuit and other lower courts have blessed an EPA power grab that expands the CWA to waters that are not "navigable" under even the most generous common understanding of the term. | The State supports a narrow, plain language interpretation of the CWA's phrases "waters of the United States" and "navigable waters" to include only wetlands that are indistinguishable from waters that are clearly subject to the Act, such as bodies of water that are relatively permanent, standing, or continuously flowing. | • *Sackett et ux. v. EPA*, 21-454<br><br>The U.S. Supreme Court is deciding whether the 9th Circuit has used the proper test for determining if wetlands are "waters of the United States" subject to the CWA.<br><br>The State filed its own amicus curiae brief with the U.S. Supreme Court arguing for the narrower interpretation. The case has been argued and a ruling from the Court is pending.<br><br>The State submitted comments on the proposed rule opposing the expansion and requesting Alaska specific exclusions in February 2022. The State anticipates a final rule in late December 2022 or early January 2023. |

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| **<u>Federal Climate Change Settlement</u>**<br>Federal government's negotiation with climate litigants threatens Alaska's sovereignty. | Federal government's settlement negotiations with plaintiffs seeking to force it to transition away from fossil fuels. | A group of people (predominately minors represented by guardians ad litem) sued the federal government in 2015 to compel it to stop taking actions that perpetuate climate change, and establish a federal policy to transition away from fossil fuels.<br>The federal government is entertaining settlement negotiations after the 9th Circuit has already dismissed the case, and the district court is refusing to implement the 9th Circuit's order (or is at least significantly delaying dismissal). The original complaint sought to impose federal policies that would limit Alaska's sovereignty regarding energy production and natural resource development. | The Biden administration's negotiations with these plaintiffs after the dismissal of the case amounts to collusive litigation to avoid the legal processes government must normally respect before implementing new policies. | • *Kelsey Cascadia Rose Juliana, et. al. v. United States* 6:15-cv-01517 (D. Oregon)<br>The case has already been heard and decided by the 9th Circuit, which resulted in an order on remand to dismiss the case for lack of standing. *Juliana v. United States*, 947 F.3d 1159, 1175 (Ninth Cir. 2020).<br>It is now on remand with the district court in Oregon, and the plaintiffs are seeking to amend the complaint while the court is setting settlement conferences. The State joined a motion for limited intervention as defendant, led by Alabama. The federal defendant has opposed the motion, arguing they adequately represent the State's interests. The motions to intervene and amend the complaint are pending before the Oregon federal district court. |

## III. FISH AND GAME

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| **<u>Arctic Ringed Seal Delisting</u>**<br><br>Alaska's Petition to delist the Arctic ringed seal as an endangered species | National Marine Fisheries Service (NMFS) Negative 90-Day Finding | The State and the North Slope Borough petitioned NMFS to delist the Arctic ringed seal in light of updated information developed since listing.<br><br>The listing of the Arctic ringed seal and designation of hundreds of millions of acres of Alaska as critical habitat for the species directly interferes with lawful activities occurring in Alaska and conducted by its citizens, including activities within the North Slope Borough (including oil and gas exploration and production, mining and mineral production, navigation dredging, in-water construction activities, commercial fishing, and subsistence hunting and fishing).<br><br>NMFS, however, denied that the Petition's information and analysis was new and concluded that the Petition did not present substantial scientific information indicating that a review of the Arctic ringed seal's biological status was warranted. | NMFS's Negative 90-Day Finding conflicted with the Endangered Species Act (ESA) and its implementing regulations, which require only that a petitioner "submit credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted." | • *North Slope Borough v. Nat'l Marine Fisheries Service*, 3:22-cv-249-JMK (D. Alaska)<br><br>The State filed a complaint on November 16, 2022. The answer is currently due in early 2023. |

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| **<u>Chinook Fishery Biological Opinion</u>**<br>Biological Opinion, WCR-2018-10660 | APA, 5 U.S.C. §§ 551–559<br>ESA, 16 U.S.C. § 1531 *et seq*.<br>NEPA, 2 U.S.C. § 4321 *et seq*. | Wild Fish Conservancy (WFC) argues that the ESA Biological Opinion related to Southern Resident Killer Whales was flawed and that take of their food (chinook salmon) was unlawful.<br>The SEAK salmon fishery has averaged $806 million in output, $484 million in gross domestic product, $299 million in labor income or wages, and 6,600 full time equivalent jobs.<br>WFC seeks an injunction that will close salmon fisheries in the EEZ adjacent to Southeast Alaska. Any such closure will have significant adverse impacts on the State's economy and its citizens' welfare. | The State argues that the BiOp was issued in compliance with federal law. Closing the salmon fisheries as sought by the plaintiffs will harm Alaska and its citizens. | • *Wild Fish Conservancy v. Thom,* 2:20-cv-00417-RAJ-MLP (W.D. Wash.)<br>Alaska moved to intervene and participated in cross motions for summary judgment. The district court granted WFC's motion for summary judgment. WFC sought to enjoin the SEAK salmon fisheries pending NMFS's preparation of a new BiOP and NEPA documentation.<br>At oral argument on November 1, 2022, the Court was swayed by the State's and Trollers' arguments regarding the devastating economic and social impacts on SEAK communities of closing the fisheries and proposed an evidentiary hearing to develop their arguments. The Magistrate took the matter under advisement and a decision is pending. |
| **<u>Cook Inlet Salmon Rule</u>**<br>Alaska Salmon FMP, Amendment 14 final rule closes the federal waters of Cook Inlet to commercial salmon fishing. | Magnuson-Stevens Act, 16 U.S.C. § 1801 *et seq.*<br>APA, 5 U.S.C. §§ 551–559<br>NEPA, 2 U.S.C. § 4321 *et seq*. | On November 3, 2021, NMFS published the Alaska Salmon FMP, Amendment 14 final rule, which closes the federal waters of Cook Inlet to commercial salmon fishing.<br>The United Cook Inlet Drift Association (UCIDA) alleges that Amendment 14 fails to | Alaska supports Amendment 14, as the fishery is fully allocated in state waters and the closure of federal waters will ensure no conflicts with adjacent federal management. | • *United Cook Inlet Drift Association v. National Marine Fisheries Service* , 3:21-cv-0255-JMK (D. Alaska)<br>The State intervened in support of NMFS. On June 21, 2022, the district court judge granted UCIDA's motion for summary judgment and vacated |

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| | | comply with the 9th Circuit's order in the previous litigation surrounding Amendment 12, while at the same time violating the Magnuson-Stevens Act (MSA), the Administrative Procedures Act, and the National Environmental Policy Act. Critically for Alaska, UCIDA argues that NMFS must manage salmon in Alaska's state waters. | | Amendment 14 and its regulations.<br>On November 28, however, the court issued an order wholly denying UCIDA's sought relief.<br>A new FMP that complies with the MSA is due May 1, 2024. |
| **<u>ESA Rule Amendments</u>**<br>Three 2019 ESA rule amendments by U.S. Fish & Wildlife Service (USFWS)<br>50 C.F.R. Part 402; 50 C.F.R. Part 424; 50 C.F.R. Part 17 (84 FR 44753; 84 FR 44976; 84 FR 44753) | NEPA, 2 U.S.C. § 4321 *et seq*.<br>Intended revocation of 2019 amendments by USFWS | Among other things, the 2019 rules clarified the meaning of "foreseeable future" in determining whether a species is threatened, allowing economic factors to be considered while still making decisions based on the best scientific and commercial data, and providing guidance on when to consider unoccupied areas as critical habitat for listed species.<br>Three lawsuits were filed and consolidated, challenging regulations as violating the National Environmental Policy Act (NEPA). | Alaska does not support the current administration's intention to revoke the 2019 rules and reinstate the prior rules.<br>Alaska is aligned with the federal government in the litigation, defending the 2019 rules. There are no conflicts between the 2019 federal regulations and state law. | • *California v. Bernhardt,* 4:19-cv-06013-JST (N.D. Cal.)<br>• *Cr. for Biological Diversity v. Bernhardt,* 4:19-cv-05206-JST (N.D. Cal.)<br>• *ALDF v. Bernhardt*, 4:19-cv-06812-JST (N.D. Cal.)<br>Alaska joined twelve other states to intervene in all three cases to defend the 2019 rules.<br>On February 24, the court ordered supplemental briefing to explain the federal defendants' current assertion that there are concerns with the NEPA documents they prepared for the 2019 rules. Supplemental briefing addressed whether categorical exclusions were proper and whether vacatur is the proper remedy for a violation of NEPA. In Orders dated July 5, 2022, the court remanded and vacated the 2019 |

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| | | | | ESA rules without ruling on the merits.<br><br>Intervenor-defendants filed a petition for a writ of mandamus asking the 9th Circuit to reverse the decision to vacate the rules without a decision on the merits. On September 21, the 9th Circuit agreed that vacating the 2019 rules without a ruling on their validity was in error, reinstating the rules.<br><br>On November 16, 2022, the court issued two orders, finding it could not decide the NEPA claims on the merits because the issues were not fully briefed, and again ordered remand without vacatur. |
| **<u>Game Management Unit 13 Hunting</u>**<br><br>Access to state-regulated general and subsistence hunting in Game Management Units (GMUs) 13A and 13B | Closure of Units 13A and 13B to moose and caribou subsistence hunting by non-federally qualified hunters | Closure of these GMUs prevents the State from managing and conserving wildlife in accordance with federal law, the Alaska Constitution, and Alaska statutes and regulations. The closures prohibit non-federally qualified users from moose and caribou hunting in GMUs 13A and 13B and could deprive Alaskans, including local subsistence-dependent Alaskans, of important food resources. | The expansion of federal authority exceeds what Congress delegated in ANILCA and infringes on the State's authority to manage wildlife. | • *State of Alaska v. Federal Subsistence Board,* 22-0195 (9th Cir.)<br><br>In August 2020, the State challenged these actions taken by the Federal Subsistence Board as violations of ANILCA, the federal open meetings laws, and the APA. The lawsuit challenged the Board's<br><br>• decision to close moose and caribou hunting in GMUs 13A and 13B for two years to non-federally qualified hunters; and |

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| | | | | • delegation of authority to local federal land managers to open emergency hunts and to delegate hunt administration outside of a federal agency.<br><br>The State's requests for injunctions were denied. The district court declined to address several of the State's claims and issued an unfavorable decision on the merits of other claims on December 3, 2021. The State filed an appeal. Oral argument was held on December 9, 2022. |
| **<u>Incidental Take Regulation (ITR)</u>**<br><br>Five-year ITR allows oil and gas activities to continue in the South Beaufort Sea region. | ESA, 16 U.S.C. § 1531 *et seq*.<br><br>MMPA, 16 U.S.C. 1361 *et seq*. | On August 5, 2021, the USFWS issued a five-year ITR allowing oil and gas activities to continue in the South Beaufort Sea region. Polar bears are listed as threatened under the Endangered Species Act (ESA) and are also protected under the Marine Mammal Protection Act (MMPA).<br><br>The ITR allows nonlethal "take" of polar bears (i.e., potential to disturb) in the Southern Beaufort Sea region for specified oil and gas activities. Such regulations have been in place since 1993 allowing oil and gas exploration, development and production in the region. | Although Alaska continues to have concerns with the modeling used by the federal government to estimate nonlethal incidental take, Alaska is aligned with the federal government for purposes of this lawsuit in order to allow at least some incidental nonlethal take, in small numbers and with negligible impact. | • *Alaska Wildlife Alliance v. US Fish and Wildlife Service,* 3:21-cv-209-SLG (D. Alaska)<br><br>The State intervened in the lawsuit in support of the ITR. Briefing is complete and a decision is pending. |

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| | | Alaska Wildlife Alliance argues that the ITR violates the ESA and MMPA. | | |
| **<u>Kuskokwim River Order</u>**<br>State emergency orders open harvest on the Kuskokwim River within the refuge during federal closure. | ANILCA,16 U.S.C. § 3101 *et seq*. | In 2021 and 2022, the Federal Subsistence Board (FSB) and agency field officials exercised their authority under ANILCA to issue emergency special actions to close the 180-mile-long section of the Kuskokwim River within the Yukon Delta National Wildlife Refuge to non-subsistence uses, while allowing limited subsistence uses by local rural residents under narrowly prescribed terms and means of harvest.<br>Alaska issued emergency orders in 2021 and 2022 permitting fishing on the same stretch of the Kuskokwim River that had been closed to non-subsistence harvest by federal emergency special action. | The FSB and its delegation of authority to the Refuge Manager violates the Appointments Clause of the U.S. Constitution. The FSB lacks jurisdiction over the Kuskokwim River because it is not "public land" under ANILCA. FSB's orders relating to the Kuskokwim River violate ANILCA and are without statutory authority. They further violate the APA for failing to manage fisheries in accordance with sound scientific principles. | • *US v. Alaska,* 1:22-cv-0054-SLG (D. Alaska)<br>The United States sued the State of Alaska, Department of Fish and Game, and Commissioner Vincent-Lang in his official capacity, seeking a declaratory judgment stating that Alaska's emergency orders that open harvest on the Kuskokwim River within the refuge during federal closure are in contravention of federal orders and are invalid and void. The U.S. further sought an injunction to prevent Alaska from issuing emergency orders, or from taking similar actions in contravention of federal orders addressing ANILCA Title VIII and applicable regulations.<br>The district judge denied the United States' motion for a temporary restraining order, but ultimately granted their request for a preliminary injunction. Several groups have intervened, including Ahtna, which argues that the state is attempting to reverse the *Katie John* line of cases. |

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| | | | | The US filed the administrative record on October 21, 2022. Discovery and motion practice will follow. |
| **<u>Metlakatla Fishing Rights</u>**<br>State jurisdiction over off-reservation fishing by Metlakatla Indians | Metlakatla Annette Island Reserve, 25 U.S.C. § 495 | Metlakatla Indian Community sued the Governor and the State of Alaska, asserting that Congress intended to grant Metlakatlans off-reservation rights when it created the Annette Island Reserve in 1897. The Community claims that Metlakatlans therefore do not need a commercial fishing permit to commercially fish in Southeast Alaska. | It is not appropriate to imply off-reservation fishing rights from the Annette Island Reserve statute. The Metlakatlans are further foreclosed from claiming an implied right to off-reservation fishing because Metlakatlans do not have aboriginal claims to preserve. Because the U.S. provided the Annette Islands to the Metlakatla as a gift rather than pursuant to an exchange, the U.S. did not intend the 1897 Act to provide any implicit off-reservation rights. | • *Metlakatla v. Dunleavy et al.,* 5:20-cv-00008-JWS (D. Alaska)<br>The State moved to dismiss, arguing that the congressional record established Congress's intent not to grant Metlakatlans off-reservation fishing rights. Judge Sedwick agreed with the State's arguments and on February 17, 2021, granted the motion to dismiss. The Metlakatla Community appealed Judge Sedwick's decision to the 9th Circuit.<br>The 9th Circuit reversed the district court decision and ruled on the merits, determining the State's limited entry program "as currently administered" impaired MIC's off-reservation fishing rights, and remanded the case to the district court to fashion a remedy. On September 22, 2022, the State filed a petition for en banc rehearing. The 9th Circuit's decision on the petition is pending. |

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| **NPS Hunting Rule**<br>85 FR 35181 - Alaska; Hunting and Trapping in National Preserves | National Park Service Organic Act, 16 U.S.C. § 1<br>Congressional Review Act, 5 U.S.C. § 801<br>ANILCA, 16 U.S.C. § 3101 *et seq*.<br>APA, 5 U.S.C. §§ 551–559 | The 2020 National Park Service (NPS) rule permits hunting practices authorized under Alaska's hunting regulations to take place on National Preserves in Alaska. The 2020 Rule withdrew a prior rule, promulgated by NPS in 2015, that preempted State law and prohibited the hunting practices on National Preserves.<br>The 2020 Rule defers to State management, thereby making the State's non-subsistence hunting practices applicable to National Preserves.<br>Environmental groups allege the 2020 Rule violates the National Park Service Organic Act, Congressional Review Act, ANILCA, and the APA | Alaska supports liberalizing hunting practices in accordance with Alaska's sustainable yield principal. The 2020 Rule is not arbitrary or capricious, because harvest data and other published studies conclude that the State's hunting regulations have resulted in low levels of additional take of predator species | • *Alaska Wildlife Alliance v. Haaland,* 3:20-cv-209-SLG (D. Alaska)<br>The state intervened in the environmental groups' challenge to the 2020 Rule. On September 30, 2022, Judge Gleason issued a decision and judgment, finding the 2020 rules violated the APA and remanding the rules without vacatur pending new rulemaking by NPS. The State appealed Judge Gleason's legal conclusions to the 9th Circuit. The State's opening brief is due on March 9, 2023. |
| **State Hunting Regulations**<br>The Board of Game (see 5 AAC 92.044) allows the taking of brown bears at black bear baiting stations on the Kenai Peninsula as well as allowing additional hunting opportunities within the Skilak Wildlife Recreation Area (WRA) (see 5 AAC 92.530). | Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge<br>81 FR 27030<br>The regulations adopted by the National Park Service in 2015 affect hunting on preserve lands throughout Alaska and regulations adopted by the U.S. Fish and Wildlife Service (USFWS) | The NPS regulations preempted state management of wildlife, prohibited several means of take for predators, and changed public participation procedures for hunting and fishing closures.<br>The USFWS regulations prohibit certain activities within the Kenai NWR and the State is objecting to the prohibition on taking brown bears at black bear | The federal Kenai Rule's ban on baiting of brown bears and hunting of coyotes, lynx, and wolves in the Skilak WRA violates ANILCA, the Improvement Act, the APA, and NEPA. | • *SCI, State of Alaska v. Haaland, et. al*, No. 21-35030, 21-35035 (9th Cir.)<br>Three cases were filed and consolidated. In July 2017, NPS and USFWS were directed by the Acting Assistant Secretary for Fish and Wildlife and Parks to initiate rulemaking procedures to reconsider their rules. In June 2020, NPS published a final rule |

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| | restrict hunting on the Kenai National Wildlife Refuge (NWR). | baiting stations, a practice that state law allows. | | that reversed much of the 2015 rule challenged in the litigation.<br><br>USFWS published a proposed rule in June 2020 that would reverse a portion of the current rule being challenged, but no final rule has been published. In November 2020, the court upheld portions of the Kenai Rule but revoked restrictions on firearms along rivers and remanded for non-compliance with NEPA. The State appealed portions of the decision pertaining to the Kenai Rule. The remaining claims against the NPS were dismissed.<br><br>The 9th Circuit issued an unfavorable decision and denied the State's petition for rehearing en banc. The State filed a petition for certiorari in October 2022 and the State awaits responses from the federal government and the intervenors. |

## IV. HEALTH AND COMMUNITY SERVICES

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| **<u>Behavioral Health Services for Minors</u>**<br>DOJ alleges the State is violating the Americans with Disabilities Act relating to community based behavioral health services for youth. | Department of Justice issued a report on December 15, 2022, finding that Alaska was violating Title II of the ADA. | DOJ alleges that the Depts. of Health and Family & Community Services are in violation of the ADA based on failing to provide community-based behavioral health services to youth in Alaska, resulting in children being placed unnecessarily in hospitals or residential facilities..<br>This is pursuant to the *Olmstead* line of cases that require States receiving Medicaid funding to ensure that individuals who are in institutions be allowed to receive services in the community if (1) that would be appropriate; (2) the individual agrees; & (3) providing the community Services would be reasonable given the constraints on the state and need to serve others with disabilities.<br>Alaska has covered the community-based behavioral health services under a relatively new Medicaid Waiver, but it has been difficult to enroll sufficient | Dept of Law is working with DOH and DFCS to respond to DOJ. The Alaska team will be meeting with DOJ representatives to reach a settlement to create a realistic plan to increase services. If that cannot be achieved, then litigation is possible. | No litigation at this time.<br>DOJ is looking to enter into a settlement agreement to require Alaska to make sure that the full spectrum community-based behavioral health services are available in significant quantities statewide.<br>DOH and DFCS will enter into settlement negotiations, but ensuring that the specified services are available in significant numbers in every Alaskan community would be extremely expensive and would likely require that Alaska actually become a provider rather than just agreeing to cover those services. |

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| | | providers for all of the services and it will be virtually impossible to provide them state-wide given the shortage of providers and difficulties with providing services in remote villages. DOJ appears to want Alaska to make sure that the services are actually available and provided in certain quantities, while under Medicaid our obligation is as an insurance provider to make sure that we are willing to pay for services, not that actual providers exist. | | |

## V. LABOR AND STATE AFFAIRS

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| **CMS COVID-19 Vaccination Rule**<br>The CMS vaccine mandate requires nearly every full-time employee, part-time employee, volunteer, and contractor working at a wide range of healthcare facilities receiving Medicaid or Medicaid funding to be vaccinated against COVID-19. | Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination<br>86 FR 61555 | The mandate conflicts with the state's sovereign police powers and violates Alaskans' fundamental privacy right to make decisions about medical treatment under Article I, Section 22 of the Alaska Constitution. The mandate also conflicts with sec. 17, ch. 2, SLA 2021, granting citizens the right to object to COVID-19 vaccines "based on religious, medical, or other grounds," and forbidding any person from "requir[ing] an individual to provide justification or documentation to support the individual's decision to decline a COVID-19 vaccine." | The mandate exceeds CMS's statutory authority, and violates the APA because it was issued without notice and comment and is arbitrary, capricious, and unlawful. The mandate is further unconstitutional under the Spending Clause, the anti-commandeering doctrine, and the Tenth Amendment. | • *Missouri et al. v. Biden*, 21-3725 (8th Cir.)<br>The State joined a Missouri-led coalition challenging the CMS rule. On April 11, 2022, the 8th Circuit vacated the district court's preliminary injunction and remanded the case to the district court. On May 19, 2022, the States filed a petition for a writ of certiorari in the United States Supreme Court, but the Court denied the petition on October 5, 2022. An Amended Complaint was filed on November 23, 2022. The Defendants response (answer or motion to dismiss) to the Amended Complaint was due on January 6, 2023. |
| **CDC Mask Mandate**<br>CDC mandate requires persons to wear masks while traveling on "conveyances within the United States," defined broadly to include "aircraft, train[s], road | Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs.<br>86 FR 8025 | The rule would interfere with Alaskans' ability to travel throughout the state. Approximately 82% of Alaska communities depend on air travel. | The mandate exceeds CDC's statutory authority, and violates the APA because it was issued without notice and comment and is arbitrary, capricious, and unlawful. | • *Florida et al. v. Walensky*, 8:2022-cv-00718 (M.D. FL.)<br>The State joined the Florida-led coalition, filing a complaint on March 29, 2022. The Federal defendants requested a stay of proceedings as *Health Freedom* |

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| vehicle[s], vessel[s]" in conflict with state sovereignty. | | | CDC failed to consider state and local measures before regulating. The mandate is further unconstitutional under the anti-commandeering doctrine, and the Tenth Amendment. | *Defense Fund v. Biden*, a case currently before the 11th Circuit Court of Appeals, will govern the outcome of this case. The coalition filed an amicus brief in that case. The 11th Circuit case is scheduled for oral argument on January 16, 2023. |
| **Federal Contractor Vaccine Executive Order**<br>EO requires all federal contractors or subcontractors to vaccinate their employees as a condition of any future contract or a renewal of an existing federal contract. | Executive Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors<br>86 FR 50985 | The mandate conflicts with the state's sovereign police powers and violates Alaskans' fundamental privacy right to make decisions about medical treatment under Article I, Section 22 of the Alaska Constitution. The mandate also conflicts with sec. 17, ch. 2, SLA 2021, granting citizens the right to object to COVID-19 vaccines "based on religious, medical, or other grounds," and forbidding any person from "requir[ing] an individual to provide justification or documentation to support the individual's decision to decline a COVID-19 vaccine." | The Contractor Mandate is not a lawful exercise of the President's authority under the Procurement Act | • *Missouri et al. v. Biden*, 22-1104 (8th Cir)<br>A coalition of 10 states filed a complaint in U.S. District Court for the Eastern District of Missouri challenging the mandate and seeking a preliminary injunction. On December 7, 2021, a federal judge in Georgia enjoined the federal government from enforcing the mandate in all 50 states. The case is currently before the 8th Circuit Court of Appeals. |
| **Head Start COVID Mandate**<br>Federal mandate would require the vaccination of Head Start staff, volunteers, and anyone else who comes in contact with Head Start | Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs<br>86 FR 68052 | The mandate conflicts with the state's sovereign police powers and violates Alaskans' fundamental privacy right to make decisions about medical treatment under Article I, Section 22 of the Alaska | The executive branch of the federal government lacks the authority to impose the head start vaccine mandate without clear congressional authorization. The rule unlawfully usurps the State's police power to | • *Louisiana et al. v. Becerra,* 3:21-cv-04370 (W.D. LA.)<br>• The State joined a Louisiana-led coalition against the DHHS mandate. On September 21, 2022, the district court denied the defendants' motion to |

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| children, as well as the masking of all Head Start children two years or older and all adults. | | Constitution. The mandate also conflicts with sec. 17, ch. 2, SLA 2021, granting citizens the right to object to COVID-19 vaccines "based on religious, medical, or other grounds," and forbidding any person from "requir[ing] an individual to provide justification or documentation to support the individual's decision to decline a COVID-19 vaccine." | legislate on health care policy within its borders | dismiss and granted summary judgment for the plaintiff states, entering an injunction against the rule. Defendants appealed on November 18, 2022. |
| **<u>Military Vaccine Mandate</u>**<br>Federal vaccine requirement for military applies to state national guard personnel, infringing the Governor's authority as Commander-in-Chief of non-federalized national guard troops in Alaska. | Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve | In addition to violating Alaskans' fundamental right to privacy, the federal government usurped the governor's authority as Commander-in-Chief of non-federalized Guardsmen | A federal official's ordering, directing, or punishing of non-federalized Guardsmen violates the Militia Clauses and the Commander-in-Chief Clause of the U.S. Constitution and the Tenth Amendment. Issuance of the mandate was further arbitrary and capricious in violation of the APA. | • *Abbott v. Biden*, 6:22-cv-00003 (E.D. TX.)<br>Governor Dunleavy joined a lawsuit filed by Texas Governor Greg Abbott challenging the federal government's COVID-19 vaccination mandate with respect to the National Guard. The district court denied the request for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits.<br>Governor Abbott filed a notice of appeal on June 28, 2022. Governor Dunleavy did not join the appeal. On January 11, 2023, the Pentagon announced that it was rescinding the military vaccination mandate. |

## VI. MINERALS AND OIL & GAS

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| **<u>ANWR Lease Program</u>**<br><br>Implementation of Federal ANWR Coastal Plain Oil and Gas Leasing Program | DOI Secretary Order 3401 imposing a moratorium on all activities of the federal government relating to the implementation of the Coastal Plain Oil and Gas Leasing Program, as ordered by EO 13990 | P.L. 115-97 established a program for oil and gas leasing in ANWR's Coastal Plain. BLM held the first oil and gas lease sale for the ANWR Coastal Plain, on January 6, 2021, offering 22 tracts on 1.1 million acres. Most leases went to AIDEA.<br><br>President Biden's EO 13990 specifically directed the Bureau of Land Management (BLM) to halt the lease program to conduct a new, comprehensive analysis of the potential environmental impacts of the program. | Neither the Secretary nor President Biden are authorized to place a moratorium on the ANWR lease program created by congressional action. Order 3401 was arbitrary and capricious and issued in violation of the APA. | • *Native Village of Venetie v. Haaland,* 3:20-cv-0223 (D. Alaska)<br>• *Gwich'in Steering Committee v. De La Vega,* 3:20-cv-0204 (D. Alaska)<br>• *National Audubon Society et al v. Haaland,* 3:20-cv-0205 (D. Alaska)<br>• *State of Washington et al v. Haaland,* 3:20-cv-0224 (D. Alaska)<br>• *Alaska Industrial Development and Export Authority v. Biden,* 3:21-cv-0245 (D. Alaska)<br><br>Environmental groups sued in late August and early September, 2020, challenging the leasing program, but their preliminary injunction was not granted. AIDEA filed suit against the Biden administration after the moratorium was imposed. Cases have been stayed pending BLM's environmental analysis. |

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| **Cook Inlet Lease Sale**<br>As part of the Inflation Reduction Act of 2022, Congress directed that the Cook Inlet Sale be held before December 31, 2022. The Bureau of Ocean Energy Management (BOEM) held the Cook Inlet lease sale on December 30, 2022 | NEPA, 2 U.S.C. 4321 *et seq*.<br>APA, 5 U.S.C. §§ 551–559 | The State favors leasing generally but did comment on the lease sale environmental analysis. The State expressed concerns about the limited acreage and leasing conditions. | The State is reviewing the complaint filed by environmental groups and has not yet determined its position. | • *Cook Inletkeeper et. al v. US, DOI, et al,* 3:22-cv-00279 (D. Alaska)<br>Environmental group challenge to December 2022 federal Cook Inlet Lease Sale filed in district court on December 21, 2022. |
| **FERC Technical Conference**<br>FERC is considering rule changes based on EO 13990 relating to climate change. | Federal Energy Regulatory Commission (FERC) Notice Inviting Technical Conference Comments regarding Greenhouse Gas Mitigation for Sections 3 and 7 of the Natural Gas Act | The FERC has not proposed any regulations at this time. The technical conference is a discussion of potential expansive regulatory efforts based on speculative measures. Future regulations along these lines would likely negatively impact approval and operation of LNG terminals and natural gas development. | The Attorney General signed onto a comment letter along with over 20 other states. The State continues to monitor draft policy statements proposed by the FERC. | No litigation at this time.<br>The FERC Technical Conference is an outgrowth of EO 13990. The State has joined as a plaintiff and challenged the EO in regards to the FERC in *Missouri, et al. v. Biden*, 4:21-cv-0287 (E.D. Mo.), discussed elsewhere. |
| **Federal Oil & Gas Lease Moratorium**<br>Federal Oil & Gas lease moratorium endangers future leasing on federal land. | Executive Order 14008, imposing moratoria on federal oil and gas leasing<br>86 FR 7619 | EO 14008 requires the Secretary of Interior to pause federal oil and gas leasing in order to review the federal leasing program. Following this instruction, the Department of the Interior imposed a moratorium on federal oil and gas lease sales.<br>The moratorium and review limit oil and gas development in the State and could result in fewer | EO 14008 is *ultra vires*, beyond the authority of the President, and in violation of the Outer Continental Shelf Lands Act (OCSLA) and the Mineral Leasing Act (MLA). Even the President cannot make significant changes to the OCSLA and/or the MLA that Congress did not delegate. In addition, the | • *Louisiana, et al. v. Biden,* 21-30505 (5th Cir)<br>A coalition of 13 states filed a complaint in March 2021, followed by a motion for preliminary injunction. The district court granted plaintiff-States' motion for preliminary injunction on June 15, 2021, enjoining defendants from implementing the challenged executive order. |

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| | | federal lands available for leasing in the future. | EO is arbitrary and capricious and not in compliance with the APA. | On August 17, 2022, the United States Court of Appeals for the 5th Circuit vacated the preliminary injunction on the grounds that it did not satisfy the requirements of Rule 65(d) and remanded to the district court for further proceedings. |
| **<u>Mining on Federal Land Rules</u>**<br>2003 Mining Claim Rule, 68 FR 61,046-01, 43 C.F.R. 3832 under which mining claimants are not limited to a single five-acre mill site, but instead may locate more than 1 mill site per mining claim if no individual mill site is larger than five acres<br>2008 Mining Claim Rule, 73 FR 73789, under which BLM will not apply FLPMA fair market value annual rent policy to approved mining operations that occur on mining claims of unknown validity | General Mining Law of 1872,<br>Fair Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701, *et seq*. | In 2009, Earthworks and other environmental organizations challenged the two rules promulgated by the U.S. Department of the Interior in 2003 and 2008. Plaintiffs argue that the rule restricts the application of the FLMPA's fair market valuation mandate of the surface estate required for use of public lands, including mining activities.<br>Elimination of these rules (adopted under the 2nd Bush administration), which eliminated regulatory hurdles for miners regarding annual use fees and mill site limits, would increase miner's costs of doing business on federal lands open to mining in Alaska. | The State agrees with the district court that the mining rules were promulgated in conformity with federal law. | • *Earthworks, et al v. DOI, et al,* 20-5382 (D.C. Cir.)<br>The State intervened along with several mining industry entities to defend the rules in federal district court due to the large volume of federal mining claims in Alaska. The district court granted summary judgment upholding the rules in 2020. Earthworks filed an appeal in the D.C. Circuit.<br>In November 2022, Earthworks and DOI moved for a further abeyance, arguing that because DOI had formed a working group (outside of the litigation) to consider broad changes to federal mining rules, the appeal should be further stayed pending the outcome of both the working group's recommendations and the separate rules changes petition.<br>On December 5, 2022, the State joined the mining industry intervenors' opposition to further |

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| | | | | abeyance. The parties await a ruling. |
| **Pebble Mine Application**<br>Pebble Limited Partnership requires a permit from EPA under Section 404(c) of the Clean Water Act (CWA) to develop the Pebble mine project. | Recommended decision of EPA Region 10 to prohibit and restrict the use of certain waters in the Bristol Bay watershed as a disposal site for the discharge of dredged or fill material associated with mining at the Pebble deposit.<br>CWA Section 404(c) | Denial of the dredge and fill permit for PLP will effectively prevent development of the large-scale mine at the Pebble deposit, harming economic development for the State. | Issuance of a dredge and fill discharge permit is appropriate under section 404(c) | EPA Region 10 issued a recommended determination to EPA administrator for final action. EPA is expected to make a decision by Jan. 31 2023. |
| **NPR-A Integrated Activity Plan (IAP)**<br>On December 31, 2020, BLM adopted a revised Integrated Activity Plan Record of Decision (ROD), which opened additional areas for leasing in the National Petroleum Reserve - Alaska. | On April 25, 2022, BLM released a new Record of Decision adopting the "no action" alternative, thereby reverting management of the NPR-A to the prior 2013 IAP. | The 2013 IAP includes certain more protective lease stipulations and operating procedures for threatened and endangered species from the 2020 IAP and would close lands to leasing opened by the 2020 ROD.<br>BLM's decision was based on Presidential EO 13990—*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*—issued on January 20, 2021. | BLM's decision to revert to the pre-2020 IAP pursuant to EO 13990 is arbitrary and capricious and harms Alaska's economy. | • *National Audubon Society et al v. Haaland,* 3:20-cv-0206 (D. Alaska)<br>• *Northern Alaska Environmental Center et al v. Haaland,* 3:20-cv-0207 (D. Alaska)<br>Environmental organizations had sued the U.S. Department of the Interior in 2020 challenging the adoption of the revised IAP ROD, and the State intervened to defend the decision.<br>Following DOI's new ROD on April 25, 2022, the NAEC plaintiffs and federal defendants agreed to dismiss that matter. The Audubon plaintiffs elected to continue their action, and an amended complaint was filed November 25, 2022. Federal defendants and the State are |

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| | | | | required to respond by January 24, 2023. |
| **Well Data Public Disclosures**<br>AS 31.05.035(c)<br>20 AAC 25.537(d) | Naval Petroleum Reserves Production Act (NPRPA), 42 U.S.C. 6501 *et seq*. | Conoco filed a declaratory judgment action in federal court alleging that AOGCC's statute, AS 31.05.035(c) is preempted under federal law and that federal law protects well data confidentiality on federal land against disclosure by AOGCC.<br>Under Conoco's interpretation of the NPRPA, a state must keep all exploration information received from a lessee confidential, whether or not such information is actually protected under the federal confidentiality provisions or risk accidentally violating the information program and being subjected to a lawsuit for civil penalties. | The State's laws do not conflict with federal law. Conoco disregards the statutory text and instead attempts to derive Congress's intent to create expansive confidentiality protections solely from statements made in a committee report and by industry members. | • *ConocoPhillips v. AOGCC,* 3:22-cv-00121-SLG (D. Alaska)<br>ConocoPhillips filed suit for declaratory judgment on May 13, 2022. The plaintiff moved for partial summary judgment and the State moved to dismiss. Oral arguments were heard on both motions on November 22, 2022. The parties await a decision. |
| **Willow Master Development Plan**<br>Implementation of the Willow Master Development Plan authorizing additional development on federal oil & gas leases | NEPA, 2 U.S.C. 4321 *et seq*.<br>CWA, 33 U.S.C., § 1251 *et seq*.<br>Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq*.<br>Marine Mammal Protection Act in 1972 (MMPA), 16 U.S.C. 1361 *et seq*. | Environmental NGOs and tribal groups challenged BLM, U.S. Army Corps of Engineers, and Fish & Wildlife Service approvals of the Willow Master Development Plan, which authorized additional development by ConocoPhillips Alaska on federal oil and gas leases for lands in the National Petroleum Reserve–Alaska. | BLM and the Corps fully satisfied the requirements of federal law in approving the Willow Master Development Plan | • *Center for Biological Diversity v. BLM,* 3:20-cv-0308-SLG (D. Alaska)<br>• *Sovereign Iñupiat for a Living Arctic v. BLM*, 3:20-cv-0290-SLG (D. Alaska)<br>The State intervened to defend the project approvals. Oral argument on plaintiffs' motions for summary judgment was held July 12, 2021. Summary judgment was granted in favor of plaintiffs on |

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| | | | | August 18, 2021. No appeal was filed. BLM and FWS have begun supplemental analyses to address deficiencies identified by the court. A draft supplemental environmental impact statement was released for comment in July 2022. |

## VII. STATE LAND AND ACCESS

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| **Alaska Native Lands into Trust**<br><br>BIA's decision to take Alaska Native lands into trust infringes the State's sovereignty. | ANILCA, 43 U.S.C. § 1601, *et seq*.<br><br>After several administration changes and three solicitor opinions presenting different legal theories, on November 16, 2022, the Solicitor issued opinion M-37076. That opinion states DOI has the legal authority to take an Alaska Tribes' lands into trust and to proclaim that trust land an Indian reservation. Consistent with M-37076, on November 17, 2022, the Bureau of Indian Affairs (BIA) placed a 787 square foot parcel of land in downtown Juneau into trust for the Central Council of Tlingit and Haida and proclaimed the parcel an Indian reservation. | There are 227 federally recognized tribes in Alaska.<br><br>Lands held in trust by the United States constitute Indian country; thus tribes have territorial jurisdiction over these lands. The tribe—not the state or the municipality—regulates and controls these lands. There is only one reservation in Alaska: the Annette Islands Reserve. DOI's approach would increase the amount of Indian country in Alaska and increase the number of reservations in Alaska.<br><br>The harm to the State's sovereignty—something Congress specifically preserved in ANCSA—is actual and occurred immediately upon the CLM grant of the Central Council's application.<br><br>Moreover, the Central Council has four additional applications pending before the Department, and the agency has also received applications from the Ninilchik Traditional Council and the | For 46 years following the passage of ANCSA, under the guidance of multiple Secretaries of the Interior, the Department declined to take lands into trust on behalf of Alaska Natives.<br><br>The Assistant Secretary's decision to accept land into trust on behalf of the Central Council and create Indian country in Alaska was arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and/or otherwise contrary to the law and in violation of the APA. | • *Alaska v. Newland et al.* (D. Alaska)<br><br>On January 17, 2023, the State of Alaska filed a complaint in federal district court challenging BIA's decision to place Tlingit and Haida's 787 square foot parcel into trust and proclaim that parcel a reservation. |

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| | | Native Village of Fort Yukon. These pending applications, coupled with the Department's current position regarding the extent of its authority under 25 U.S.C. § 5108, as articulated in the most recent Solicitor Opinion, further jeopardize the State of Alaska's sovereign authority | | |
| **<u>Ambler Industrial Access Road</u>**<br>BLM, USACE and NPS permitting of 211-mile industrial road through southern Brooks Range and Gates of the Arctic National Park and Preserve to access the Ambler Mining District | National Environmental Policy Protection Act (NEPA), 2 U.S.C. 4321 *et seq*.<br>Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 *et seq*.<br>National Historic Preservation Act (NHPA), 54 U.S.C. § 300101 *et seq*.<br>Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq*.<br>Clean Water Act (CWA), 33 U.S.C., § 1251 *et seq*. | Environmental groups and tribal entities filed two lawsuits challenging BLM, USACE and NPS permits for 50-year right-of-way for an industrial road through the southern Brooks Range and Gates of the Arctic National Park and Preserve to access the Ambler Mining District.<br>Plaintiffs allege that the permits violate ANILCA, CWA, NEPA, and NHPA. | The federal agencies complied with ANILCA and the NHPA when assessing the Ambler Road Project's impact. Remand prejudices AIDEA because it undermines AIDEA's rights under its permits, and results in an open-ended delay in the Ambler Road Project. | • *Northern Alaska Environmental Center et al v. Haaland,* 3:20-cv-00187-SLG (D. Alaska)<br>• *Alatna Village Council et al v. Heinlein,* 3:20-cv-00253-SLG (D. Alaska)<br>The State, AIDEA and Ambler Metals, LLC intervened in support of the permits.<br>The cases have been remanded to federal defendants to conduct additional environmental review. Plaintiffs filed a motion for reconsideration seeking to vacate the underlying ROD, which was denied on June 14, 2022. Federal defendants are to file status reports every 60 days during the remand period.<br>BLM has also issued a notice of intent to prepare a supplemental EIS. The State and intervenors |

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| | | | | timely filed scoping comments on November 3, 2022. |
| **ANCSA Land Remediation**<br>Significant portions of ANCSA land provided by federal government is environmentally contaminated. | Failure of the DOI to remediate contaminated ANCSA lands | Through ANCSA, the United States sought to extinguish all Alaska Natives' claims to aboriginal title to over 360 million acres of land in Alaska, in exchange for title to a designated 44 million acres of land ("ANCSA Lands") and other compensation.<br>Significant portions of over 1000 of these parcels were contaminated with hazardous substances. | Congress required the US Executive to identify, investigate, and remedy contamination on lands conveyed under ANCSA three times over the last thirty years. The DOI has repeatedly failed to take the actions that Congress directed it to take. DOI's failure to follow Congress's instructions violates the APA. | • *Alaska v. U.S.,* 3:22-cv-00163-HRH (D. Alaska)<br>The State brought suit against the United States alleging violations of the APA. The United States filed a motion to dismiss. In response, the State amended its complaint, after which the United States filed another motion to dismiss the amended complaint on December 21, 2022. |
| **ANCSA 17(d) Withdrawals**<br>Revocation of 16 ANCSA Section 17(d)(1) withdrawals covering nearly 28 million acres of BLM-managed lands | Delay in implementing Public Land Orders 7899, 7900, 7901, 7902, and 7903 | Pursuant to Section 17(d)(1) of ANCSA, DOI withdrew more than 158 million acres of land in Alaska from appropriation under the public land laws, removing them from availability for selection by the State.<br>The five PLOs partially revoked Section 17(d)(1) withdrawals covering 28 million acres of BLM lands, and returned those lands to multiple use management, including possible conveyance to the State under Statehood Act entitlements.<br>After the Biden Administration took office, however, BLM | BLM's action delaying implementation of the PLOs was arbitrary and capricious, an abuse of discretion, and not in accordance with law under the Administrative Procedures Act. | • *Alaska v. Haaland,* 22-35376 (9th Cir.)<br>The State filed suit challenging the continued delay and seeking an injunction against BLM to revoke the ANCSA 17(d)(1) withdrawals and return the land to multiple-use management and possible conveyance to the State under its Statehood Act entitlements.<br>In March 2022, the district court granted the federal defendants' motion to dismiss the complaint. The court held that the delay decision was not a final agency action and no statute or regulation |

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| | | announced a 2 year minimum delay in implementation. | | required publication. The State appealed to the 9th Circuit.<br>On August 18, 2022, BLM issued its notice of intent to conduct NEPA analysis on the withdrawal revocations, with comments due on October 17, 2022. The parties are currently engaged in settlement discussions. |
| **ANWR Boundary**<br>State ownership of land between Canning and Staines River | Public Land Order No. 2214<br>25 FR 12598 | BLM denied the State's statehood entitlement request for conveyance of 20,000 acres, based on dispute over whether the western boundary of ANWR is the western bank of the Canning River or the western bank of the Staines River. The State also objected to a survey plat of the area directly south of the area requested for conveyance.<br>If the State's title is recognized, the State would be entitled to 100% of the mineral revenue instead of 50%. | Interior Board of Land Appeals determination that "the extreme west bank of the Canning River" should be reinterpreted as "the Staines River" was arbitrary and capricious under the Administrative Procedure Act . | • *Alaska v. US DOI,* 3:22-cv-0078-SLG (D. Alaska)<br>On April 6, 2022, the State filed a complaint seeking review of the IBLA's decision to uphold BLM's determination that ANWR included the disputed 20,000 acres. The parties are currently disputing the contents of the administrative record. Briefing on cross-motions for summary judgment is anticipated to begin in mid-2023. |
| **Chicken RS 2477 ROWs**<br>State's title to existing rights of way near Chicken arising under Revised Statute 2477 | BLM is failing to recognize state owned RS 2477 rights of way through wild and scenic river corridors near Chicken, Alaska. BLM has taken the position that valid existing rights need to first be judicially determined | The routes provide access to state and federal mining claims, as well as overland access for hunting and to recreational sites. The State does not have clear ownership of the RS 2477 rights of way. BLM's management, regulation, and restrictions on its | The roads and trails at issue in this litigation are public rights-of-way granted by the United States pursuant to RS 2477. These rights arise automatically, by operation of law when all elements supporting their | • *Alaska v. U.S.,* 4:13-cv-00008-RRB (D. Alaska)<br>The State sued the U.S. and others to quiet title to a number of RS 2477 rights-of-way near Chicken, Alaska.<br>The State successfully condemned the rights-of-way |

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| | before it is obligated to recognize them. | servient land are inconsistent with the State's rights of way. | creation have been factually satisfied. | across Native allotment lands, which was necessary before the case proceeded on the main issues relating to land owned by the federal government. The Native allotment owners appealed that decision to the 9th Circuit and, in November 2020, the 9th Circuit affirmed the district court.<br><br>Since the district court's decision on the condemnation, the remainder of the case has also proceeded. The case is currently stayed pending settlement discussions. |
| **Chugach National Forest Plan**<br><br>The 2020 Chugach National Forest Land Management Plan creates de facto Conservation System Units (CSU) | On April 16, 2020, the Chugach National Forest released the Final Record of Decision for its 2020 Land Management Plan. | The unauthorized CSU's overlap existing highways, railways, and utilities and will make it difficult to impossible to expand or improve these facilities. The new plan specifically identified the Resurrection Pass Trail as a CSU, although the trail has no such congressional designation. The new plan also mandates management of a number of river segments as if those segments were CSUs, although State highways parallel these rivers and are located within the restrictive management areas. | The new Chugach National Forest Plan established de facto CSUs in violation of ANILCA's prohibition of additional CSUs except by Act of Congress. ANILCA Title V; ANILCA section 1326. | No litigation at this time. The State sought resolution of these issues with the USFS both formally and informally. The State is considering its options. |

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| **Eastern Interior RMP**<br>BLM's Eastern Interior Resource Management Plan (EIRMP) is inconsistent with ANILCA | BLM adoption of Eastern Interior Resource Management Plan (EIRMP). | The EIRMP recommends unjustified mineral closures and conservation designations. The EIRMP also fails to provide for lifting outdated ANCSA d-1 withdrawals unless new conservation withdrawals are implemented, although BLM has lifted the withdrawals in some of the less controversial areas, facilitating conveyance of certain statehood selections. | The EIRMP is inconsistent with ANILCA and Federal Land Policy Management Act's multiple use mandate. | No litigation at this time. The State continues to monitor congressional and agency action on the issue and evaluate options, including administrative action and litigation. |
| **Fortymile River Navigability**<br>Alaska ownership of submerged land underlying Middle and North Forks of Fortymile River | 1983 Navigability Finding | BLM previously found portions of the Middle Fork of the Fortymile, North Fork of the Fortymile, Dennison Fork, and West Fork of the Dennison Fork non-navigable. In response to the State's notice of intent to sue, BLM reversed its position on the Dennison Fork and the West Fork of the Dennison Fork, but not the other two rivers<br><br>Without a judicial order, the State's ownership of the submerged lands would not be recognized by BLM; these lands would continue to be managed by BLM, not the State. | The "equal footing doctrine" guarantees to newly-admitted states the same rights enjoyed by the original thirteen states and other previously-admitted states, including title ownership to lands underlying navigable and tidally influenced waters.<br><br>In addition, the Submerged Lands Act of 1953 vested in the states title to and ownership of lands beneath navigable waters within the boundaries of respective States.<br><br>Alaska's title to its submerged lands vested at statehood on January 3, 1959. Therefore, unless a pre-statehood withdrawal | • *Alaska v. US,* 3:18-cv-00265-TMB (D. Alaska)<br><br>The State filed a quiet title action on these two rivers in October 2018. BLM filed an answer denying the navigability of the disputed portions of the Middle Fork and North Fork of the Fortymile.<br><br>After conducting extensive discovery, the United States disclaimed ownership to the claimed segment of the Middle Fork and a portion of the claimed segment of the North Fork, below Champion Creek. Approximately 16 miles of the North Fork remain in dispute. On August 30, 2022, the State filed a motion for summary judgment as to the remaining North Fork, the United States filed a response and cross- |

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| | | | clearly included the submerged lands and intended to defeat Alaska's statehood title, Alaska retains ownership and management authority of its submerged lands and navigable waters. | motion for summary judgment on November 14, 2022. Briefing is anticipated to conclude by the end of March 2023, with trial to occur in mid to late 2023, if necessary. |
| **<u>King Cove Access Road</u>**<br>King Cove's right to reasonable access across the Izembek NWR to cure the landlocking of the City via the creation of the NWR | On July 15, 2021, the DOI Deputy Secretary Beaudreau issued a one-page memo (the Beaudreau decision) withdrawing a prior DOI determination that the City of King Cove is entitled to a road right-of-way across the Izembek National Wildlife Refuge (NWR) to connect King Cove to the airport at Cold Bay. | Deputy Secretary Beaudreau's July 15, 2021 memorandum withdrawing the earlier DOI decision resulted in a complete shutdown of the State's environmental permitting process for the King Cove to Cold Bay road. Until such road is developed, the residents of King Cove will remain a landlocked community and will have inadequate access to the rest of Alaska for health and safety needs. | Secretary Bernhardt's January 15, 2021 threshold determination that the City of King Cove was an "inholding" under ANILCA section 1110(b) guaranteed the city's right to reasonable access across the Izembek NWR to cure the landlocking of the city via the creation of the NWR. Secretary Bernhardt's finding was a thoroughly documented factual determination made under the regulatory processes of 43 CFR 36.10. | On October 1, 2021 the State filed its administrative appeal of DOI's withdrawal of the prior final agency action that determined King Cove was an inholding under ANILCA Title XI and, thus, entitled to a road right-of-way to the Cold Bay airport. The City of King Cove and the Aleutians East Borough are co-applicants to the State's right-of-way application under ANILCA 1110(b).<br>On March 11, 2022, the USFWS Alaska Region Director denied the State's administrative appeal without considering or addressing the merits of the State's arguments. USFWS's March 11, 2022 decision to dismiss the State's appeal is a denial of the State's access request to complete environmental studies—the requested relief of the appeal—and a denial of the State's request to reinstate the decision that |

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| | | | | found King Cove and inholding under ANILCA Title XI.<br><br>The decision by the USFWS Alaska Region Director constitutes a final agency action that may be appealed to the federal district court in Alaska |
| **<u>King Cove Land Swap</u>**<br><br>DOI entered into a land swap agreement in 2019 with King Cove Corporation. | NEPA, 2 U.S.C. 4321 *et seq*<br><br>ESA, 16 U.S.C. § 1531 *et seq*.<br><br>ANILCA, 16 U.S.C. § 3101 *et seq*. | For many years, residents of King Cove have been trying to get a road from the village to the airport at Cold Bay. The road would be primarily for health and safety purposes, as the airport at Cold Bay is the nearest location where large planes can land in the area's often poor weather conditions. A road directly connecting these two towns would have to cross federally designated wilderness in the Izembek National Wildlife Refuge. DOI agreed to a land exchange that would permit the road to be built.<br><br>The land swap was challenged by environmental groups alleging violations of NEPA, ESA, and ANILCA. | The land swap complies with federal law and is urgently needed to provide access to land-locked King Cove. | *Friends of Izembek NWF v. Bernhardt* (9th Circuit: 20-35721, 35727, 35728).<br><br>In June 2020, the land swap agreement was vacated by the district court after finding the agreement violated the Administrative Procedures Act and Title XI of the Alaska National Interest Lands Conservation Act. The State, King Cove Corporation, and DOI appealed the decision vacating the agreement to the 9th Circuit.<br><br>On March 16, 2022, the 9th Circuit reversed the district court on all grounds and remanded the decision for further proceedings. That decision was vacated for a rehearing before an 11-judge panel of 9th Circuit judges, which was held on December 13, 2022. The State awaits a decision from the rehearing. |

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| **Koyukuk River Navigability**<br>State ownership of South Fork and Middle Fork of the Koyukuk River, the Bettles River, and the Dietrich River | BLM administrative decision finding waters non-navigable | Alaska's title to the South Fork and Middle Fork of the Koyukuk River, the Bettles River, and the Dietrich River vested at statehood on January 3, 1959, by operation of the Equal Footing Doctrine, the Submerged Lands Act, and the Alaska Statehood Act.<br>BLM has failed to acknowledge the State's ownership. Instead, the United States has claimed that the subject waters are non-navigable, and hence did not convey to the State at statehood.<br>Without a judicial order, the State's ownership of the submerged lands would not be recognized by BLM; these lands would continue to be managed by BLM, not the State. | The "equal footing doctrine" guarantees to newly-admitted states the same rights enjoyed by the original thirteen states and other previously-admitted states, including title ownership to lands underlying navigable and tidally influenced waters.<br>In addition, the Submerged Lands Act of 1953 vested in the states title to and ownership of lands beneath navigable waters within the boundaries of respective States.<br>Alaska's title to its submerged lands vested at statehood on January 3, 1959. Therefore, unless a pre-statehood withdrawal clearly included the submerged lands and intended to defeat Alaska's statehood title, Alaska retains ownership and management authority of its submerged lands and navigable waters. | • *Alaska v. US,* 3:21-cv-0221-SLG (D. Alaska)<br>The state filed a quiet title action on these rivers in October 2021. The parties are engaged in discovery. |
| **Ladue Statehood Entitlement Survey**<br>BLM rejected State's objections to a proposed | General Selection application F-028269 (GS-913). | The plat of survey includes an insufficiently surveyed and described boundary between SOA land and land owned by | BLM's proposal is inconsistent with section 6 of the Alaska Statehood Act. | • *SOA v. IBLA*, 2020-0361<br>Alaska filed the notice of appeal with the IBLA on June 5, 2020. Merits briefing is stayed pending |

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| statehood entitlement patent on General Selection application | | Tetlin Native Corporation. Mining claims straddle the insufficiently described boundary. | | ongoing settlement discussions with BLM and Tetlin Native Corporation, the adjacent landowner. BLM submitted a proposed new informational traverse and field notes in August 2021, which are acceptable to the State. BLM required Tetlin to concur in the informational traverse for it to adopt this new informational traverse. In December 2022, DNR learned Tetlin would not concur in that informational traverse. Currently, the State's statement of reasons is due on or before February 28, 2023. |
| **<u>Mendenhall Lake Navigability</u>**<br>State ownership of submerged land underlying Mendenhall Lake and the Mendenhall River | United States continued assertion of ownership of the subject submerged lands | Alaska's title to the Mendenhall Lake and River vested at statehood on January 3, 1959, by operation of the Equal Footing Doctrine, the Submerged Lands Act, and the Alaska Statehood Act.<br>The United States has claimed, however, that these waters were the subject of a pre-statehood withdrawal, and hence did not convey to the State at statehood. | The "equal footing doctrine" guarantees to newly-admitted states the same rights enjoyed by the original thirteen states and other previously-admitted states, including title ownership to lands underlying navigable and tidally influenced waters.<br>In addition, the Submerged Lands Act of 1953 vested in the states title to and ownership of lands beneath navigable waters within the boundaries of respective States. | • *Alaska v. US,* 3:22-cv-0240-HRH (D. Alaska)<br>The State filed a quiet title action on these waters in November 2022. The United States' answer is currently due in early 2023. |

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| | | | Alaska's title to its submerged lands vested at statehood on January 3, 1959. No pre-statehood withdrawals in effect at the time of statehood defeated the State's interest to the subject submerged lands | |
| **<u>Mulchatna River Navigability</u>**<br>State ownership of submerged lands underlying Turquoise Lake, Twin Lakes, the Mulchatna River, and the Chilikadrotna River, Lake Clark National Park and Preserve | BLM administrative decision finding waters non-navigable | Alaska's title submerged lands underlying Turquoise Lake, Twin Lakes, the Mulchatna River, and the Chilikadrotna River, Lake Clark National Park and Preserve vested at statehood on January 3, 1959, by operation of the Equal Footing Doctrine, the Submerged Lands Act, and the Alaska Statehood Act.<br>BLM has failed to acknowledge the State's ownership. Instead, the United States has claimed that the subject waters are non-navigable, and hence did not convey to the State at statehood.<br>Without a judicial order, the State's ownership of the submerged lands would not be recognized by BLM; these lands would continue to be managed by BLM, not the State. | The "equal footing doctrine" guarantees to newly-admitted states the same rights enjoyed by the original thirteen states and other previously-admitted states, including title ownership to lands underlying navigable and tidally influenced waters.<br>In addition, the Submerged Lands Act of 1953 vested in the states title to and ownership of lands beneath navigable waters within the boundaries of respective States.<br>Alaska's title to its submerged lands vested at statehood on January 3, 1959. Therefore, unless a pre-statehood withdrawal clearly included the submerged lands and intended to defeat Alaska's statehood title, Alaska | • *Alaska v. US,* 3:22-cv-0103-SLG (D. Alaska)<br>The State filed a quiet title action on these waters in October 2022. The United States has filed a motion to dismiss portions of this case related to segments of the Chilikadrotna River. Briefing of the motion to dismiss is anticipated to conclude in early 2023. Following a decision on the motion to dismiss, the parties will begin discovery. |

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| | | | retains ownership and management authority of its submerged lands and navigable waters. | |
| **<u>Tongass Exemption Rule</u>**<br>2020 Tongass Exemption Rule exempts Tongass National Forest from the Roadless Rule | ANILCA, 16 U.S.C. § 3101 *et seq*.<br>Administrative Procedures Act, 5 U.S.C. §§ 551–559<br>NEPA, 2 U.S.C. § 4321 *et seq*.<br>Biden Administration proposed repeal of the Tongass Exemption Rule | The Roadless Rule prohibits new road construction and reconstruction in inventoried roadless areas on National Forest System lands.<br>The 2020 Tongass Exemption Rule was published following a rulemaking process that begin in 2018 with the State of Alaska's petition for an exemption.<br>A group of Alaska Native tribes, tourism businesses, a fisheries advocacy group, and environmental organizations filed a complaint alleging that the 2020 Tongass Exemption Rule violates ANILCA, NEPA, and the APA. | Alaska supports the Tongass Exemption to the Roadless Rule. The rule was issued in compliance with the APA, NEPA, and ANILCA. | • *Village of Kake v. US Dept. Ag,* 1:20-cv-00011-HRH (D. Alaska)<br>The State intervened to support defense of the 2020 Tongass Exemption Rule. In November 2021, USDA proposed to repeal the 2020 Tongass Exemption Rule. The case is stayed pending the Biden administration's proposed repeal of the 2020 Tongass Exemption.<br>The State opposed the repeal. The final decision is expected in January 2023. |
| **<u>Tongass Land Management Plan</u>**<br>2016 amendment to Tongass Land Management Plan (TLMP) does not incorporate the Tongass Exemption. | Tongass National Forest Land and Resource Management Plan Amendment<br>81 FR 88657 | The 2016 TLMP amendment fully incorporated both the Roadless Rule and the Secretary of Agriculture's directive to rapidly transition timber harvest from old growth to young growth. The result would effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry would likely be | The 2016 TLMP is inconsistent with federal law because it incorporates the 2001 Roadless Rule. The Forest Service also failed to make the administrative change to the plan as required by the 2020 Tongass Exemption Rule. | No litigation at this time.<br>The State's objections to the 2016 TLMP were not resolved. Also, in support of the USDA's motion to stay litigation challenging the 2020 Tongass Exemption Rule, the USDA indicated that it did not anticipate approving any projects in inventoried roadless areas in the Tongass. The USDA has yet to amend the TLMP as required |

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| | | forced out of business while utilities, mining, and other industries would be substantially harmed. | | by the 2020 Tongass Exemption Rule. The State is monitoring the USDA's implementation of the 2020 Tongass Exemption Rule and the 2016 TLMP. |

## VIII. TAXATION

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| **ARPA Tax Mandate**<br>The "Tax Mandate" of the American Rescue Plan Act of 2021 (ARPA) restricts states from using funds to "directly or indirectly offset" a reduction in the net tax revenue of a state and requires detailed accounting of modification to tax. | The "Tax Mandate" of the American Rescue Plan Act of 2021 (ARPA) | The Tax Mandate, due to its ambiguity, could expose a state to claims by the federal government to return COVID relief funds if the state enacted any form of tax relief or even spending cuts. State legislatures would lack information to determine the impact of revenue measures on the ability to receive or retain federal funds. The Tax Mandate and the detailed accounting requirement set a dangerous precedent of federal intrusion on state taxing authority. | The Tax Mandate exceeds Congress's power under the Spending Clause of the U.S. Constitution because it is ambiguous, coercive, and unrelated to ARPA's purpose. It also violates the tenth amendment, and the anti-commandeering doctrine by preventing the State from decreasing future taxes. | • *West Virginia et al v U.S. Dep't of Treasury,* 22-10168 (11th Cir.)<br>The State joined litigation as a plaintiff state in litigation challenging the Tax Mandate.<br>The district court on November 11, 2021, decided in the States' favor that the Tax Mandate provision of ARPA is an unconstitutionally ambiguous condition on the States' receipt of federal funding in violation of the Spending Clause. The district court granted a permanent injunction against the Tax Mandate.<br>On January 14, 2022, DOJ appealed the district court decision to the 11th Circuit Court of Appeals. The State continued in the case as an appellee. The briefing is completed. Argument was held on September 13, 2022. The case is awaiting decision. |