

**Department of Law**  
**House Finance Subcommittee 2017**

February 5, 2017

The attached documents are provided in follow-up to the February 1, 2017 subcommittee meeting:

- I. Civil Division UGF Operations Overview Memo
- II. Significant Cases Memo with Actual Costs in Comparison to Outside Counsel Costs
- III. Law Outside Counsel Contract Activity FY'16
- IV. Federal Laws and Litigation Reports 2014-2017
- V. Lists of Significant Cases Presented at Prior Subcommittees
- VI. Oil and Gas Major Litigation Lists FY'13-FY'16

# MEMORANDUM

## State of Alaska Department of Law

TO: Pat Pitney  
OMB Director

DATE: September 22, 2016

TEL. NO.: 269-5229

FROM: Steve DeVries  
Civil Division Director

SUBJECT: Civil Division General Fund  
Budget Planning FY18

### **CONFIDENTIAL – DELIBERATIVE PROCESS PRIVILEGE**

This memorandum addresses the Civil Division's general fund budget. In particular, it addresses budget cuts the division has absorbed from FY15 through FY17 for FY18 budget planning purposes. It also identifies work currently performed by Civil Division sections using GF funding sources for agencies that do not separately pay for Law's work for them primarily with Interagency (IA) funding.

Identifying GF-funded work streams for reduction has been challenging. Last year Deputy AG Cantor polled each agency represented by the department asking each to identify work performed by the Civil Division for each agency that could be reduced or eliminated. No department or agency expressed any desire or inclination to reduce work performed by the Civil Division on their behalf.

This poll was repeated again this year with the same result. This is creating an untenable tension. The Civil Division is facing a downward trajectory in resources while concurrently being asked to provide the same level of services.

### **Budget Reductions from FY15 through FY17**

A starting point for building Law's FY18 budget is to recognize budget cuts already accomplished. The Civil Division's UGF budget has been reduced 33.5 percent from FY15 through FY17. This compares with an overall Department of Law UGF budget reduction of 20.2 percent,<sup>1</sup> a Criminal Division UGF reduction of 8.5 percent, and an Administrative Services Division UGF reduction of 4 percent over the same timeframe:

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<sup>1</sup> Measured from FY14 – FY17, the department's overall UGF reduction has been 26.4 percent.

**UGF BUDGET COMPARISON**  
(in thousands)

Division	FY15	FY17	% Change FY15 to FY17
Department Total	61,274	48,875	(20.2%)
Civil	29,230	19,429	(33.5%)
Criminal	29,312	26,823	(8.5%)
Administrative Services	2,732	2,624	(4.0%)

Each division (primarily the Civil Division) has other funds available to fund some operations in addition to GF. These alternative funding sources include primarily IA, and to a lesser extent federal funds or other program receipts. When considering all funds instead of just GF, the department and division budget reductions from FY15 to FY17 break down as follows:

**ALL FUNDS BUDGET COMPARISON**  
(in thousands)

Division	FY15	FY17	% Change FY15 to FY17
Department Total	95,400	84,459	(11.5%)
Civil	57,493	48,731	(15.2%)
Criminal	33,387	31,187	(6.6%)
Administrative Services	4,520	4,541	0.5%

In reviewing this detail, it is important to remember that IA funds may not be used for purposes beyond the scope of each Reimbursable Services Agreement (RSA) – the permissible use of these funds is restricted. In other words, IA funds cannot be used to fund Law's other GF functions. Similar use restrictions apply to all other non-GF funding sources.

This limitation illustrates an important point. Law's GF budget is flexible; it allows the division to move resources where they are needed for the variety of GF work the Civil Division performs. Because litigation needs are unpredictable, being able to move funding resources to areas where needs arise is a critically important tool for the division to be able to defend the state, protect its sovereignty and resources, and collect revenues when they are due.

For FY 16, the percentage of GF and IA work performed by each Civil Division section (component) breaks down as follows:

	IA Hours* FY16	IA % of Total Billable	GF Hours** FY16	GF % of Total Billable	% of Total Division GF Hours
Commercial, Fair Business Practices	13,606.4	58%	9,782.7	42%	6%
Child Protection	276.50	1%	53,534.00	99%	33%
Collections & Support	8,286.00	59%	5,754.60	41%	4%
Environmental	5,783.30	44%	7,423.30	56%	5%
Human Services	8,497.40	47%	9,607.00	53%	6%
Legislation & Regulations	1,647.60	19%	7,252.4	81%	4%
Labor & State Affairs	12,634.80	57%	9,378.70	43%	6%
Legal Support Services	7,074.10	74%	2,427.30	26%	1%
Natural Resources	9,392.20	25%	28,880.60	75%	18%
Opinions, Appeals & Ethics	4,059.40	21%	15,375.40	79%	9%
Regulatory Affairs & Public Advocacy	9,053.9	85%	1,540.50	15%	1%
Special Litigation	2,517.80	38%	4,145.40	62%	3%
Transportation	12,554.8	88%	1,781.30	12%	1%
Torts & Workers' Compensation	21,435.1	81%	5,068.1	19%	3%
<b>Total</b>	<b>116,819.3</b>	<b>xx</b>	<b>161,951.30</b>	<b>xx</b>	<b>100%</b>

\* Includes other restricted funds in addition to IA, such as federal funds or other Designated General Funds (DGF) sourced from industry surcharges.

\*\*GF hours listed exclude non-billable time for office absences (personal leave) or other non-billable administrative matters.

**Civil Division Component Detail of GF Work Performed**

The following discussion addresses the GF work performed by each Civil Division component (section), the agency for which the work is performed, and representative examples of cases, cost savings or revenues generated as a result of each section's GF work.

### **Commercial & Fair Business Practices Section (CFB)**

The CFB section currently is staffed by fourteen lawyers and two paralegals. There are four attorney positions that have not been filled. This section has a very diverse practice which includes representing nineteen different divisions within the Departments of Revenue, Natural Resources, Commerce, Education & Early Development, and Administration. In FY16, 42 percent of the section's time was billed to GF matters.

The GF work the section performs includes:

- **Consumer protection.** This is a statutory function of the Attorney General. AS 45.50.471 - .561. This GF work is currently staffed by two AAGs (down from four in 2014) and one litigation assistant (down from two in 2014). The unit investigates unfair and deceptive trade practices by businesses and pursues enforcement actions to stop such practices and obtain remedies for consumers. The unit receives close to 500 consumer complaints per year, which are addressed by either an informal mediation process or by formal investigations and enforcement actions. The unit also participates in multistate investigations and handles the department's statutorily required registration of charitable organizations, paid solicitors, telemarketers, and sellers of business opportunities. AS 45.68.010. This registration process generates about \$160,000 in fees each fiscal year.

During the past seven years, the Consumer Protection Unit has generated significant revenue (in the form of SDPR). From FY08 through FY16, the unit recovered over \$60 million in consumer and antitrust settlement payments for the state. These funds derive from Alaska's participation in multistate consumer protection and antitrust enforcement matters (primarily against large pharmaceutical companies and telecommunications providers) and in matters initiated locally.

For example, the unit's recoveries in FY16 were \$3.7 million; in FY 15 they were \$856,000; and in FY14, they were \$5.9 million.<sup>2</sup>

- **Excise tax enforcement and Unclaimed Property.** This GF work is performed on behalf of the Department of Revenue. One attorney performs this work. The excise tax work includes providing advice and litigating

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<sup>2</sup> Most of the large pharma cases contributing to this amount are resolved and few are forecast for future action. This means the large multi-million recoveries the Consumer Protection Unit realized previously are unlikely to continue. Smaller annual recoveries are expected instead.

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enforcement matters for taxes due to the state on motor fuels, fisheries, alcoholic beverages, (and soon marijuana); vehicle rentals, and cruise ship passengers.

For example, in FY16, this GF work successfully defended a Department of Revenue fisheries assessment of \$2.7 million.

The assigned attorney also gives day to day advice related to recovery of unclaimed property and prosecutes claims against unclaimed property held by the state. Most unclaimed property is considered abandoned after three years after which it escheats to the state.

- **Violent Crimes Compensation Board.** This GF work is performed on behalf of the Department of Administration. This board's purpose is to provide crime victims and their dependents compensation for costs incurred when appropriate. AS 18.67. A section attorney provides advice as needed on administrative proceedings when a victim requests compensation or appeals a denial of a compensation request.
- **Long Term Care Ombudsman.** This GF work is performed on behalf of the Mental Health Trust Authority. The Long Term Care Ombudsman investigates complaints and pursues remedies for older Alaskans who reside in long term care facilities. AS 47.62.015. A section attorney provides this representation which is required by law. AS 47.62.050.
- **Tobacco MSA Arbitration.** This litigation is partially funded by Law's GF. This arbitration arises under the Tobacco Master Settlement Agreement (MSA) and involves an annual determination of whether each state "diligently enforced" their settlement obligations requiring Non-Participating Manufacturers (NPMs) to place funds into escrow in each state where they do business. If states (including Alaska) prove they diligently enforced their NPM obligations, they are exempt from a downward adjustment to Participating Manufacturers' (PMs) annual payments to states under the MSA which amounts to millions of dollars every year for the state.

The 2004 tax year arbitration is expected to begin in the second quarter of 2017 to adjudicate whether any part of Alaska's \$22 million 2004 allocation should be reduced. This litigation requires a substantial commitment of attorney resources to protect Alaska's financial interests. While some tobacco cessation funds will cover part of the state's expenses related to the MSA, this funding source is inadequate to cover full litigation costs and the balance will need to be covered by Law's GF.

- **Miscellaneous work for the Department of Commerce, Community and Economic Development (DCCED).** This GF work includes providing legal advice on miscellaneous grant programs, monitoring legislation related to DCCED programs, and providing advice on new programs, such as the Division of Tourism's recently established Alaska Tourism Marketing Board.

### **Child Protection Section (CP)**

The Child Protection Section represents the Office of Children's Services (OCS) within the Department of Health and Social Services in child in need of aid (CINA) cases throughout the state. The section also represents OCS in other administrative hearings where OCS alleges an incident of neglect or abuse has occurred, but where it does not rise to a level requiring OCS to assume protective custody. Virtually all of this work (99 percent) is funded by the Civil Division's GF budget. For FY16, this work absorbed 33 percent of the Civil Division's GF budget.

The CP Section has offices in Anchorage, Fairbanks, Juneau, Bethel, Nome, Kenai and Palmer which are necessary to handle numerous court appearances required in these cases.<sup>3</sup> The CP Section currently consists of twenty six AAGs, fourteen paralegals and fifteen other support staff including current vacancies. These staffing levels have relatively constant since FY12.<sup>4</sup> While CP staffing levels have remained static, the CP section has been addressing increasing OCS caseloads statewide since 2011, except for FY16 which saw a modest statewide decrease in filings of 3.4 percent.

For example, from FY14 to FY15 caseloads increased by:

- 77 percent in Anchorage
- 29 percent in Fairbanks
- 79 percent in Bethel
- 55 percent in Juneau

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<sup>3</sup> Whenever OCS takes a child into emergency custody, a court hearing must be held within 48 hours. Other hearings are held to advise parents of their rights, assign counsel for indigent parents, review placement decisions, determine probable cause, adjudicate petitions for a determination that a child is in need of aid, adjudicate disposition of cases, and terminate parental rights. An AAG represents OCS at all of these hearings.

<sup>4</sup> The section has three additional paralegals; the numbers of AAGs and legal assistants are the same in FY16 as in FY12.

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- 40 percent in Kenai
- 53 percent in Palmer/MatSu

These case filing statistics do not reflect clearance rates, i.e. the number of cases closed in each year compared to the number of cases opened in the same period. From FY15 to FY16, the case clearance rate was 74 percent. This means 26 percent of the cases opened in this period remained open after FY16 ended. A 3.4 percent case filing decrease occurring in FY16 therefore does not mean CP section AAGs have fewer cases. Each open case requires ongoing AAG labor commitments.

### **Collections and Support Section (CS)**

This section is comprised of two subunits: the Collections Unit and the Child Support Unit. The Collections Unit collects judgments and surcharges ordered in criminal and minor offense court cases and owed to the State of Alaska. The Collections Unit also collects restitution ordered in criminal and juvenile delinquency cases and distributes the restitution to the victim, who may be a person, a business, or a state agency. The Child Support Unit provides advice and legal representation to the Child Support Services Division (CSSD) of the Department of Revenue to assist the agency in the performance of its functions and meeting federal requirements.

The CS Section consists of five AAGs (including one vacancy), three Associate Attorneys, two and ½ paralegals, and seven and ½ support staff. The section's CSSD representation is primarily IA funded. The balance of the section's work is primarily funded by Law's GF. In FY16, 41 percent of the section's time was billed to GF matters, primarily the section's restitution efforts.

A portion of this restitution function was eliminated effective February 1, 2017 by Governor Walker's FY17 budget veto. This veto eliminated the section's restitution efforts on behalf of crime victims who are not state agencies. This will reduce the section's GF budget by \$400,000 per year beginning in FY18.<sup>5</sup> The section's remaining restitution collection work on behalf of state agencies is also funded by GF. In FY16, the section collected restitution for state agencies. But identifying the specific amount recovered in FY16 has not yet been determined.<sup>6</sup>

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<sup>5</sup> The Court System recently proposed to fund the vetoed work function through the balance of FY17 to allow it time to absorb these duties. The administration agreed to allow Law to do this.

<sup>6</sup> This data has been requested from the Administrative Services Division which has higher priority work to complete at this time. The specific amounts recovered can be supplied at a later date if needed.



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The section's collection work on behalf of state agencies apart from restitution also provides substantial revenues for the state. For example, in FY16, approximately \$10 million was collected for the state and its agencies including the Department of Corrections (\$1.5 million), the Department of Public Safety (\$412,000), and for the state's general fund (\$8 million). This work was funded with program receipts (designated general funds). The section's collection work is also targeted for elimination as a part of a shared services model currently being explored.

### **Environmental Section**

The Environmental Section represents the Department of Environmental Conservation's (DEC) four substantive divisions (Air, Water, Environmental Health, and Spill Prevention and Response). It is staffed by eight AAGs (two positions are vacant and two are part time – shared with other sections) and two paralegals. The section provides day-to-day agency advice, and represents the agency in litigation and appeals for recovery of DEC costs incurred for cleanup (or oversight of cleanup of contaminated sites or spill events), and other enforcement and compliance litigation. The section defends state agencies and officials when they are sued for the performance of their duties in conjunction with environmental matters. The section also assists in regulation and legislation preparation and review, and it provides advice and helps coordinate comments and litigation for multiple state agencies and the Governor's Office on federal rulemakings and national environmental issues.

In FY16, 56 percent of the section's time was billed to GF matters. The bulk (64 percent) was for work performed by the section on the Flint Hills litigation. This action was initiated by the state against the Flint Hills refinery (and its former owner Williams Alaska Petroleum) for groundwater contamination at the North Pole refinery. Trial is scheduled to begin in March 2017. The other major category of GF work performed by the section (28 percent) addressed a variety of statehood defense matters including Pebble Mine litigation and comments on the EPA's proposed Clean Power regulations.

### **Human Services Section (HS)**

The Human Services Section represents the Department of Health and Social Services (DHSS) in all matters except Child in Need of Aid (CINA) cases which are handled by the Child Protection Section. HS is staffed with ten AAGs and five paralegals (two are shared with other sections). In FY16, 53 percent of the section's time was billed to GF matters. The IA work funded by DHSS is primarily for Medicaid, API (partially funded by Law's GF as well), the Pioneer Home, HIPAA, and Child Care Assistance.

The section's work funded by Law's GF includes:

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- Representing DHSS in managing public assistance programs, specifically in seeking to uphold decisions to reduce or terminate benefits. This work ultimately saves the state money; if suspensions and/or termination of benefits are affirmed, that means other state GF funds are not expended on benefits.
- Representing DHSS (Adult Protective Services) to have guardians or conservators appointed for persons who do not have any safety net and are being exploited financially, or who cannot take care of themselves because of a lack of capacity (the elderly, the disabled, the mentally ill).
- The section also represents other DHSS divisions, such as the Pioneer Homes, Alaska Psychiatric Institute (API), Office of Children's Services (OCS), Division of Juvenile Justice (DJJ), and the Department of Corrections (DOC) in hearings to establish guardianships or conservatorships. In these situations we are able to save the state GF expenditures by getting a court appointed conservator or guardian which saves the state money by helping with housing (moving a person who was at API into an assisted living home) or getting individuals on public benefits such as Medicaid and Social Security so that daily costs of care and medical care are shifted to the federal government.
- Representing DHSS in advising and defending its licensing agencies responsible for licensing foster homes and assisted living homes. These activities are essential to ensure the health, safety and welfare of vulnerable children and adults who are being cared for in these homes. The section's GF work ensures that homes are operated in conformance with state regulations. Most of the section's work here is in litigation where DHSS has suspended or terminated a provider's license who then contests that decision.
- Representing DHSS in civil litigation. Recent examples include successfully defending a class action challenging the current foster care rate systems and working with the Juneau DA's office in briefing issues related to transfer of a minor charged with a felony in another state under the Juvenile Justice Compact.
- Advising DHSS with the Public Records Act compliance, including assisting in privilege review of material prior to disclosure. Since much work at DHSS is confidential, these reviews are critical to ensure that there are no inadvertent disclosures.
- Advising DHSS in developing, adopting, and interpreting regulations. Doing so upfront decreases downstream litigation expense.

### **Legislation & Regulations Section (LR)**

The L&R section includes three AASs and three support staff. This section houses a statutorily mandated position - the regulations attorney. AS 44.62.125. It also houses an assistant regulations attorney and a third attorney who acts as the Civil Division's

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legislative liaison and assistant to the attorney general in addition to assisting the section on complex or controversial regulations issues. In FY16, approximately 81 percent of the LR Section's work was GF.

The section's GF work includes:

- **Regulations.** The two regulations attorneys review every regulation adopted by a state agency, board or commission with regulation adopting authority. This includes all regulations adopted under the APA or under other authority. All are reviewed to determine adherence to statutory standards and compliance with the Drafting Manual on Administrative Regulations, which is required by law. AS 44.62.060.

The section also provides an annual training on the regulations process for all state agencies and assistant attorneys generals. This training helps ensure agencies properly adopt regulations, and thereby avoid legal issues later on.

Some, but not all of the section's regulations work is funded by IA.

- **Legislation.** The section oversees all legislative drafting requests from the governor's office. Other Civil Division section AAGs usually do the initial draft of the legislation, and the L&R section supervisor revises, edits, and prepares the legislation for introduction to the legislature. If a bill is complex, on a tight timeline, or is otherwise unusual, the section supervisor may draft the bill for the governor. Much of the work is highly technical, must follow legislative drafting and formatting protocol. Failing to do so will result in a bill not transmitting properly, which would result in a delayed introduction of a governor's bill.

Section AAGs provide substantial support for the governor's legislative office year round, but especially during the legislative session. The L&R supervisor assigns every bill introduced to an AAG for monitoring in order to spot legal issues. Identification of legal issues is a critical function in order to avoid legislation being passed that has legal problems. The section also advises the governor's office of legal problems on bills so they can direct us as to whether to work with the legislator to fix the issue. This is a full-time activity from August to the beginning of a legislative session. The section also drafts bills during the session, again as directed by the governor and monitors bills for needed fiscal notes from Law.

The section monitors legislative hearings, especially those of governor's bills and other bills the governor's office is interested in. They provide

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advice on legislative procedure, and prepare proclamations for special sessions.

The section ensures bill review letters are prepared (written or oral, as directed by the governor) for each bill passed, and they are reviewed before being sent to the governor. The section monitors all bill transmittals to the governor for signature to help the governor's legislative office. Once a bill is transmitted, the time for the governor to act begins so bills must be tracked carefully. The L&R supervisor and the legislative liaison both provide draft veto letters or law without signature letters as requested by the governor. The section also reviews "objection letters" by the governor that explain the governor's budget vetoes.

- **Work with OMB.** The section works closely with OMB and the governor's office to prepare budgets for publication on December 15 each year and for introduction the first day of the legislative session. Section attorneys also assist with requests from OMB on budget issues (typically interpretation of budget bill language) throughout the year and with assistance from other section attorneys.

### **Labor & State Affairs Section (LSA)**

The Labor & State Affairs Section represents a large number of agencies in addition to the Governor and Lt. Governor's offices. The section consists of eighteen AAGs (including two vacancies), two paralegals (including one vacancy), and six support staff (including two vacancies) in Anchorage and Juneau. In FY16, approximately 43 percent of the LSA Section's work was GF.

The section's GF work includes:

- **Division of Elections.** The section represents the division in matters such as initiative applications, ballot challenges, candidate and voter eligibility, and compliance with federal voting requirements.

For example, section attorneys represented the Division in a nine-day federal trial in *Toyukak v. Treadwell*, an action challenging the state's compliance with the language assistance provisions of the Voting Rights Act. Another example is the section's successful defense of the Lieutenant Governor's decision not to certify a ballot measure banning set nets and shore gill nets in non-subsistence areas of the state.

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- **Alaska State Commission on Human Rights.** The section provides day-to-day advice to the Commission and represents it in appeals from its decisions.
- **Governor's Executive Office.** The section provides routine advice on the governor's constitutional and statutory powers, legislative rules and procedure, separation of powers issues, and boards and commissions issues, including the governor's appointment powers.

For example, section attorneys worked on legal issues and funding disputes regarding the governor's power to expand Medicaid in 2015, and they provided legal guidance on the governor's line item veto power to reduce the amount of the Permanent Fund Dividend for 2016.

- **OMB, Division of Finance, State Bond Committee, Treasury Division.** The section provides ongoing legal support to each agency in the areas of budget and public finance, including preparation of budgets, and they work with the legislature and the governor's office, particularly in the areas of appropriations, dedicated funds, the constitutional budget reserve, the Executive Budget Act, and financial reporting and state pension plan obligations under GASB. The section also advises the State Bond Committee, the Alaska Municipal Bond Bank Authority, and the Pension Obligation Bond Corporation.

For example, section attorneys advised the Commissioner of Revenue on financial issues such as a proposed lending program, investment authority and fiduciary obligations, and drafted the Permanent Fund Protection Act legislation.

- **Department of Administration.** Section AAGs address legislative and advice matters affecting the state employee pay plans, geographic differentials, and legislative funding of monetary terms of state labor agreements.

The section advises and represents the Division of Personnel and Labor Relations and various departments and agencies of the state in employment matters. This includes providing advice, representing client agencies in administrative and court proceedings, and assisting with regulation and legislation projects. Agency advice can cover a range of topics from ongoing employee disciplinary matters, arbitrations, labor relations, collective bargaining agreements, pay plan and classification questions, compliance with statutory requirements (ADA, EEOC, family medical leave, whistleblower, and human rights laws), and wrongful termination. Section

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attorneys assisted the administration with 2015 Government Shutdown planning due to the 2015 budget impasse, which included drafting of furlough letters, preparing FAQ's regarding employment issues from possible shutdown, and assisting OMB in drafting budget proposals for various shutdown scenarios.

The section advises and represents the Division of General Services (DGS), representing the state on over 300 leases, lease-financing, procurement of supplies and professional services, bid protests and breach of contract cases. The work can involve providing advice and representation in mediations, administrative hearings, and court proceedings for virtually all departments and agencies of the state. The work also involves providing advice and assistance to agencies in drafting and reviewing contract terms and conditions.

For example, during the past year, the section advised and represented the Department of Health and Social Services in contract disputes arising under two large IT contracts worth a combined total of over \$190 million, and assisted DHSS in reviewing records and responding to several sweeping public records requests related to those contracts.

### **Legal Support Services (Information & Project Support - IPS)**

The IPS Section provides project and litigation support for the Civil Division and to the Criminal Division for electronic discovery and Public Records Act issues. It also provides advice to state agencies on numerous topic areas. In FY16, approximately 26 percent of the IPS Section's work was GF. The section consists of one and ½ AAGs and six support staff.

Specific GF work includes:

- **Project support activities for LAW.**
  - Operating, customizing, and training all Civil Division employees on the division's matter-management, timekeeping, and accounting system.
  - Operating and training attorneys and paralegals on LAW's in-house electronic discovery and legal hold systems.
  - Identifying and helping attorneys and paralegals use hosted electronic discovery systems and other litigation-related software, such as trial presentation software.
  - Overseeing LAW's responses to all requests for LAW's records and maintaining LAW's public records log.

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- Managing LAW's contracts for online legal research services, such as Westlaw.
- Overseeing LAW's review of agency-specific records retention schedules.
- Developing and maintaining LAW's Internet and intranet sites (e.g., legal resources, including an electronic discovery webpage).
- Designing LAW's publications (e.g., annual report and consumer protection pamphlets).

For example, the section is providing litigation support for the division in numerous cases including the *Flint Hills* and *Xerox* litigations by identifying and liaising with electronic discovery and data storage vendors to support these document-intensive cases.

- **Public Records Act (PRA).** The section advises and trains agencies in responding to public records requests, including communicating with requesters, complying with statutory and regulatory requirements, and searching for, reviewing, and producing records. The section also represents agencies in litigation challenging their PRA responses and responds to and coordinates responses to public records requests for LAW's records.

For example, the section represented the governor's office in *Alaska Dispatch News v. Parnell* (a superior court action challenging the response to requests for records regarding allegations of sexual assault, fraud, and other misconduct at the Alaska National Guard), and it is lead on responding to PRA requests from KTOO for former Attorney General Craig Richards's emails and text messages, and to a Democratic National Committee request for Trump-related records.

- **Protected Information.** The section advises agencies on what constitutes privileged information under, for example, the executive communications, deliberative process, attorney-client, and/or attorney work-product privileges, or confidential information under, for example, the Alaska Uniform Trade Secrets Act, copyright laws, or the Alaska Constitution's right to privacy.
- **Records Retention Requirements.** The section advises agencies on their records retention responsibilities under the State Records Management Act, works with the Alaska State Archives on development of statewide and agency-specific records retention schedules, and advises and trains agencies on implementing legal holds.

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- **Information Technology.** The section advises the Division of Enterprise Technology Services and the State Security Office on legal issues, including requirements affecting state information systems (preserving emails and limiting employee's personal use of state information systems).
- **Social Media and the Internet.** The section advises agencies on the use of social media and the Internet, including complying with terms of service, the First Amendment, and records retention requirements.
- **Open Meetings:** The section advises agencies on complying with the Open Meetings Act.

### **Natural Resources Section (NR)**

The Natural Resources Section represents the Departments of Fish & Game, Natural Resources and Revenue. It also represents the Alaska Oil and Gas Conservation Commission. It is staffed by twenty AAGs (with two vacancies) and five paralegals. In FY16, approximately 75 percent of the NR Section's work was GF. This represents approximately 18 percent of the Civil Division's GF budget.

In FY16, the section's GF work recovered over \$72 million in taxes due to the state. In FY15, the section's GF work recovered over \$57 million in both taxes and royalties. Not captured by this data is the section's GF work defending refund demands made by taxpayers and royalty obligors holding state oil, gas and minerals leases. These refund demands amount to claims for tens or hundreds of millions of dollars every year.

The section's GF work includes:

- **Department of Natural Resources.**<sup>7</sup> The section represents several divisions within the department, including the Division of Oil and Gas, the Division of Mining, Land and Water, the Division of Forestry, the Division of Parks and Outdoor Recreation, and the Recorder's Office. This representation includes:
  - **Royalties.** The section advises DNR (primarily the Division of Oil and Gas) on royalty related matters, and represents each division in any litigation concerning royalties due the state on its oil, gas and

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<sup>7</sup> DNR has been providing Law an RSA of \$300,000 for litigation support to defend DNR's permitting and planning processes, including title defense, regulation review, records requests, planning, land management, authorizations and land sales. The amount of this RSA is dwarfed by the work performed by NR staff annually which must be covered by the Civil Division's GF budget.



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minerals leases. This includes defending assessments made and defending against protests and refund requests regarding assessments for royalties due under leases or under numerous royalty settlement agreements covering most North Slope oil and gas leases.

Royalty disputes arise on a regular basis. For example, section AAGs are currently defending DNR royalty audits with disputed individual amounts of \$14 million, \$4.8 million, \$2.2 million, \$1.7 million and \$2.9 million.

- **Fire suppression cost recovery.** The section advises and represents the Division of Forestry in its efforts to recover the state's forest fire suppression costs, and defends it against claims for damages incurred. For example, the section recently assisted in recovering \$675,000 in fire suppression costs.
- **Permitting.** Section AAGs provide day-to-day advice on all DNR permitting decisions made across several divisions, and represent DNR when those decisions are challenged. Permitting decisions defended include those pertaining to development of Alaska's oil and gas resources, mining decisions, water allocation claims, and timber permitting decisions. In a related matter, the section recently participated in litigation defending the U.S. Forest Service's Big Thorne Timber Sale, which is significant to the Southeast economy.
- **Commercial Fisheries Entry Commission ("CFEC"), and the Oil and Gas Royalty Board.** Section AAGs provide day-to-day advice to each of these entities and represent them in litigations when their decisions are challenged.
- **Land sales and leasing.** Section AAGs provide day-to-day advice to support DNR's land sales and leasing programs, including defending challenges to decisions to sell or lease state land. These programs provide opportunities to Alaskans to purchase or use state land and bring in revenue to the state.
- **Gasline.** Section AAGs provide ongoing advice promoting the administration's efforts to establish a gasline linking Alaska's stranded North Slope gas reserves to tidewater for marketing.
- **Department of Fish and Game.** The section represents the Alaska Board of Fish, the Alaska Board of Game, and the Divisions of Commercial Fisheries, Sport Fish, Habitat and Subsistence. Section AAGs attend all

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board meetings to advise on procedures, proposals, and legal issues as they arise. They ensure an adequate record for all board action exists, and represent the boards in litigation.

For example, the section routinely defends the department against perennial challenges to fish and game allocation decisions. Recent examples include a successful defense against challenges to community subsistence harvest hunts and limits on Tier II access to caribou in Game Unit 13.

- **Department of Revenue.** Section AAGs provide advice and represent DOR by defending its tax assessments in the areas of corporate income tax, oil and gas production taxes, and property taxes levied on oil and gas exploration, production and pipeline property.

Section AAGs are currently defending many DOR tax decisions implicating many millions of dollars. Section AAGs also recently settled a long standing dispute with certain taxpayers and municipalities regarding state property tax assessments on TAPS, recovering over \$15 million for the state.

- **Statehood Defense.** Section AAGs defend the state in a multitude of arenas falling under this category. Examples include the section's participation in federal rulemakings or litigation defending the state's interests in areas including the Endangered Species Act<sup>8</sup>, RS2477 access<sup>9</sup>, Outer Continental Shelf leasing decisions, and other jurisdictional disputes with the federal government.

Examples include the recent *Sturgeon* case heard by the U.S. Supreme Court, the state's successful defense of its sovereignty over the Mosquito Fork against the federal government, and litigation concerning critical habitat determinations made for polar bears and beluga whales, or decisions to list – or not list – species such as the Steller Sea lion and humpback whales.

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<sup>8</sup> The Department of Fish and Game (DFG) provides Law an \$85,000 RSA for this work which does not cover all ESA work performed or the cost of the AAG assigned to perform it. The balance is made up by Law's GF. Law has sometimes been successful in having DGF fund this balance by adding to the RSA. It did so in FY16, but not in FY15.

<sup>9</sup> DNR provided Law a \$175,000 RSA for RS2477 work. This amount was exceeded in FY16, and it will be exceeded in FY17, with the balance made up with the Civil Division's GF budget.

### Opinions, Appeals & Ethics Section (OAE)

The Opinions, Appeals & Ethics Section is staffed by eleven and ½ AAGs (with one vacancy). The section is generally responsible for handling many civil appeals for the state and its agencies in state and federal court, administering and enforcing the Executive Branch Ethics Act (which is a statutory duty of the Attorney General), drafting Attorney General Opinions, and providing advice and representation for the state on Native law issues. In FY16, approximately 79 percent of the OAE Section's work was GF.

The section's GF work includes:

- **Appeals:** All of the section's attorneys handle appeals in state and federal courts for a variety of state agencies. The appeals include legal challenges to all manner of state actions, statutes, and regulations. For example, section lawyers recently defended the Department of Revenue's decision to aggregate Prudhoe Bay Unit Producing Areas for oil production tax purposes against the producers' challenge before the Alaska Supreme Court, with hundreds of millions of dollars at stake. And two of the section's lawyers represented the State before the United States Supreme Court in the *Sturgeon* case, which concerned federal restrictions on activities on Alaska's waters. The section also represents DHSS in all children in child-in-need-of-aid appeals.

To promote effective representation of the State's interests, the section monitors appeals in civil matters involving the State, including appeals that other sections handle. That monitoring includes evaluating whether to file an appeal, reviewing briefs before they are filed, and arranging moot courts to prepare advocates for oral argument.

- **Litigation:** The section's attorneys sometimes handle litigation at the trial court level, particularly when an appeal is likely. For example, section attorneys helped defend the constitutionality of Alaska's campaign finance limits in federal court.
- **Opinions:** The section's attorneys draft and review attorney general's opinions, which provide written legal guidance in response to the governor's requests. These opinions are published and address matters such as statutory interpretation, the effects of court decisions, and conflicts between federal and state laws.
- **Advice:** In addition to formal opinions, the section's attorneys provide less formal oral and written advice, often to the Governor's Office. The

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subjects may include, for example, the scope of the governor's authority, the legality of proposed actions, or the appointment or removal of board or commission members. The section's guidance helps the State avoid costly litigation and liability.

- **Native law:** Two and ½ of the section's attorneys devote substantial time to legal issues involving Alaska Natives. That work includes representing the State in litigation, advising the Governor's Office and other state agencies, meeting with representatives of tribes and other Native groups, and drafting and negotiating waivers of sovereign immunity with tribes.
- **Ethics:** One attorney in the section serves as the State Ethics Attorney. His ethics duties include advising current and former state officials on their obligations under the Executive Branch Ethics Act, investigating ethics complaints, prosecuting ethics complaints before the Personnel Board, serving as the department's designated ethics supervisor, advising other agencies' designated ethics supervisors, making recommendations to the attorney general about gift reports from the governor and lieutenant governor, and coordinating quarterly ethics reports from all executive branch agencies to the Personnel Board.
- **Amicus:** The attorney general receives frequent requests to write or join amicus briefs, most often in United States Supreme Court cases. Section attorneys evaluate those requests and make recommendations to the attorney general. When the State writes an amicus brief, the section's attorneys usually write it.

### **Regulatory Affairs & Public Advocacy Section (RAPA)**

RAPA represents the Attorney General as public advocate before the Regulatory Commission of Alaska (RCA). The section also represents the state's interests in pipeline proceedings before the FERC, and it enforces Alaska's antitrust laws. The section is staffed by four AAGS, and four non-attorney professionals who serve as investigators and expert witnesses generally in RCA proceedings. In FY16, approximately 15 percent of RAPA's work was GF.<sup>10</sup> The section's work before the RCA is not GF funded.<sup>11</sup> The balance of the section's work is GF funded.

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<sup>10</sup> RAPA assumed all non-RCA work in FY16 following a reorganization of the Civil Division. Because FY16's data represents only a portion of the year, it is anticipated RAPA's GF work percentage will grow in FY17 and beyond as a percentage of its total workload.

The section's GF work includes:

- **FERC Proceedings.** RAPA represents the state before the FERC in pipeline tariff proceedings. Because increases in pipeline tariffs, particularly on TAPS, have the effect of reducing state production taxes and royalties, RAPA's representation of the state before the FERC can have substantial financial impacts for the state. For example, the state was recently successful in contesting the inclusion of approximately \$700 million in cost upgrades to TAPS from being factored into pipeline tariff rates. This decision, if upheld on appeal, should save the shippers approximately \$2 billion over the projected remaining lifespan of TAPS in the form of reduced tariff rates. These tariff reductions will create a positive impact of the state's receipt of production taxes and royalties over the same period.
- **Antitrust Law Enforcement.** The section is responsible for enforcing Alaska's antitrust laws, which is a statutory duty of the attorney General. AS 45.50.562. For example, the section recently negotiated a consent decree with Tesoro requiring it to sell a petroleum fuel terminal at the Port of Anchorage as a part of Tesoro's purchase of Flint Hills Resources' fuel storage assets, including its storage facility at the Port of Anchorage. The divestiture was required in order to preserve competition in Alaska's fuel markets.

### Special Litigation Section (SL)

The Special Litigation Section was created to develop litigation expertise in the Civil Division and to deploy that expertise—in collaboration with subject matter sections—to handle high-profile, expedited, and/or complicated litigation. The section is staffed by four AAGs. In FY16, approximately 62 percent of SL's work was GF.

The section's GF work includes assignment of cases from other sections. Many of the cases assigned can be GF funded. Recent examples of GF work include:

- Representing the Division of Retirement and Benefits in a diminishment case about dental vision and audio benefits for retirees that will have implications for the State's ability to manage retirement obligations.

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<sup>11</sup> RAPA's work before the RCA is funded by an industry surcharge. AS 42.05.254; AS 42.04.286. In the budget, this funding source is referred to as Designated General Funds (DGF).

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- Representation of the Department of Revenue in an ongoing corporate income tax dispute.
- Representation of the Alaska Public Offices Commission in a recent federal court challenge to the constitutionality of Alaska's campaign finance laws.
- Representation of the Division of Elections in a challenge to candidate party membership requirements.

### **Transportation and Torts/Workers Compensation Sections**

These two sections are almost exclusively funded by IA and therefore no GF related discussion is needed for these sections.

# MEMORANDUM

## State of Alaska Department of Law

TO: Pat Pitney  
OMB Director

DATE: November 18, 2016

269-5229

Thru: Jahna Lindemuth  
Attorney General

TEL. NO.:

Jim Cantor  
Deputy Attorney General

AGO NO.:

SUBJECT: Civil Division General Fund  
Budget Planning FY18

FROM: Steve DeVries  
Civil Division Director

### **CONFIDENTIAL – DELIBERATIVE PROCESS PRIVILEGE**

This memorandum addresses questions raised with the department's Administrative Services Director concerning the Civil Division's proposed general fund (GF) budget. The specific questions addressed below are:

1. Examples of big cases won and big cases lost. For each, estimate what it would have cost the state to have used outside counsel instead of Law's staff trying similar cases.
2. Examples of kinds of cases we would have to take to outside counsel if we have to absorb more big GF cuts, and what it would cost the state to use outside counsel instead.
3. Other examples about how cuts we have sustained have impacted our operations and Alaskans.
4. Where AAG representation would be cut from OAH hearings, explain the expected impacts, and where known whether other state law departments perform similar work or is it handled by other agency staff.

#### **Assumptions:**

- In addressing these questions, I have confined our response to case examples occurring within the last two years.
- To address questions about comparable costs for outside counsel to perform similar tasks, we have compared the department's OMB approved billing rates in

effect at the time of billing for attorneys<sup>1</sup> to market rates allowed by the Alaska Court System – in particular, market rates that the Alaska Supreme Court allowed as “reasonable” in 2011 – 2013 in the *Nunamta* case.<sup>2</sup> This is a very conservative estimate. The passage of time and inflation has driven costs up beyond – or well beyond – these levels.<sup>3</sup>

In *Nunamta*, the Alaska Supreme Court allowed the following rates in its order:

- Attorneys’ with 30 or more years of experience: \$350/hour
- Attorneys’ with 20 – 30 years of experience: \$300/hour
- Attorneys’ with 11 – 20 years of experience: \$250/hour
- Attorneys’ with 5 - 10 years of experience: \$215/hour
- Attorneys’ with 1 – 4 years of experience: \$181/hour
- Paralegals: \$106/hour

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<sup>1</sup> For FY17: \$160.88 for attorneys, \$100.09 for paralegals; for FY16: \$157.51 for attorneys, \$101.18 for paralegals; for FY15: \$156.84 for attorneys, \$101.90 for paralegals.

<sup>2</sup> *Nunamta Aulukestai et al. v. DNR et al.* This was a case about mineral exploration at the Pebble prospect. The Court concluded that DNR’s Miscellaneous Land Use Permits authorizing various mineral exploration activities at the Pebble ore deposit were functionally irrevocable; the permits therefore conveyed an interest in land and should have been preceded by public notice. The supreme court order on fees was issued on August 31, 2015.

<sup>3</sup> Measuring the reasonableness of attorney fees in the context of fees awarded to prevailing parties in litigation frequently underestimates the actual costs of outside counsel. For example, the department recently awarded a competitive bid to outside counsel for FERC-related work where the contract billing rate is \$575/hour.



**“BIG” CASE EXAMPLES AND COST COMPARISONS**

<b>Case</b>	<b>Description</b>	<b>Won or Lost</b>	<b>Law’s Costs</b>	<b>Costs if Outside Counsel</b>	<b>Savings to State</b>
<i>Alaska Leg. Counsel v. Walker</i>	Challenge to Governor’s Medicaid expansion decision	Won	\$139,719	\$210,560	\$70,842
<i>Nageak v. Mallott</i>	District 40 primary election challenge	Won	\$159,467	\$251,954	\$92,487
<i>Planned Parenthood v. State</i>	Challenge to constitutionality of parental notice requirement for minors having abortions	Lost	\$856,234	\$1,283,454	\$427,220
<i>DHSS v. Xerox</i>	Contract dispute claiming Xerox failed to provide functioning Medicaid Management Information System	Settled	\$416,371	\$667,250	\$250,878
<i>State v. Planned Parenthood</i>	Challenge to state statute prohibiting Medicaid funding for elective abortions	Decision pending	\$434,671	\$698,376	\$254,704
<i>State v. Ketchikan Gateway Borough</i>	Challenge to local contribution requirement for local school districts	Won	\$264,276	\$346,068	\$81,792
<i>Sturgeon v. Frost</i>	Challenge to National Park Service assertion of jurisdiction over state waters	Won	\$481,588	\$783,474	\$301,886
<i>Aniak White Alice Site Cleanup</i>	Contaminated Site action against USAF, DOT, and School District for PCB cleanup at Aniak school sites.	Settled	\$333,702	\$735,763	\$402,061
<i>Nunamta v. DNR</i>	Challenge to DNR’s temporary exploration permits for mining exploration at the Pebble prospect.	Lost	\$1,111,063	\$2,080,186	\$969,123
<i>DEC v. Ritz Consulting</i>	Failed wastewater septic system enforcement case brought on behalf of DEC.	Partial win	\$132,772	\$268,019	\$135,247
<i>U.S. Army</i>	Leaking underground storage	Won	\$42,253	\$77,970	\$35,717

<i>Fort Wainwright</i>	tank compliance order proceeding.				
<i>Thompson v. APOC</i>	Constitutional challenge to Alaska's campaign finance limits	Pending	\$450,457	\$674,434	\$268,978
<i>Murran v. DHSS</i>	Class action challenge to DHSS' foster care base rate	Won	\$208,585	\$303,356	\$94,770
<i>Filipino American Assisted Living v. DHS</i>	Due process challenge to funding and investigations of licensed assisted living homes	Won	\$199,868	\$300,876	\$101,008
<i>Toyukak v. Treadwell</i>	Challenge to state elections balloting under Voting Rights Act based on language barriers	Lost	\$711,843	\$1,048,878	\$337,035
<i>Hamby v. Walker</i>	Challenge to Alaska's Constitutional provision limiting marriages to one man and one woman.	Lost	\$104,945	\$155,358	\$50,414
<i>Dickson v. State</i>	Challenge to state RS2477 access rights over Iditarod Trail	Won	\$810,527	\$1,189,242	\$378,715
<i>Mosquito Fork</i>	Defense of state sovereignty over navigable waters	Won	\$547,742	\$745,927	\$198,185
<i>TAPS v. State</i>	D.C. Cir. appeal from FERC "strategic reconfiguration" decision	Pending	\$28,602	\$250,000 <sup>4</sup>	\$221,398
Tobacco Settlement Litigation	Defense of state's annual receipt of millions (2004 - \$21.5 million)	Pending	\$111,114	\$258,000	\$146,886
<b>Totals</b>			<b>\$7,545,799</b>	<b>\$12,329,145</b>	<b>\$4,819,346</b>

This data shows Civil Division representation conservatively costs the state approximately 60 percent of what it would cost to use outside counsel for comparable work.

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<sup>4</sup> This was an actual bid amount for this work from outside counsel.

It is also important to recognize that the twenty cases and savings identified above represent only a sliver of the litigation the Civil Division performs. During the most recent two year period ending October 31, 2016, the division’s attorneys were involved in:

- 473 litigation-related matters supported by the division’s general fund; and
- 1,471 litigation-related matters supported by IA receipts.<sup>5</sup>

Comparing Law’s costs to provide these services to what outside counsel would cost the state using the same discount ratio shows the following:

<b>Matters<sup>6</sup></b>	<b>Law’s Costs</b>	<b>Costs if Outside Counsel</b>	<b>Savings to State</b>
GF Litigation	\$24,968,863	\$41,614,772	\$16,654,909
IA Litigation	\$35,269,954	\$58,783,257	\$23,513,303
<b>Totals</b>	<b>\$60,238,817</b>	<b>\$100,398,029</b>	<b>\$40,168,212</b>

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<sup>5</sup> The Civil Division’s attorneys also provide numerous other services not captured by these totals. For example, during this same period, Civil Division attorneys represented the state in 3,763 Child-In-Need-Of-Aid (CINA) and Substantiation cases. In FY 16, these CINA and Substantiation cases consumed 33 percent of the division’s GF budget. Other matters not included in this two year data compilation include, but are not limited to, all appellate work (781 cases), bankruptcy work (16 cases), executions (133 cases), estate recovery (810 cases), guardianships (488 cases), conservatorships (77 cases), and mental health commitments (2,115 cases). For a summary of all GF work performed by the division’s attorneys, please refer to the September 20, 2016 memorandum entitled “Civil Division General Fund Budget Planning FY 18.” This memorandum was directed to Pat Pitney and distributed to OMB staff during our September 20, 2016 Heads-up planning meeting.

<sup>6</sup> The GF and IA litigation data in this table was drawn from the Civil Division’s Prolaw data management system only using the following Matter Type identifiers: Administrative Litigation, General Litigation, Litigation Enforcement, and RAPA FERC.

**CASE TYPE EXAMPLES LAW WOULD NEED TO CONTRACT OUT IF  
FACED WITH ADDED GF CUTS**

<b>Case Type</b>	<b>Description or Examples</b>	<b>Estimated Cost if Done by Law</b>	<b>Estimated Cost if Farmed Out</b>
FERC tariff disputes	State challenge to TAPS including “strategic reconfiguration” costs in rates	\$4.26 million <sup>7</sup>	\$16 million (actual cost to the state, billed at \$678/hour for senior counsel and \$533/hour for associates)
Statehood defense	<i>Dickson</i> ; <i>Mosquito Fork</i>	\$810,527 ( <i>Dickson</i> ); \$547,742 ( <i>Mosquito Fork</i> )	\$1,189,242; \$745,927
Constitutional challenges including challenges to executive actions	<i>Hamby v. Walker</i> ; <i>Wielechowski v. State</i> (PFD Veto case)	\$104,945 ( <i>Hamby</i> )	\$155,358 ( <i>Hamby</i> )
Challenges to DHSS licensing decisions	<i>Murran v. DHSS</i> ; <i>Filipino American Assisted Living v. DHS</i>	\$208,585 ( <i>Murran</i> )	\$303,356 ( <i>Murran</i> )
DEC regulations review	Regulations for DEC contaminated sites, underground storage tank, contingency plan, animal health, air permitting, drinking water and solid waste programs are updating regulations to update requirements, modernize programs and meet federal requirements.	\$8,836 per regulation project review	\$16,830 per regulation project review

<sup>7</sup> Computed using Law’s FY17 billing rate of \$161/hour, and the average of outside counsel costs per hour (\$605/hour).

DEC permit adjudications and appeals	Green Acres Farm septic lagoon	\$53,974	\$99,269
DEC site cleanup and cost recovery actions	<i>Aniak White Alice Site Cleanup</i>	\$333,702	\$735,763

**EXAMPLES HOW CUTS SUSTAINED HAVE IMPACTED OPERATIONS AND ALASKANS**

**1. Child Protection.**

- Heavy AAG caseloads and shrinking resources create morale and retention problems that negatively impact client service delivery. Attorney caseloads have increased an average of 55 percent over the state in recent years, and the section has lost two positions. Section attorneys carry an average of 89 family cases each, with attorneys in Anchorage and Palmer carrying over 100 cases. The American Bar Association Standards for lawyers representing child welfare agencies recommend no more than 60 family cases per attorney.
- More cases, fewer attorneys and abbreviated court schedules lead to longer stays for children in foster care who could otherwise find permanency in a “forever home.” It costs the state approximately \$35/day for a child to be maintained in foster care.
- More cases and fewer resources could negatively impact the amount of Title IVE federal dollars the state is entitled to receive in reimbursement for eligible legal services performed in Child in Need of Aid cases, thereby increasing the amount of GF dollars needed for the same work.

**2. Human Services:**

- The section has to triage Adult Protective Services cases based upon a real-time assessment of risk. Due to the volume of cases that are being referred, this means cases are evaluated daily and adjusted depending on the level of risk to the person who is in need of assistance. While all of these people are in need of help, depending on their living situations, others that are more at risk get handled first leaving many waiting for services, which costs the state more in the long run.
- Efforts to assist in discharge planning have been increasingly difficult for people who are committed to API for treatment. Many have significant social, medical,

mental health or criminal history making placement options addressing health, safety and welfare difficult if not impossible. This results in longer API placements than medically indicated at a much higher cost to the state.

### 3. **Consumer Protection and Antitrust Enforcement Actions.**

- The Consumer Protection Unit has lost half of its attorney staff (from four AAGs to two) and it no longer has an investigator. This has led to a reduction in the state's ability to pursue vigorous antitrust and consumer protection enforcement. The state has previously collected over \$100 million since 2004 through its consumer protection and antitrust enforcement efforts. Examples include: (a) \$11 million recovery from Merck based on illegal sales and marketing of pharmaceuticals. (b) Average Wholesale Pricing (AWP) litigation that netted the state over \$60 million. (c) In 2006, the Unit settled a consumer protection case against Eli Lilly for \$15 million. (d) This year, the Unit recovered over \$1 million from Apple in antitrust litigation related to price fixing of Ebooks.
- In FY14, Consumer Protection Unit attorneys spent approximately 3,153 hours on consumer protection investigations and matters. In FY16, Consumer Protection Unit attorneys spent approximately 1,781 hours on consumer protection investigations and matters. This represents about a 43 percent reduction in the Unit's consumer protection efforts because of reductions in staff.
- Without a Consumer Protection investigator, the section is very limited in its ability to conduct thorough investigations and perform undercover work. While it is possible for attorneys to do a lot of their own investigating, this has become increasingly difficult due to attorney staff reductions and because attorneys cannot ethically engage in undercover work. Attorneys can only supervise such activities. The Unit has received several complaints involving apparent violations of the Consumer Protection Act by local businesses that it was not able to investigate due to a lack of investigative staff. Several open investigations have also been delayed.
- The RAPA section currently handles antitrust matters. It is currently involved in four antitrust multistate matters that all have the potential for large money recoveries, but the section is not joining others due to a lack of resources.
- With the loss of personnel and assignments to other matters, the Consumer Protection Unit and RAPA are unable to vigorously seek out and prosecute "high value" consumer protection and antitrust cases. Further GF reductions could result in even more declined cases that could potentially cost the state millions.

- While the Consumer Protection Unit’s consumer complaint process continues to be generally effective, but it is closing complaints that would receive additional attention if it had more resources. For example, it closed several complaints recently where the complainant received the relief he or she requested (a refund, etc.) but it was evident the state could have required each business to change their practices if the Unit had resources to follow up each case. The Unit has also closed complaints where there was a violation of the Consumer Protection Act, and reason to suspect more consumers had been harmed, but it was unable to investigate further.
- The Consumer Protection Unit has not been able to create or complete brochures, such as a brochure addressing consumer rights in purchasing funeral services that would have included information on dealing with remains after an autopsy by the state medical examiner. This was a big issue in rural areas, and was addressed by legislation in 2014.
- The Consumer Protection Unit has not had time to actively update its consumer protection webpage. Last month it had an inquiry from a legislator if or when the webpage would update information on ID theft to include child ID theft (the subject of a bill that passed in the last session).
- While the Consumer Protection Unit has streamlined its Charity and Paid Solicitor registration process, it does not have sufficient time to follow up with registrants, or unregistered organizations that are not meeting legal requirements under the Charitable Solicitations Act.

#### **4. Environmental.**

- Position reductions and positions held vacant have resulted in a drop in cost recovery of DEC oversight and cleanup costs for spill response and contaminated sites. Because of statute of limitations bars on some of these types of costs, the section is unable to recover past costs incurred by DEC.
- Enforcement work suffers most when the section must focus on defensive litigation and advice to the client.
- The section has been unable to pursue cleanup of “lingering contaminated sites” where there is no responsible party undertaking a cleanup. This results in contamination being unaddressed, contaminated sites remaining unclosed which

has impacts on Alaskans wanting to use, sell or develop property. These lingering contaminated sites have a chilling effect on local economies and real estate sales.

- Large GF cuts will erode the section's ability to provide proactive advice on permits and approvals. Without preventative lawyering, permits and approvals are less likely to be upheld on appeal or may result in permit disputes and litigation that could have been resolved at an earlier point in the agency review. These permit adjudications and appeals are costly and time consuming. To the extent the section is asked by the agency to assist in permitting work, work will be delayed because of fewer available attorneys. Permit delays result in slowing projects and construction work.

## **5. Labor & State Affairs.**

- The L&SA section has shed six attorneys since 2015 and lost its only paralegal in Juneau. This drastic downsizing has led to each AAG taking on additional agency clients.
- Due to attorney shortages and increased workload, L&SA has hit a saturation point in doing more with less. For example, one attorney in the section took over the entire workload of an attorney who left the section and who was not replaced, meaning that this attorney began representing and advising the Department of Revenue and OMB (specifically on appropriations/budget issues), APFC, the State Bond Committee, Division of Finance, and the governor's office—all while retaining his current clients, which include the Department of Administration, personnel and labor relations, and ASCHR. Moreover, during the last two years, the legal issues presented in the Revenue/OMB/budget arena has become more complex because of challenging fiscal conditions and longer legislative sessions, meaning this attorney regularly works substantial hours beyond the normal work week for no additional compensation.
- Another example is the attorney assigned as primary counsel to the Lieutenant Governor's office and the Division of Elections. Due to significantly fewer attorneys in the section and throughout the Division, this attorney has taken on many cases and requests for legal advice outside her assigned areas of law and client agencies, including agency advice work that the criminal division would typically handle.
- Of particular note is the increase in retirement and benefit appeals and Workers' Compensation Benefit Guarantee Fund cases. There are fewer attorneys in the section to represent DOLWD and DRB while simultaneously being required to handle an increased workload in each area. This workload is only expected to increase in the foreseeable future.



- Further reductions or cutbacks in staff resources would be completely unmanageable and indeed, more costly to the State in the long run.

### **POTENTIAL IMPACTS FROM CUTTING AAG REPRESENTATION AT OAH HEARINGS**

- **DHSS Benefits Cases: Risk = Increased state costs.** Reducing attorneys who represent DHSS before OAH will likely lead to increased state costs due to ineffective defense of suspensions and/or termination of benefits. When agency decisions to suspend or terminated benefits are upheld, other state GF funds are not expended on benefits.
- **OCS Substantiation Cases: Risk = Increased risk to children.** Many cases where OCS substantiates a report of harm or neglect do not result in OCS taking custody of a child for various reasons, making a substantiation finding the only record of past child abuse or neglect by a caretaker. If OCS had to defend substantiation cases themselves they would drop many, not because they aren't valid, but because OCS lacks personnel to invest in their defense. Cases pursued would also have less likelihood of success without counsel. With no record of valid substantiations, foster care licenses might be issued to dangerous caretakers putting a vulnerable population at further risk of harm. Children harmed in foster care lead to lawsuits and damages. Substantiations are also reported to other states who are investigating child abuse and neglect cases. Without this record, other states will not know that an adult harmed or posed a risk of harm to a child in Alaska.

### **OTHER STATE LAW DEPARTMENT REPRESENTATION IN SIMILAR OAH PROCEEDINGS**

- **DHSS Benefits Cases.** It is our understanding other state law departments handle benefit cases in a similar manner as the Department currently provides: agencies handle some matters internally but not complex cases and/or where attorneys are involved, and attorneys are available to provide legal advice for due process (notice) and other procedural or legal issues that come up in a hearing even if they are not handling the case.
- **OCS Substantiation Cases.** Most states have some form of review process for their substantiations but that the method varies between internal review by CPS management to court remedies. To the extent that appellants can seek court relief, I would assume that the agency is represented in some fashion but the report does

not contain that specific piece of information. This is reported in a National Study of Child Protective Services Systems and Reform Efforts; Review of State CPS Policy (2003) but the report does not state how representation is handled.  
[https://aspe.hhs.gov/report/national-study-child-protective-services-systems-and-reform-efforts-review-state-cps-policy#.WBejT\\_eLBfQ.email](https://aspe.hhs.gov/report/national-study-child-protective-services-systems-and-reform-efforts-review-state-cps-policy#.WBejT_eLBfQ.email).

Department of Law

FY2016 Outside Counsel Expense

Contract Number	Vendor	Law Type	Client	Total	Inter-Agency	General Fund
07-209-347	Ashburn & Mason	Oil, Gas & Mining	DNR	\$ 2,163.00	\$ -	\$ 2,163.00
07-215-297	Ballard Spahr	Bond Counsel	DOT	\$ 4,160.80	\$ 4,160.80	\$ -
16-203-903	Ballard Spahr	Bond Counsel	ASLC	\$ 47,769.08	\$ 47,769.08	\$ -
16-203-910	Ballard Spahr	Bond Counsel	ASLC	\$ 18,411.77	\$ 18,411.77	\$ -
11-207-550	Ballard Spahr	Bond Counsel	ASLC	\$ 50,178.56	\$ 50,178.56	\$ -
12-207-636	Birch Horton Bittner & Cherot	Legal Counsel	AIDEA/AEA	\$ 164,276.90	\$ 164,276.90	\$ -
15-203-852	Birch Horton Bittner & Cherot	Legal Counsel	AHFC	\$ 8,489.56	\$ 8,489.56	\$ -
12-203-659	Birch Horton with Kenneth Vassar	Bond Counsel	AHFC	\$ 81,140.00	\$ 81,140.00	\$ -
16-207-858	Brustein & Manasevit	Ed - Federal Issues	DEED	\$ 10,981.25	\$ 10,981.25	\$ -
12-207-655	Cernosia, Arthur W.	Ed - Special Ed. Policies	DEED	\$ 8,604.37	\$ 8,604.37	\$ -
14-209-786	Christianson, Law Offices of Cabot C	Bankruptcy	DNR	\$ 2,776.16	\$ -	\$ 2,776.16
16-209-890	Christianson, Law Offices of Cabot C	Bankruptcy	DNR	\$ 81,709.98	\$ -	\$ 81,709.98
16-206-853	Covington & Burlington	Fed Pub Assistance	HHSS	\$ 7,000.00	\$ 7,000.00	\$ -
15-501-849	Eric Sanders	Hearing Officer	Law	\$ 1,715.00	\$ -	\$ 1,715.00
14-209-737	Greenberg Traurig	Oil, Gas & Mining	DNR	\$ 2,941,214.64	\$ 2,941,214.64	\$ -
12-207-638	Groh Eggers	Legal Counsel	AIDEA/AEA	\$ 6,354.47	\$ 6,354.47	\$ -
10-215-497	Hogan Lovells, LLP	Tran - Int Air	DOTPF	\$ 18,026.46	\$ 18,026.46	\$ -
11-208-559	Holland & Hart	Land - Public	DNR	\$ 316.00	\$ -	\$ 316.00
08-208-417	Holland & Hart	Endangered Species	DNR	\$ 166,104.31	\$ -	\$ 166,104.31
15-206-821	Hornby Zeller Associates	Child Protection	HSS	\$ 150.00	\$ -	\$ 150.00
14-207-745	Ice Miller, LLP	Pension Funds	APFC	\$ 106.31	\$ 106.31	\$ -
14-207-763	Ice Miller, LLP	Tax Law	DOA	\$ 242,238.76	\$ 192,287.84	\$ 49,950.92
12-203-626	Jermain Dunnagan & Owens	Real Estate	AHFC	\$ 135,257.85	\$ 135,257.85	\$ -
16-215-899	Jermain Dunnagan & Owens	Bankruptcy	DOT	\$ 97,485.67	\$ 97,485.67	\$ -
15-207-804	Jones Day	Oil, Gas & Mining	AGDC	\$ 243,196.31	\$ 243,196.31	\$ -
81-783-023	Kaye Scholer Fierman Hays & Handler	Oil, Gas & Mining	Law	\$ 11,150.96	\$ -	\$ 11,150.96
04-209-160	McArthur, Law Office of John Burrirt	O&G Royalties	Law(O&G)	\$ 30,211.97	\$ -	\$ 30,211.97
16-209-861	Milbank, Tweed Hadley & McCloy	Oil, Gas & Mining	AGDC	\$ 3,575,268.93	\$ 3,575,268.93	\$ -
13-215-673	Miller Nash Graham & Dunn	Trademark Law	DOT	\$ 2,638.63	\$ 2,638.63	\$ -
15-209-782	Mintz, Robert Attorney	O&G Gas Tax Law	DOR	\$ 12,183.00	\$ 12,183.00	\$ -
81-783-017	Morrison & Foerster	Oil, Gas & Mining	Law(O&G)	\$ 257,679.21	\$ -	\$ 257,679.21
14-214-766	Nicoll Black & Feig, PLLC	Maritime Law	DOA	\$ 40,964.30	\$ 40,964.30	\$ -
15-207-793	Nielsen, Law office of Mark J.	Trademark Law	ASMI	\$ 32,259.48	\$ 32,259.48	\$ -
15-207-859	Nielsen, Law office of Mark J.	Trademark Law	ASMI	\$ 2,178.00	\$ 2,178.00	\$ -
15-207-845	Orrick, Herrington & Sutcliffe	Bond Counsel	DOR	\$ 3,000.00	\$ -	\$ 3,000.00
16-207-904	Orrick, Herrington and Sutcliffe	Bond Counsel	DOR	\$ 131,659.22	\$ 131,659.22	\$ -
12-207-640	Reeves Amodio	Environmental Law	AIDEA/AEA	\$ 32,226.13	\$ 32,226.13	\$ -
13-208-706	Stanley, Michael	Fisheries Mgmt	ADF&G	\$ 3,660.00	\$ -	\$ 3,660.00
12-207-592	Van Ness Feldman	Hydroelectric Lic	AEA	\$ 241,651.15	\$ 241,651.15	\$ -
13-207-667	Vassar, Kenneth (prev w/ Birch Horton)	Bond Counsel	AIDEA/AEA	\$ 41,412.50	\$ 41,412.50	\$ -
12-207-650	Wohlforth Brecht & Cartledge APC	Bond Counsel	DOR	\$ 83,271.53	\$ 83,271.53	\$ -
13-207-668	Wohlforth Brecht & Cartledge APC	Bond Counsel	DOR	\$ 180.00	\$ 180.00	\$ -
15-207-796	Wyde, Rich Law Offices of	Info Sys & Software	HSS	\$ 2,475.00	\$ 2,475.00	\$ -
<b>Category Total</b>				<b>\$ 8,843,897.22</b>	<b>\$ 8,233,309.71</b>	<b>\$ 610,587.51</b>

**Alaska Department of Law**

**Federal Laws and**  
**Litigation Report**

*In compliance with AS 44.23.020(h)*

**Dated: January 15, 2014**

## **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](mailto:cori.mills@alaska.gov).

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# **I. Federal Laws or Actions that Conflict with State Management of its Lands and Resources**

## **1. 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. The impact of the federal government's action in this regard, if it were left unchallenged, is great. The State could lose its ownership interest and/or management authority of over 600 identified and codified rights-of-way, encompassing over 20,000 linear miles of travel corridors. (See, [http://dnr.alaska.gov/kodiak/gis/raster/map\\_library/y2001/Iris/rs2mil01\\_1.pdf](http://dnr.alaska.gov/kodiak/gis/raster/map_library/y2001/Iris/rs2mil01_1.pdf). To see images depicting the Alaska Highway System, within much of the State, with and without taking into consideration R.S. 2477 rights-of-way, see Z. Kent Sullivan, *R.S. 2477 – What it is, Why it is Important to Alaska, & Recent Developments*, dated August 12-13, 2013, at 3-4, <http://dnr.alaska.gov/commis/cacfa/documents/FOSDocuments/KentSullivanRS2477WhitePaper.pdf>.) The State could also lose its ownership interest or management authority over numerous other R.S. 2477 rights-of-way within the State that are known or believed to exist. Additionally, the federal government has imposed restrictions on the public's use of some of these rights-of-way which is impacting their livelihoods. The state has filed litigation, identified below, asserting its rights to a portion of the R.S. 2477 rights-of-way in Alaska.

Primary Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 4:13-cv-00008-RRB) (Chicken area R.S. 2477 litigation)

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 the Native allotment landowners' motion to dismiss the case as against their property. The court indicated that an immediate appeal would be wise before moving forward with the case, and the State agreed. The State will file an appeal on the motion to dismiss as to the Native allotment landowners. The State continues to pursue its case against the other owners.

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

*Purdy v. Busby*, Case No. 4:12-cv-00031-RRB (related case involving Chicken area R.S. 2477 right-of-way)(federal court)

*Ahtna, Inc. v. State*, Case No. 3AN-08-6337 CI (involving Klutina Lake Road and Copper Center to Valdez R.S. 2477, a/k/a RST 633)

*Dickson v. State*, Case No. 3AS-12-7260 CI (involving a portion of the historic Iditarod Trail (Knik to Susitna), a/k/a RST 118)

*State v. Lonewolf*, Case No. 3PA-12-1978 CI, concluded in March 2013 (involving the Chickaloon Road and the Chickaloon-Knik-Nelchina R.S. 2477 right-of-way, a/k/a RST 564)

*Eastham v. Price*, Case No. 3HO-99-00066 CI, concluded November 2012 (involving long-standing dispute concerning a trail near Homer at the head of Kachemak Bay initially determined by the trial court to be a R.S. 2477 right-of-way)

*Aubrey v. State*, Case No. 3PA-13-02322 CI (involving appeal of DNR management actions taken concerning the Chickaloon-Knik-Nelchina R.S. 2477 right-of-way, a/k/a RST 564)

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

*Mills v. United States*, 9th Cir., Case No. 12-35589 (involving the Fortymile Station to Eagle R.S. 2477 right-of-way)(federal court)

*Caywood v. State*, AK S.Ct., Case No. S-14253, concluded November 2012 (involving DNR management actions on the Rex Trail R.S. 2477 right-of-way, a/k/a RST 119 and the Kobi-Bonnifield Trail to Tatlanika Creek)

*Orth v. Largent*, Case No. 4FA-13-02333 CI (dispute concerning use of potential R.S. 2477 rights-of-way known as the Esther Mining Area and Bonanza Creek Trail System, a/k/a RST 769)

*Idiotic, Inc. v. Igiugig Lodge, LLC*, Case No. 3AN-10-9848, concluded in March 2013 (involving dispute regarding use of the Nakeen to Igiugig R.S. 2477 right-of-way)

\*(The State is also aware of and monitoring R.S. 2477 cases outside of Alaska (mainly in Utah), too numerous to mention, which have the potential to influence and affect R.S. 2477 legal precedent created within the Ninth Circuit and Alaska.)



## **2. Refusal of federal government to recognize State's ownership of the land underlying the Mosquito Fork of the Fortymile River**

Description of the Issues Identified – Under the U.S. Constitution as well as 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." The federal Bureau of Land Management has rejected evidence presented by the state that the Mosquito Fork is navigable. It has instead labeled the river "non-navigable" and denied the State's ownership of the land underlying that river.

Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 3:12-cv-00114-SLG)

Status of Litigation – The State's challenge to the federal government's assertion that the river is non-navigable is pending in federal district court.

## **3. Regulations of the Secretaries of the Interior and Agriculture asserting subsistence jurisdiction in all navigable waters in and adjacent to federal conservation system units (national parks, national wildlife refuges, etc.)**

Citation to Federal Statute or Regulation – 36 C.F.R. 242.3, 50 C.F.R. 100.3

Description of the Issues Identified – Federal regulations allow the U.S. to establish federal subsistence fisheries in state navigable waters that conflict with state law, and let federal managers preempt state fishery. The federal regulations are based on federal court decisions holding that the U.S. holds federal reserved water rights in all navigable waters in and adjacent to federal conservation system units. The State believes this is inconsistent with Alaska National Interest Lands Conservation Act's (ANILCA's) definition of "public lands" in 16 U.S.C. 3102(1)-(3).

Litigation – *State of Alaska v. Jewell* (9th Cir., 09-36125), cert. pending

Status of Litigation – The Ninth Circuit Court of Appeals upheld the regulations. The State filed a petition for certiorari in the U.S. Supreme Court on November 4, 2013.

- 4. 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 regulations violate section 103(c) of ANILCA (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. If this action is upheld by the courts, NPS regulations would continue to apply to navigable waters even if the state owns the river bed if the waters flow through the external boundaries of national park system units. State law governing use and permitting of these waters would not apply.

Litigation – *Sturgeon and State of Alaska v. Masica, et al.* (AK Dist. Ct., 3:11-cv-183-HRH); *Wilde v. U.S.* (AK Dist. Ct., 4:10-cr-021-RBB)

Status of Litigation – In *Sturgeon*, the State challenged the authority of the National Park Service to require Alaska Department of Fish & Game (ADF&G) to obtain a research specimen collection permit to conduct salmon genetic sampling from the bed (a gravel bar) of the Alagnak River. The federal district court ruled in favor of the Park Service and the State appealed to the Ninth Circuit. In *Wilde*, the State filed amicus briefs explaining that 43 U.S.C. § 3103(c) prohibits application of NPS regulations on the Yukon River where it flows through Yukon-Charley Rivers National Preserve. Mr. Wilde was arrested by NPS rangers when he refused to allow them to conduct a boat safety check under NPS regulations. His arrest was upheld by the federal district court. Mr. Wilde has also appealed to the Ninth Circuit.

- 5. Federal action listing certain populations of the ringed and bearded seals as threatened or endangered under the Endangered Species Act (ESA) 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 listed the ringed and bearded seals as threatened or endangered under the ESA despite lacking information supporting its finding

and in conflict with the State's data and the best available scientific and commercial data. Alaska's interests and 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 and regulatory programs under the ESA.

The State has filed litigation in relation to the bearded seal decision but not the ringed seal decision.

Litigation – *State of Alaska v. NMFS* (AK Dist. Ct., 4:13-cv-00021-RRB)

Status of Litigation – The State filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future. The lawsuit is in its preliminary stages and is pending before the federal district court.

## **6. Federal action designating a large area in Alaska as critical habitat for the polar bear under the Endangered Species Act (ESA)**

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

Description of the Issues Identified – Designation of critical habitat under the ESA 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." ESA Section 4(b)(2). In the case of designation of critical habitat for the polar bear, the federal government's action did not follow the required process and failed to include sufficient record evidence to support 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 even present. If the critical habitat designation is upheld, 187,147 square miles of Alaska would be subject to Section 7 federal ESA 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 as Case Nos. 13-35619, 13-35662, 13-35667, 13-35669, and 13-35666.

**7. Federal actions designating critical habitat for the Southwest Alaska Distinct Population Segment of the northern sea otter and the Cook inlet population of Beluga whales under the Endangered Species Act (ESA)**

Citation to Federal Register – 74 Fed. Reg. 51988 (October 8, 2009) (sea otter); 76 Fed. Reg. 20180 (April 11, 2011) (Beluga whale)

Description of the Issues Identified – The designation of critical habitat for both species potentially violates the ESA and the Administrative Procedure Act (APA) because: (1) the NMFS and the Fish and Wildlife Service (FWS) failed to comply with designating requirements under the ESA and APA, (2) NMFS and FWS failed to adequately support its determinations in the record, (3) NMFS and FWS failed to provide adequate justification to the State and failed to cooperate with the State to the extent required by the ESA and APA, (4) NMFS and FWS failed to respond to significant comments as required by the APA, (5) the designations are arbitrary and capricious, constituted an abuse of discretion, and were otherwise not made in accordance with the law as required by the APA. These critical habitat designations could impact the State in a couple of ways. Management of state land and waters may be impacted by the designations because Section 7 consultations are involved when taking actions in the area designated as critical habitat. In addition, there may be additional regulatory costs associated with Section 7 consultations or litigation over actions requiring federal approval within critical habitat areas.

**8. Decision by former Secretary of State Hillary Clinton to extend the Emission Control Area to coastal areas of Alaska**

Description of the Issues Identified – As of August 1, 2012, marine vessels in the Emission Control Area (ECA) must use expensive low-sulfur fuel under a decision made by Secretary of State Clinton. The ECA includes the waters within 200 miles of the Southcentral and Southeastern Alaska coasts. The extension of the ECA to Alaska not only conflicts with Alaska's water quality and shipping laws, but it can potentially result in increased prices on shipping goods to Alaska as well as put unnecessary burdens on the cruise ship industry. The State believes Secretary Clinton's actions violated several federal laws, including the APA and the Act to Prevent Pollution from Ships.

Litigation – *State of Alaska v. Kerry* (AK Dist. Ct., 3:12-cv-00142-SLG)

Status of Litigation – The federal district court disagreed with the State and granted the federal government's motion to dismiss. The State decided not to appeal.

## **9. 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, a court struck down the exemption, which the State has appealed. 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. Cir., 13-5147); *Organized Village of Kake v. U.S. Dept. of Agriculture* (9th Cir., 11-35517)

Status of Litigation – The State intervened in *Organized Village of Kake* to support the U.S. Department of Agriculture's exemption of Alaska from the Roadless Rule. The Alaska District Court struck down the exemption, and the State appealed to the Ninth Circuit. After the district court struck down the exemption, the State filed a lawsuit in D.C. District Court challenging the Roadless Rule and its application to Alaska. The district court dismissed the case on statute of limitations grounds, and the State appealed to the D.C. Circuit.

## **II. Federal Laws or Actions that Could Preempt State Law**

### **1. Sections 4 and 5 of the Voting Rights Act (VRA) requiring preclearance by the U.S. Department of Justice of any change in elections in Alaska**

Citation to Federal Statute or Regulation – 42 U.S.C § 1973(b)

Description of the Issues Identified – Section 4 of the VRA contains a formula identifying jurisdictions that had to submit any changes in their election laws to the federal government for pre-approval or “preclearance” under Section 5 of the VRA. Alaska, as a State identified in Section 4, had to submit every change, no matter how small, to the U.S. Department of Justice. The preclearance requirement also impacted the way election districts had to be redistricted, which was inconsistent with the Alaska Constitution's redistricting requirements. This led to prolonged litigation and uncertainty whenever redistricting occurred.

Litigation – *State of Alaska v. Holder* (AK Dist. Ct., 1:12-cv-1376); *Shelby County v. Holder* (U.S. Sup. Ct., 12-96)

Status of Litigation – In addition to bringing its own suit challenging Sections 4 and 5 of the VRA, the State also filed an amicus brief in the case of *Shelby County* before the U.S. Supreme Court addressing similar issues. In *Shelby County*, the U.S. Supreme Court struck down Section 4 of the VRA. The district court case was subsequently dismissed. The decision frees Alaska from the onerous requirement that it ask permission from the federal government before making any change to its election laws or procedures.

Other Litigation – *Toyukuk v. Treadwell* (AK Dist. Ct., 3:13-cv-00137-JWS)

Status of Other Litigation – The case is on-going in federal district court and involves challenges to language assistance provided in the last election to voters in Dillingham and Wade Hampton census areas. The lawsuit also requests that the court require the State, despite the *Shelby County* case, to obtain federal preclearance before any election change is implemented.

### **III. Federal Litigation in Which the State Intervened to Challenge a Federal Action**

#### **1. Clean Air Act Emission Standards – *White Stallion Energy Center LLC v. EPA* (D.C. Cir., 12-1272)**

The State intervened in support of the plaintiffs in this case to challenge the EPA's rule setting new Clean Air Act emission standards for power plants. The case is currently pending before the D.C. Circuit.

#### **2. Greenhouse Gases Endangerment Finding – *Chamber of Commerce of the United States v. Environmental Protection Agency* (S.Ct., 12-1272)**

The D.C. Circuit consolidated several appeals challenging the EPA's Greenhouse Gases Endangerment finding. The cases were consolidated under *Coalition for Responsible Regulation v. EPA*. The State had intervened in support of the U.S. Chamber of Commerce's appeal. After the D.C. Circuit upheld the finding, the State joined with the U.S. Chamber of Commerce on a petition for a writ of certiorari. The U.S. Supreme Court granted the petition, along with five others on the same subject, and agreed to address the following question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting

requirements under the Clean Air Act for stationary sources that emit greenhouse gases." Oral argument is scheduled for February 24, 2014.

#### **IV. Federal Litigation in Which the State Intervened in Support of a Federal Action**

**1. Underwater Seismic Surveys in Cook Inlet – *Native Village of Chickaloon v. National Marine Fisheries Services* (9th Cir., 13-35752)**

Plaintiffs challenged NMFS' issuance to the Apache Alaska Corporation of an incidental harassment authorization for beluga whales. The authorization allowed the corporation to conduct underwater seismic surveys in Cook Inlet. The State intervened to support issuance of the authorization. The district court, for the most part, upheld NMFS' actions. Both parties appealed. It is now pending before the Ninth Circuit.

**2. Taking Land into Trust for Tribes – *Akiachak Native Community v. Dept. of Interior* (D.C. Dist. Ct., 1:06-cv-00969)**

The State intervened to support the law prohibiting the federal government from taking land into trust for Alaska Natives. It is the State's position that the Alaska Native Claims Settlement Act forecloses taking land into trust for Alaska Natives, except Metlakatla. The federal district court disagreed and found in favor of the plaintiffs. The State appealed the court's ruling.

**3. CD-5 USACE Permit – *Nukapigek v. U.S. Army Corps of Engineers* (AK Dist. Ct., 3:13-cv-00044)**

Two cases have been combined that challenge the 404 permit issued by the U.S. Army Corps of Engineers (USACE) to ConocoPhillips. The permit allows discharge of fill materials into waters of the U.S. to construct the CD-5 drill pad. The State intervened in support of USACE's action. The case is pending before the federal district court.

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

Plaintiffs filed a lawsuit against the federal government challenging certain rules relating to mining claims. These rules generally benefitted 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.

**5. Salmon Fishery Management Plan – *United Cook Inlet Drift Association v. National Marine Fisheries Service* (AK Dist. Ct., 3:13-cv-00104)**

Plaintiffs sued 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 removed any federal oversight under the Magnuson-Stevens Act 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. The case is currently pending before the federal district court.

**6. Bureau of Ocean Energy Management's Lease Sale 193 in Chukchi Sea – *Native Village of Point Hope v. Salazar* (9th Cir., 12-35287)**

Plaintiffs challenged the Bureau of Ocean Energy Management's decision to conduct Lease Sale 193 in the outer continental shelf of the Chukchi Sea. The State intervened to support BOEM's decision. The district court dismissed the case, and plaintiffs appealed to the Ninth Circuit.

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

The following table provides the list of cases in which the State either filed or join in an amicus brief in 2013 involving the federal government or the potential preemption of state law.

Case Name	Court	Party Brief Supports	Stage of Litigation	Issue
<i>Uintah County v. Jewell</i>	Utah Dist. Ct.	Petitioner	On the Merits	Whether BLM's Wild Land's policy violates the Administrative Procedure Act, Federal Advisory Committee Act, the Wilderness Act, and other federal statutes.
<i>Native Village of Point Hope v. EPA</i>	9th Cir.	Respondent	On the Merits	Whether the EPA properly approved Alaska Department of Environmental Conservation's site-specific criteria for water discharge in Red Dog Creek.



<i>National Mining Association v. Perciasepe</i>	D.C. Cir.	Petitioner	On the Merits	Whether the EPA exceeded its authority under the Clean Water Act and the Surface Mining Control and Reclamation Act—and violated the Administrative Procedure Act—by imposing, without notice-and-comment rulemaking, an enhanced review process for dredge-and-fill permits and substantive standards for coal mining regulation.
<i>Mingo Logan Coal Co. v. EPA</i>	S.Ct.	Petitioner	Certiorari Petition	Whether the EPA has authority under the Clean Water Act to withdraw discharge site specifications after the Corps of Engineers has issued a final dredge-and-fill permit.
<i>EPA v. EME Homer City Generation</i>	S.Ct.	Respondent	On the Merits	Whether the EPA's rule regulating cross-state air pollution exceeds its authority under the Clean Air Act.
<i>Oklahoma v. EPA</i>	10th Cir.	Petitioner	Petition for Rehearing En Banc	Whether the EPA erred in rejecting Oklahoma's regional haze state implementation plan.
<i>Luminant Generation Co. v. EPA</i>	S.Ct.	Petitioner	Certiorari Petition	Whether the EPA may disapprove a state implementation plan without finding a conflict between the plan and any requirement of the Clean Air Act and whether the Fifth Circuit erred in affirming the EPA's decision on grounds other than those the EPA cited.
<i>Montana Shooting Sports Association v. Holder</i>	S.Ct.	Petitioner	Certiorari Petition	Whether Congress has the Commerce Clause authority to regulate intrastate manufacture of firearms and ammunition.
<i>National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms and Explosives</i>	S.Ct.	Petitioner	Certiorari Petition	Whether federal laws and regulations prohibiting licensed gun dealers from selling handguns and handgun ammunition to adults under 21 violate the Second Amendment.
<i>Montana Environmental Information Center v. Stone-Manning</i>	9th Cir.	Respondent	On the Merits	Whether a state's Eleventh Amendment sovereign immunity bars certain citizen suits against states in federal court under the Surface mine Control and Reclamation Act.

<i>WildEarth Guardians v. McClintic</i>	10th Cir.	Respondent	On the Merits	Whether New Mexico game commission chair's failure to regulate trapping in the Mexican gray wolf's occupied range violates the Endangered Species Act.
<i>Conestoga Wood Specialties Corp. v. Sebelius</i>	S.Ct.	Petitioner	Certiorari Petition	Whether the Affordable Care Act's mandate that employers provide health insurance coverage for contraceptives violates a Mennonite family's and their closely held company's free-exercise rights under the First Amendment and the Religious Freedom Restoration Act.
<i>Dan's City Used Cars, Inc. v. Pelkey</i>	S.Ct.	Respondent	On the Merits	Whether the Federal Aviation Administration Act of 1994 preempts state law negligence and consumer protection claims arising from a towing company's disposal of a vehicle.

**Alaska Department of Law**

**Federal Laws and**  
**Litigation Report**

*In compliance with AS 44.23.020(h)*

**Dated: January 15, 2015**

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# **I. Federal Laws or Actions that Conflict with State Management of its Lands and Resources**

## **1. 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-RRB); *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 the Native allotment landowners' motion to dismiss the case as against their property. The court indicated that an immediate appeal would be wise before moving forward with the case, and the State agreed. The State appealed the order granting the Native allotment landowners' motion to dismiss and that appeal is pending before the Ninth Circuit Court of Appeals. The State's case against the other defendants has been stayed pending the outcome of the appeal.

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

*Ahtna, Inc. v. State*, Case No. 3AN-08-6337 CI (involving Klutina Lake Road and Copper Center to Valdez R.S. 2477, a/k/a RST 633).

*Dickson v. State*, Case No. 3AS-12-7260 CI (involving a portion of the historic Iditarod Trail (Knik to Susitna), a/k/a RST 118).

*Aubrey v. State*, Case No. 3PA-13-02322 CI (involving an appeal of DNR management actions taken concerning the Chickaloon-Knik-Nelchina R.S. 2477 right-of-way, a/k/a RST 564).

*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, a/k/a RST 1974).

\*(The State is also monitoring many R.S. 2477 cases outside of Alaska (mainly in Utah) which have the potential to influence and affect R.S. 2477 legal precedent created within the Ninth Circuit and Alaska.)

## **2. Refusal of federal government to recognize State's ownership of the land underlying the Mosquito Fork of the Fortymile River**

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." The federal Bureau of Land Management has rejected evidence presented by the State that the Mosquito Fork is navigable. It has instead labeled the river "non-navigable" and denied the State's ownership of the land underlying that river.

Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 3:12-cv-00114-SLG)

Status of Litigation – The State's challenge to the federal government's assertion that the river is non-navigable is pending in federal district court.

## **3. 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 believes this regulation violates 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. If this regulation is found to be valid and enforceable notwithstanding ANILCA section 103(c), NPS regulatory oversight would continue to apply to navigable

waters within park boundaries even if the state owns the river bed. State law governing use and permitting on these waters would be preempted.

Litigation – *Sturgeon and State of Alaska v. Masica, et al.* (9th Cir., 13-36165, 13-36166); *Wilde v. U.S.* (AK Dist. Ct., 4:10-cr-021-RBB)

Status of Litigation – In *Sturgeon*, the State intervened in the case to challenge the authority of the National Park Service to require Alaska Department of Fish & Game (ADF&G) 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 the Park Service and the State appealed to the Ninth Circuit. The Ninth Circuit 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. The Ninth Circuit denied the State’s request for rehearing en banc.

In *Wilde*, the State filed amicus briefs explaining that 43 U.S.C. § 3103(c) prohibits application of NPS regulations on the Yukon River where it flows through Yukon-Charley Rivers National Preserve. Mr. Wilde was arrested by NPS rangers when he refused to allow them to conduct a boat safety check under NPS regulations. His arrest was upheld by the federal district court and the Ninth Circuit.

**4. Federal action listing certain populations of the ringed and bearded seals as threatened or endangered under the Endangered Species Act (ESA) 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 ESA 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 listed the ringed and bearded seals as threatened or endangered under the ESA despite lacking information supporting its finding and in conflict with the State’s data and the best available scientific and commercial data. NMFS also recently proposed to designate approximately 350,000 square miles of waters off Alaska’s coast as critical habitat for the ringed seal. Alaska’s interests and 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 taken under the ESA.



To date, the State has filed litigation regarding the bearded seal decision but not the ringed seal decision.

Litigation – *State of Alaska v. NMFS* (AK Dist. Ct., 4:13-cv-00021-RRB)

Status of Litigation – The State filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future. The federal district court agreed with the State and overturned the decision. The case is now on appeal before the Ninth Circuit.

## **5. Federal action designating a large area in Alaska as critical habitat for the polar bear under the Endangered Species Act (ESA)**

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

Description of the Issues Identified – Designation of critical habitat under the ESA 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 would be subject to Section 7 federal ESA 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 as Case Nos. 13-35619, 13-35662, 13-35667, 13-35669, and 13-35666.

## **6. Federal Ground Fish Fishery Regulations Covering Western Alaska**

Citation to Federal Register – 79 Fed. Reg. 70286 (November 25, 2014)

Description of the Issues Identified - Steller sea lions are divided into two populations under the ESA. The dividing line between the Western distinct population segment (DPS) and the Eastern DPS is at 144 degrees west longitude (Cape Suckling, Alaska). The Western population is listed as endangered under the ESA. Although the Eastern population was previously

listed as threatened, it was delisted in 2013 following a petition by the State of Alaska and a separate petition by the states of Washington and Oregon. In 2010, NMFS changed the federal regulations governing the ground fish fishery in western Alaska to protect the Western DPS based on the theory that fisheries were causing nutritional stress and lowering Steller sea lion reproduction rates within the Western DPS. The State and fishing industry groups sued but lost at the trial court level and on appeal. However, one trial court claim was resolved in the State's favor which requires that NMFS complete a full EIS under NEPA. That process resulted in NMFS completing a new biological opinion and issuing new fishing regulations that removed some of the more onerous regulatory provisions. The new regulations are set to become effective for the new fishing season beginning January 1, 2015.

## **7. 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, a court struck down the exemption, which the State appealed. 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. Cir., 13-5147); *Organized Village of Kake v. U.S. Dept. of Agriculture* (9th Cir., 11-35517)

Status of Litigation – The State intervened in *Organized Village of Kake* to support the U.S. Department of Agriculture's exemption of Alaska from the Roadless Rule. The Alaska District Court struck down the exemption, and the State appealed to the Ninth Circuit. A three-judge panel of the Ninth Circuit upheld the exemption, but the Ninth Circuit agreed to rehear the case, nullifying the panel decision. The oral argument in the rehearing en banc occurred on December 16, 2014.

After the Alaska District Court struck down the exemption in *Organized Village of Kake*, the State filed a separate lawsuit in D.C. District Court challenging the Roadless Rule and its application to Alaska—*State of Alaska v. U.S. Department of Agriculture*. After various procedural challenges that were rejected by the D.C. Court of Appeals, the case will be heard on the merits by the D.C. District Court.

## **8. 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, where large planes can land in the area’s often poor weather conditions, primarily for health and safety purposes. The area the road would traverse is within federal wilderness in the Izembek National Wildlife Refuge. The State has intervened in a case filed by Agdaagux Tribe of King Cove challenging the decision of Interior Secretary Jewell denying a proposed land exchange which would have allowed construction of a road. The State has 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* (AK Dist. Ct., 3:14-cv-0110-HRH).

Status of Litigation – The case is pending before the district court.

## **9. Non-Drilling Oil and Gas Exploration Plans for ANWR under Section 1002 of ANILCA**

Description of the Issues Identified - In 2013, the State filed a proposed plan for non-drilling oil and gas exploration in the Arctic National Wildlife Refuge (ANWR) under Section 1002 of ANILCA. The plan was rejected by the United States Fish and Wildlife Service (USFWS) based on the argument that authorization for exploration in the 1002 Area expired after the report mandated by section 1002(h) was submitted to Congress in 1987. The State filed a lawsuit seeking a determination that the Department of Interior and USFWS may continue to approve non-drilling oil and gas exploration plans for the Coastal Plain of ANWR under Section 1002 of ANILCA.

Litigation – *State of Alaska v. Jewell* (AK Dist. Ct., 3:14-cv-00048-SLG)

Status of Litigation – The case will be decided on summary judgment and briefing is complete. Oral argument will be held on January 20, 2015.

## **10. 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.

Litigation – *Pebble Limited Partnership v. EPA* (AK Dist. Ct., 3:14-cv-00097; 9th Cir., 14-35845).

Status of Litigation – The State intervened in support of a lawsuit brought by Pebble Limited Partnership (PLP), asserting two claims. The first claim asserted that EPA did not have jurisdiction under the Clean Water Act to commence a Section 404(c) veto review in the absence of a Section 404 dredge and fill application associated with mine development at Pebble. The second claim asserted that EPA’s exercise of its Clean Water Act Section 404(c) veto authority was premature and violates the Alaska Statehood Act, and the compact that Congress and the State made under the Act with respect to lands and resources granted to the State for its management and socio-economic use. The EPA filed a motion to dismiss, which was granted after the court concluded the action was not ripe. However, the order dismissing the action was without prejudice, and the State may bring the same claims at a later date when EPA’s veto review process is completed. PLP filed an appeal of the dismissal with the Ninth Circuit, where briefing is underway. The State did not join the appeal.

In the fall of 2014, PLP also filed two other lawsuits against EPA for its actions on the Pebble Deposit. One appeal addresses EPA’s alleged violations of the Freedom of Information Act (FOIA) in responding to PLP’s records requests. The other focuses on EPA’s alleged violations of the Federal

Advisory Committee Act (FACA) in establishing technical review teams of the BBWA. In the latter case, the district court recently issued a preliminary injunction enjoining EPA from taking further action on its Section 404(c) veto review until the court considers PLP's FACA claim on the merits. The State did not intervene in either the FOIA or FACA lawsuits, but continues to monitor the two cases.

## **II. Federal Litigation in Which the State Intervened to Challenge a Federal Action**

### **1. Clean Air Act Emission Standards – *Michigan v. EPA* (S.Ct., 14-46)**

The State intervened with Michigan and several other states challenging an EPA rule setting new Clean Air Act hazardous air pollutant emission standards for power plants. The D.C. Circuit Court of Appeals found in favor of the EPA and upheld the new rules in *White Stallion Energy Center LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). On November 25, 2014, the Supreme Court granted the states' petition for certiorari to consider the issue of "[w]hether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."

### **2. Greenhouse Gases Endangerment Finding – *Chamber of Commerce of the United States v. Environmental Protection Agency* (S.Ct., 12-1272)**

The D.C. Circuit of Appeals consolidated several appeals challenging the EPA's Greenhouse Gases Endangerment finding. The cases were consolidated under *Coalition for Responsible Regulation v. EPA*. The State had intervened in support of the U.S. Chamber of Commerce's appeal. After the D.C. Circuit upheld the finding, the State joined with the U.S. Chamber of Commerce on a petition for a writ of certiorari. The U.S. Supreme Court granted the petition, along with five others on the same subject. The Court held that the EPA acted unlawfully in rewriting regulatory permitting thresholds of the Clean Air Act to assert regulatory authority over certain small stationary sources, including retail stores, offices, shopping centers, schools, churches and many others, based solely on GHG emissions. However, EPA's authority to regulate GHG of sources otherwise subject to the permitting requirements was upheld.

**3. Clean Power Plan – *In re: Murray Energy Corporation* (D.C. Cir., 14-1112)**

The State intervened in support of Murray Energy Corporation's petition challenging EPA's proposed Clean Power Plan regulations to reduce carbon dioxide emissions from certain existing electric power plants. The court has directed EPA to respond to the petition.

**III. 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 State intervened to support a regulation excluding Alaska from regulations that otherwise govern the creation of Indian trust land. The State has claimed that the Alaska Native Claims Settlement Act forecloses taking land into trust for Alaska Natives, except Metlakatla. The federal district court disagreed and found in favor of the plaintiffs. The case is now on appeal before the D.C. Circuit Court of Appeals.

After the federal district court ruled, the United States proposed to amend the land-into-trust regulation to remove the Alaska exclusion. The State submitted comments on the proposed rule, and the final regulation has been published. The federal district court has enjoined the Secretary of the Interior from creating any new trust land in Alaska pending resolution of the appeal.

**2. CD-5 USACE Permit – *Nukapigak v. U.S. Army Corps of Engineers* (AK Dist. Ct., 3:13-cv-00044)**

Two cases have been combined that challenge a 404 permit issued by the U.S. Army Corps of Engineers (USACE) to ConocoPhillips. The permit allows discharge of fill materials into waters of the U.S. to construct the CD-5 drill pad. The State intervened in support of USACE's action. The case is fully briefed and awaiting final disposition before the district court.

**3. 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.

**4. Salmon Fishery Management Plan – *United Cook Inlet Drift Association v. National Marine Fisheries Service* (AK Dist. Ct., 3:13-cv-00104)**

United Cook Inlet Drift Association (UCIDA) sued 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 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. UCIDA appealed to the Ninth Circuit, and the case is in the early briefing stages.

**5. Bureau of Ocean Energy Management's Lease Sale 193 in Chukchi Sea – *Native Village of Point Hope v. Salazar* (9th Cir., 12-35287)**

Plaintiffs challenged the Bureau of Ocean Energy Management's (BOEM) decision to conduct Lease Sale 193 in the outer continental shelf of the Chukchi Sea. The State intervened to support BOEM's decision. The district court dismissed the case, and plaintiffs appealed to the Ninth Circuit. The Ninth Circuit reversed, holding that the EIS relied on an improper estimate of "economically recoverable oil," and it remanded the case.

**6. Big Thorne Timber Sale - *SEACC v. U.S. Forest Service* (AK Dist. Ct., 1:14-cv-00013-RRB)**

In three separate suits, plaintiffs are seeking injunctions to prevent the U.S. Forest Service's (USFS) Big Thorne Timber sale on Prince of Wales Island. The State has joined with several other parties as intervenor-defendants in support of the USFS. The cases are in the early briefing stages.

## **IV. Federal Litigation in Which the State Filed or Joined in an Amicus Brief**

The following table provides a list of cases where the State either filed or joined in an amicus brief in 2014 involving the federal government or the potential preemption of state law.

<b>Case Name</b>	<b>Court</b>	<b>Party Brief Supports</b>	<b>Stage of Litigation</b>	<b>Issue</b>
<i>Stewart &amp; Jasper Orchards v. Jewell</i>	S.Ct.	Petitioner	Certiorari Petition	(1) Whether the ESA requirement that Fish & Wildlife Service suggest a "reasonable & prudent alternative" to an agency action likely to jeopardize existence of protected species or adversely modify habitat requires the Secretary to address technical feasibility and effects on third parties; and (2) whether the Secretary of USFWS may disregard "best scientific data" in developing biological opinion (BiOp).
<i>American Farm Bureau Federation v. EPA</i>	3 <sup>rd</sup> Cir.	Appellant	On the Merits	Whether the EPA exceeded its authority under the Clean Water Act in setting the total maximum daily loads of nitrogen, phosphorous, and sediment for the Chesapeake Bay.
<i>San Luis &amp; Delta Mendota Water Auth. v. Jewell</i>	9 <sup>th</sup> Cir.	Appellant	On the Merits	Whether USFWS' biological opinion regarding operation of a water project on Delta smelt habitat was based on "best scientific and commercial data" and complied with mandates of the Endangered Species Act.
<i>ONRC Action v. USBR</i>	9 <sup>th</sup> Cir.	Respondent	On the Merits	Whether water transfers (including Bureau of Reclamation transfers through Klamath Straights) require a National Pollutant Elimination System (NPDES) permit under the Clean Water Act
<i>Colorado (&amp; Western States) v. Catskill Mountains Chapter of Trout Unlimited</i>	2 <sup>nd</sup> Cir.	Appellant	On the Merits	Whether NPDES permits are required for water transfers.



<i>Sierra Club &amp; NRDC v. EPA</i>	N.D. Cal.	Defendant	On the Merits	Whether a proposed consent decree concerning EPA's failure to timely complete designations for sulfur dioxide national ambient air quality standards and requiring states to comply with data collection requirements violates the Clean Air Act.
<i>Michigan v. EPA</i>	S.Ct.	Petitioner	Certiorari Petition	Whether EPA is required to consider costs when setting standards for emission of hazardous air pollutants from certain electric generating units.
<i>Murray Energy Corp. v. EPA</i>	D.C. Cir.	Appellant	On the Merits	Whether EPA's proposed rule requiring states to regulate greenhouse gas emissions from existing power plants under section 111(d) of the Clean Air Act is permissible given that EPA has authority to regulate the same power plants under sec. 112.
<i>Oklahoma v. EPA</i>	S.Ct.	Petitioner	Certiorari Petition	Whether EPA may conduct de novo review of states' air quality plans over federal lands under Clean Air Act.
<i>Arizona v. Raytheon</i>	9 <sup>th</sup> Cir.	Appellant	On the Merits	What is appropriate level of judicial deference to a state environmental agency's determination on finalization of a CERCLA settlement?
<i>Sebelius v. Hobby Lobby Stores, Inc.; Conestoga Wood Specialties Corp. v. Sebelius</i>	S.Ct.	Respondent	On the Merits	Whether the Affordable Care Act mandate that employers provide health insurance coverage for contraceptives violates for-profit corporations' rights under the Religious Freedom Restoration Act or the First Amendment.
<i>Sissel v. U.S. Dep't of Health &amp; Hum. Servs.</i>	D.C. Cir.	Appellant	On the Merits	Whether the Affordable Care Act violates the Origination Clause of U.S. Constitution.

<i>Hotze v. Sebelius</i>	5 <sup>th</sup> Cir.	Petitioner	On the Merits	Whether the Affordable Care Act violates the origination clause of the Constitution.
<i>Armstrong v. Exceptional Child</i>	S.Ct.	Petitioner	On the Merits	Whether the Supremacy Clause gives Medicaid providers a private right of action to enforce 42 U.S.C. §1396a(a)(30)(A) against a state.
<i>Direct Marketing Ass'n v. Brohl</i>	S.Ct.	Respondent	On the Merits	Whether a Colorado statute requiring out-of-state businesses to report information about in-state sales to Colorado Department of Revenue violates the Tax Injunction Act or is barred by comity.
<i>Pom Wonderful v. Coca-Cola</i>	S.Ct.	Petitioner	On the Merits	Whether a private party may bring a Lanham Act claim challenging a product label regulated under the Food, Drug, and Cosmetic Act
<i>Health Net, Inc. v. Oregon Dep't of Revenue</i>	Or. Tax Ct.	Defendant	On the Merits	Whether a state may override Multistate Tax Compact taxpayer-election provision and require multistate taxpayers to use apportionment formula.
<i>Oneok v. Learjet</i>	S.Ct.	Respondent	On the Merits	Whether the Natural Gas Act preempts a state antitrust action brought by natural gas users alleging gas traders manipulated the market.
<i>Holt v. Hobbs</i>	S.Ct.	Respondent	On the Merits	Whether the Department of Correction's grooming policy violates Religious Land Use and Institutionalized Persons Act by prohibiting petitioner from growing one-half inch beard in accordance with his Muslim beliefs.
<i>Baskin v. Bogan</i>	7 <sup>th</sup> Cir.	Appellant	On the Merits	Whether Indiana's ban on same-sex marriage violates equal protection and due process.
<i>Latta v. Otter</i>	9 <sup>th</sup> Cir.	Appellant	On the Merits	Whether Idaho's amendment prohibiting same-sex marriage violates due process and equal protection.

<i>DeBoer v. Snyder</i>	6 <sup>th</sup> Cir.	Appellant	On the Merits	Whether Michigan's constitutional amendment prohibiting same-sex marriage violates equal protection under the U.S. Constitution.
<i>Herbert v. Kitchen/ Smith v. Bishop</i>	S.Ct.	Petitioner	Certiorari Petition	Does the U.S. Constitution include a right to same-sex marriage?
<i>Kitchen v. Herbert</i>	10 <sup>th</sup> Cir.	Appellant	On the Merits	Whether equal protection/due process require states to recognize right to marry for same-sex couples and require states to recognize valid marriages performed in other jurisdictions
<i>Sevcik v. Sandoval</i>	9 <sup>th</sup> Cir.	Appellant	On the Merits	Whether Nevada's refusal to recognize same-sex marriages violates the equal protection clause of the U.S. Constitution.
<i>DeLeon v. Perry</i>	5 <sup>th</sup> Cir.	Appellant	On the Merits	Whether Texas's definition of marriage as between one man and one woman violates the U.S. Constitution

**Alaska Department of Law**

**Federal Laws and**  
**Litigation Report**

*In compliance with AS 44.23.020(h)*

**Dated: September 9, 2015**

## **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.

Although the deadline for this report is January 15, the Department of Law is submitting the report early in light of limited staffing throughout the fall. If there are substantial changes that occur before the start of the upcoming legislative session, an addendum to this report will be submitted. 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](mailto: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. Adoption by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) of the “waters of the United States” (WOTUS) 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 (CWA), 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 CWA. 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 WOTUS rule. Among other claims, the states assert that EPA and the Corps failed to consult as required by the CWA 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 North Dakota District Court recently granted a preliminary injunction to stop the rule from going into effect in the 13 plaintiff-states while the litigation proceeds.

## **2. Clean Power Plan Rule by the Environmental Protection Agency 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.

## **3. 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-RRB); *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 the Native allotment landowners’ motion to dismiss the case as against their property. The court indicated that an immediate appeal would be wise before moving forward with the case, and the State agreed. The State appealed



the order granting the Native allotment landowners' motion to dismiss and that appeal is pending before the Ninth Circuit Court of Appeals. The State's case against the other defendants has been stayed pending the outcome of the appeal.

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

*Ahtna, Inc. v. State*, Case No. 3AN-08-6337 CI (involving Klutina Lake Road and Copper Center to Valdez R.S. 2477, a/k/a RST 633).

*Dickson v. State*, Case No. 3AS-12-7260 CI (involving a portion of the historic Iditarod Trail (Knik to Susitna), a/k/a RST 118).

*Aubrey v. State*, Case No. 3PA-13-02322 CI (involving an appeal of DNR management actions taken concerning the Chickaloon-Knik-Nelchina R.S. 2477 right-of-way, a/k/a RST 564).

*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, a/k/a RST 1974).

\*(The State is also monitoring many R.S. 2477 cases outside of Alaska (mainly in Utah) which have the potential to influence and affect R.S. 2477 legal precedent created within the Ninth Circuit and Alaska.)

#### **4. Refusal of federal government to recognize State's ownership of the land underlying the Mosquito Fork of the Fortymile River**

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." The federal Bureau of Land Management (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.

Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 3:12-cv-00114-SLG)

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, the United States filed a disclaimer of interest pursuant to 28 U.S.C. § 2409a(e). The

United States 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. The State filed a motion for an award of fees and costs on August 11.

**5. 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 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.

Litigation – *Sturgeon and State of Alaska v. Masica, et al.* (9th Cir., 13-36165, 13-36166); *Wilde v. U.S.* (AK Dist. Ct., 4:10-cr-021-RBB)

Status of Litigation – In *Sturgeon*, the State intervened in the case to challenge the authority of the National Park Service to require Alaska Department of Fish & Game (ADF&G) 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 the Park Service and the State appealed to the Ninth Circuit. The Ninth Circuit 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. In a separately decided but related case brought by Mr. Sturgeon, the Ninth Circuit held that the regulation did not violate ANILCA. Mr. Sturgeon has filed a petition for certiorari with the U.S. Supreme Court, and the U.S. Supreme Court has not decided yet whether it will review the case. The State filed an amicus brief in support of Mr. Sturgeon’s petition.

In *Wilde*, the State filed amicus briefs explaining that 43 U.S.C. § 3103(c) prohibits application of NPS regulations on the Yukon River where it flows through Yukon-Charley Rivers National Preserve. Mr. Wilde was arrested by NPS rangers when he refused to allow them to conduct a boat safety check under NPS regulations. His arrest was upheld by the federal district court and the Ninth Circuit.

**6. Federal action listing certain populations of the ringed and bearded seals as threatened or endangered under the Endangered Species Act (ESA) 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 ESA 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 listed the ringed and bearded seals as threatened or endangered under the ESA despite lacking information supporting its finding and in conflict with the State’s data and the best available scientific and commercial data. NMFS also recently 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 taken under the ESA.

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

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 under the ESA based on climate model projections 100 years into the future. The federal district court agreed with the State and overturned the decision. The case is now on appeal before the Ninth Circuit. The appellees’ responsive briefs are due September 21, 2015.

Based on the success with the case regarding the bearded seal, the State filed a lawsuit challenging the listing of the ringed seal in March 2015. The case is pending before the Alaska District Court. The State, along with other plaintiffs, filed their opening briefs August 10, 2015.

**7. Federal action designating a large area in Alaska as critical habitat for the polar bear under the Endangered Species Act (ESA)**

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

Description of the Issues Identified – Designation of critical habitat under the ESA 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 ESA 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 as Case Nos. 13-35619, 13-35662, 13-35667, 13-35669, and 13-35666. The case is awaiting decision by the Ninth Circuit with briefing and oral argument completed on August 11, 2015.

## **8. Federal Ground Fish Fishery Regulations Covering Western Alaska**

Citation to Federal Register – 79 Fed. Reg. 70286 (November 25, 2014)

Description of the Issues Identified - Steller sea lions are divided into two populations under the ESA. The dividing line between the Western distinct population segment (DPS) and the Eastern DPS is at 144 degrees west longitude (Cape Suckling, Alaska). The Western population is listed as endangered under the ESA. Although the Eastern population was previously listed as threatened, it was delisted in 2013 following a petition by the State of Alaska and a separate petition by the states of Washington and Oregon. In 2010, NMFS changed the federal regulations governing the ground fish fishery in western Alaska to protect the Western DPS based on the theory that fisheries were causing nutritional stress and lowering Steller sea lion reproduction rates within the Western DPS. The State and fishing industry groups sued but lost at the trial court level and on appeal. However, one trial court claim was resolved in the State’s favor which required that NMFS complete a full EIS under NEPA. That process resulted in NMFS completing a new biological opinion and issuing new fishing regulations that removed some of the more onerous regulatory provisions. Although the State was not involved, various environmental groups challenged the new biological opinion. Ultimately, the biological opinion was upheld in court.

## 9. Potential Listing of the “Alexander Archipelago Wolf” in Southeast

Description of the Issues Identified – In 2011, the Center for Biological Diversity and Greenpeace filed a petition before the U.S. Fish and Wildlife Service to list the so-called “Alexander Archipelago Wolf” in Southeast Alaska as a threatened or endangered species under the ESA. Among other things, the petitioners claim logging on the Tongass brings new roads, making wolves vulnerable to hunting and trapping. On March 31, 2014, the USFWS published a 90-day finding indicating that the 2011 petition presented substantial information to suggest that listing may be warranted. Pursuant to a settlement agreement reached between USFWS and the petitioners after petitioners sued for delay in making a decision, USFWS has until December 31, 2015, to decide (1) whether the wolves comprise a population that can be listed and, if so, (2) whether listing is warranted. If both findings are affirmatively resolved, then USFWS will propose a listing rule. The State is monitoring the listing and will be providing comments.

## 10. 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, a court struck down the exemption, which the State appealed. 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. Cir., 13-5147); *Organized Village of Kake v. U.S. Dept. of Agriculture* (9th Cir., 11-35517)

Status of Litigation – The State intervened in *Organized Village of Kake* to support the U.S. Department of Agriculture's exemption of Alaska from the Roadless Rule. The Alaska District Court struck down the exemption, and the State appealed to the Ninth Circuit. A three-judge panel of the Ninth Circuit upheld the exemption, but the Ninth Circuit agreed to rehear the case, nullifying the panel decision. The oral argument in the rehearing en banc occurred on December 16, 2014. In a 6 to 5 split decision released on July 29, 2015, the Ninth Circuit ruled against the State and upheld the district court decision striking down the Tongass exemption to the roadless rule. The State has until October 26, 2015 to decide whether it will file a petition of certiorari with the U.S. Supreme Court.

After the Alaska District Court struck down the exemption in *Organized Village of Kake*, the State filed a separate lawsuit in D.C. District Court challenging the Roadless Rule and its application to Alaska—*State of Alaska v. U.S. Department of Agriculture*. 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.

## **11. 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* (AK Dist. Ct., 3:14-cv-0110-HRH).

Status of Litigation – The district court recently upheld Secretary Jewell’s decision. The plaintiffs are considering whether to appeal to the Ninth Circuit.

## **12. Non-Drilling Oil and Gas Exploration Plans for ANWR under Section 1002 of ANILCA**

Description of the Issues Identified - In 2013, the State filed a proposed plan for non-drilling oil and gas exploration in the Arctic National Wildlife Refuge (ANWR) under Section 1002 of ANILCA. The plan was rejected by the United States Fish and Wildlife Service (USFWS) based on the argument that authorization for exploration in the 1002 Area expired after the report mandated by section 1002(h) was submitted to Congress in 1987. The State

filed a lawsuit seeking a determination that the Department of Interior and USFWS may continue to approve non-drilling oil and gas exploration plans for the Coastal Plain of ANWR under Section 1002 of ANILCA.

Litigation – *State of Alaska v. Jewell* (AK Dist. Ct., 3:14-cv-00048-SLG)

Status of Litigation – The Alaska District Court issued a decision in favor of Secretary Jewell, upholding the federal government’s interpretation that any obligation with respect to Section 1002 exploration plans expired in 1987. The State is evaluating whether to appeal.

### **13. 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.

Litigation – *Pebble Limited Partnership v. EPA* (AK Dist. Ct., 3:14-cv-00097; 9th Cir., 14-35845).

Status of Litigation – The State intervened in support of a lawsuit brought by Pebble Limited Partnership (PLP), asserting two claims. The first claim asserted that EPA did not have jurisdiction under the Clean Water Act to commence a Section 404(c) veto review in the absence of a Section 404 dredge and fill application associated with mine development at Pebble. The second claim asserted that EPA’s exercise of its Clean Water Act Section 404(c) veto authority was premature and violates the Alaska Statehood Act, and the compact that Congress and the State made under the Act with respect to lands

and resources granted to the State for its management and socio-economic use. The EPA filed a motion to dismiss, which was granted after the court concluded the action was not ripe. However, the order dismissing the action was without prejudice, and the State may bring the same claims at a later date when EPA's veto review process is completed. PLP filed an appeal of the dismissal with the Ninth Circuit. The State did not join the appeal. In May of 2015, the Ninth Circuit affirmed the district court's dismissal of the case.

In the fall of 2014, PLP also filed two other lawsuits against EPA for its actions on the Pebble Deposit. One appeal addresses EPA's alleged violations of the Freedom of Information Act (FOIA) in responding to PLP's records requests. The other focuses on EPA's alleged violations of the Federal Advisory Committee Act (FACA) in establishing technical review teams of the BBWA. In the latter case, the district court issued a preliminary injunction enjoining EPA from taking further action on its Section 404(c) veto review until the court considers PLP's FACA claim on the merits. The State did not intervene in either the FOIA or FACA lawsuits, but continues to monitor the two cases.

## **II. Federal Litigation in Which the State Intervened to Challenge a Federal Action**

### **1. Clean Air Act Emission Standards – *Michigan v. EPA* (S.Ct., 14-46)**

The State intervened with Michigan and several other states challenging an EPA rule setting new Clean Air Act hazardous air pollutant emission standards for power plants. The D.C. Circuit Court of Appeals found in favor of the EPA and upheld the new rules in *White Stallion Energy Center LLC v EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Subsequently, the U.S. Supreme Court granted the states' petition for certiorari and held that the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.



### **III. 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 State intervened to support a regulation excluding Alaska from regulations that otherwise govern the creation of Indian trust land. The State has claimed that the Alaska Native Claims Settlement Act forecloses taking land into trust for Alaska Natives, except Metlakatla. The federal district court disagreed and found in favor of the plaintiffs. The case is now on appeal before the D.C. Circuit Court of Appeals and the State filed its opening brief on August 24, 2015.

After the federal district court ruled, the United States proposed to amend the land-into-trust regulation to remove the Alaska exclusion. The State submitted comments on the proposed rule, and the final regulation has been published. The federal district court has enjoined the Secretary of the Interior from creating any new trust land in Alaska pending resolution of the appeal.

#### **2. CD-5 USACE Permit – *Nukapigak v. U.S. Army Corps of Engineers* (AK Dist. Ct., 3:13-cv-00044)**

Two cases were combined that challenge a 404 permit issued by the U.S. Army Corps of Engineers (USACE) to ConocoPhillips. The permit allows discharge of fill materials into waters of the U.S. to construct the CD-5 drill pad. The State intervened in support of USACE's action. After USACE submitted supplemental information pursuant to the court's order, the court upheld the permit and rejected plaintiffs' claims.

#### **3. 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.

**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 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 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. UCIDA appealed to the Ninth Circuit, and the case is in the briefing stages.

**5. Bureau of Ocean Energy Management's Lease Sale 193 in Chukchi Sea – *Native Village of Point Hope v. Salazar* (9th Cir., 12-35287)**

Plaintiffs challenged the Bureau of Ocean Energy Management's (BOEM) decision to conduct Lease Sale 193 in the outer continental shelf of the Chukchi Sea. The State intervened to support BOEM's decision. The district court dismissed the case, and plaintiffs appealed to the Ninth Circuit. The Ninth Circuit reversed, holding that the EIS relied on an improper estimate of "economically recoverable oil." BOEM issued another EIS in compliance with the court's order, and the matter is back before the district court with a challenge to the new EIS.

**6. Shell's Chukchi Exploration Plan -- *Alaska Wilderness League v. Jewell* (9th Cir. 15-71656)**

Appellants challenged Bureau of Ocean Energy Management's (BOEM) approval of Shell's Exploration Plan for the Chukchi Sea (exploration plan appeals are filed directly with the circuit court). The State intervened in support of BOEM's decision. The parties are briefing the appeal on an expedited schedule.

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

In three separate suits, plaintiffs are seeking injunctions to prevent the U.S. Forest Service's (USFS) Big Thorne Timber sale on Prince of Wales Island. The State has joined with several other parties as intervenor-defendants in support of the USFS. The district court upheld the timber sale and plaintiffs

appealed. The Ninth Circuit denied plaintiffs motion for injunction pending appeal, and the case is in the early briefing stages.

#### **IV. 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 2015 to date involving the federal government or the potential preemption of state law.

1. ***Sturgeon v. Masica (Petition for Certiorari, Supreme Court)***. Alaska filed an amicus brief to the Supreme Court in support of a private plaintiff-appellant challenging the National Park Service’s authority to regulate state waters—and by extension state, Native, and private lands—falling within conservation system units. The State argued that under the Alaska National Interest Lands Conservation Act (ANILCA), Alaska retains the sovereign right to manage its lands and resources without federal regulatory interference.
2. ***People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service (Tenth Circuit)***. Alaska joined Utah’s amicus brief in support of a group of private land owners arguing that Congress lacks authority under the Commerce Clause to regulate an exclusively intrastate threatened species.
3. ***Sierra Club v. McCarthy (Ninth Circuit)***. Alaska joined Nebraska’s amicus brief in support of a multi-state group of intervenors challenging an EPA settlement with the Sierra Club. The intervenor-states argued that EPA’s settlement disregarded requirements in the Clean Air Act.
4. ***Peruta v. San Diego (En Banc Ninth Circuit)***. Alaska joined Alabama’s amicus brief in support of a group of private plaintiffs challenging a “good cause” requirement to obtain a concealed weapon permit on the grounds that the requirement violates the Second Amendment.
5. ***Jackson v. San Francisco (Petition for Certiorari, Supreme Court)***. Alaska joined Nebraska’s amicus brief in support of a group of private plaintiffs challenging a San Francisco regulation that required handguns in homes be kept in a locked box when not carried on a person on the grounds that the regulation violated the Second Amendment.

6. ***Freidman v. Highland Park (Petition for Certiorari, Supreme Court)***. Alaska joined West Virginia's amicus brief in support of petitioners Illinois State Rifle Association and a municipal resident in challenging a municipal ordinance that prohibits possession of assault weapons and large-capacity magazines and considers the appropriate framework to be applied in Second Amendment cases.

**Alaska Department of Law**

**Federal Laws and Litigation Report**  
**SUPPLEMENT**

**Dated: February 10, 2016**

The following are updates to the 2016 Federal Laws and Litigation Report that have occurred since the report was submitted on September 9, 2015:

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

Item 2 on Page 5: Clean Power Plan Rule by the Environmental Protection Agency Under Section 111(d) of the Clean Air Act: The U.S. Supreme Court recently halted implementation of the Clean Power Plan rule until the conclusion of the case, which could include an appeal to the U.S. Supreme Court. The State continues to monitor this case, even though Alaska was exempted from the final rule.

Item 5 on Page 7: 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.”: The U.S. Supreme Court granted Mr. Sturgeon’s petition for certiorari, and oral argument occurred in January. Mr. Sturgeon’s case and the State’s case had been separated by the Ninth Circuit. While the court denied the State’s case on mootness grounds, the Ninth Circuit found in favor of the National Park Service on the merits in Mr. Sturgeon’s case. The State submitted an amicus brief in support of Mr. Sturgeon and participated in the oral argument before the U.S. Supreme Court. The State is awaiting the Court’s decision.

Item 9 on Page 10: Potential Listing of the “Alexander Archipelago Wolf” in Southeast: The United States Fish and Wildlife Service issued a decision to not list the wolf as an endangered or threatened species.

Item 10 on Page 10: Application of 2001 Roadless Rule in areas like the Tongass National Forest: The State filed a petition of certiorari with the U.S. Supreme Court in October, seeking to have the Court review the decision striking down the Alaska exemption to the Roadless Rule (*Organized Village of Kake v. U.S. Dept. of Agriculture*).

Item 12 on Page 11: Non-Drilling Oil and Gas Exploration Plans for ANWR under Section 1002 of ANILCA: The State decided not to appeal the district court’s ruling upholding Secretary Jewell’s denial of the State’s proposed exploration plan.

### **III. Federal Litigation in Which the State Intervened in Support of a Federal Action**

Item 1 on Page 14: Taking Land into Trust for Tribes – *Akiachak Native Community v. Dept. of Interior* (D.C. Cir., 13-5360): The oral argument on the appeal will occur March 4, 2016.

Item 7 on Page 15: Big Thorne Timber Sale – *SEACC v. U.S. Forest Service* (AK Dist. Ct., 1:14-cv-00013-RRB; 9th Cir., 15-352332): The oral argument on the appeal took place on February 3, 2016. The State is awaiting the court’s decision.

### **IV. Federal Litigation in Which the State Filed or Joined in an Amicus Brief**

(New Item, Page 17)

7. ***United States Army Corps of Engineers v. Hawkes Co., Inc.* (Supreme Court).** Alaska will be joining other states in filing amicus briefs in support of the private plaintiff. The case addresses whether an approved jurisdictional determination issued by the Army Corps of Engineers under the Clean Water Act is “final agency action” subject to judicial review.

**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.



**Alaska Department of Law  
Additional Significant Court Cases in 2012\*\***

**February 13, 2013**

Case Name	Case No.	Brief Description	Status
<b>ACCESS AND LAND</b>			
<i>RS 2477 Challenges</i>	N/A	State is preparing to file litigation against the federal government to quiet title to state rights-of-way established under R.S. 2477 in the Fortymile Area around Chicken.	Litigation not yet filed.
<i>REDOIL v. State</i>	S14216	Plaintiff challenged the Department of Natural Resources' decision to offer tracts for leasing in the Beaufort Sea Lease Sale Area.	At the Alaska Supreme Court after the trial court found in favor of the plaintiff.
<b>BRISTOL BAY</b>			
<i>Nondalton Tribal Council v. Dept. of Natural Resources</i>	3DI0946CI	Plaintiffs challenged specific provisions of the 2005 Bristol Bay Area Land Use Plan.	Case closed; parties settled on remand to trial court.
<i>Nunamta Aulukestai v. Dept. of Natural Resources</i>	S14560	Plaintiffs challenged constitutionality of regulations and statutes relating to issuance of temporary exploration permits.	At the Alaska Supreme Court after the trial court found in favor of the state.
<i>State v. Lake and Peninsula Borough</i>	3DI1100053CI	The state challenged the borough's enactment of an initiative prohibiting permits for certain large-scale development projects.	At the trial court level.
<b>CHILD SUPPORT</b>			
<i>Central Council of Tlingit and Haida Indian Tribes of Alaska v. State</i>	S14935	Plaintiffs sued to require the state to enforce the Tlingit Haida tribal court's child support orders.	At the Alaska Supreme Court after the trial court held in favor of plaintiffs.

\*\*Please see the "List of Federal Litigation" and the "Oil, Gas and Mining Section: Major Litigation" for other significant cases.

**Alaska Department of Law  
Additional Significant Court Cases in 2012\*\***

**February 13, 2013**

Case Name	Case No.	Brief Description	Status
<b>CONSUMER PROTECTION</b>			
<i>State v. Onboard Media</i>	1JU1300498CI	State filed a consent decree regarding the port shopping programs the onboard promoters conduct on cruise ships that visit ports in Alaska.	Consent decree filed in trial court.
<b>ENERGY PROJECTS</b>			
<i>U.S. v. Golden Valley Electric (and Alaska Industrial Development and Export Authority)</i>	4:12-cv-00025-RRB	U.S. filed a consent decree relating to the air permit to operate the Healy Clean Coal Project.	Case closed; consent decree filed in the trial court.
<i>State v. Hilcorp</i>	3AN1210858	State filed a consent decree to resolve competitive concerns with Hilcorp Alaska LLC's acquisition of Marathon Oil Company's Cook Inlet assets.	Case closed; consent decree filed in the trial court.
<b>ENVIRONMENTAL</b>			
<i>State v. BP Exploration (Alaska) Inc.</i>	3AN-09-06181	State sued BP for damages caused by the 2006 pipeline leaks and pipeline replacements in the Prudhoe Bay oilfield.	Case closed; three-judge arbitration panel ruled in favor of the state for \$245 million in lost royalties and \$10 million to cover environmental damages.

**Alaska Department of Law  
Additional Significant Court Cases in 2012\*\***

**February 13, 2013**

Case Name	Case No.	Brief Description	Status
<b>PARENTAL NOTIFICATION</b>			
<i>Planned Parenthood v. State</i>	S15010, S15030, S15039	Plaintiff challenged the Parental Notification Law (a ballot initiative) on constitutional grounds.	At the Alaska Supreme Court after the trial court upheld the core requirements of the law.
<b>TRANSPORTATION</b>			
<i>Alaska Marine Highway System v. Robert E. Derecktor, Inc.</i>	IJU10507CI	State sued the manufacturer and retailer of the engines of the state's fast ferries because of accelerated degradation.	At the trial court level.

**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>ENDANGERED SPECIES ACT</b>			
<i>In Re Polar Bear Endangered Species Act Listing et al.</i>	(DC Cir.) 11-5219	State challenged the listing of the polar bear as threatened under ESA.	The court of appeals upheld the listing and denied the motion for rehearing. Petition for certiorari has been filed with the U.S. Supreme Court.
<i>State of Alaska v. Jewell</i>	3:11-cv-00036-RRB	State challenged the final designation of critical habitat for the polar bear.	At the court of appeals after trial court found in favor of the state.
<i>State of Alaska v. Lubchenko</i>	(9th Cir.) 12-35201	State challenged the National Marine Fisheries Service biological opinion finding that existing fishing regulations jeopardize the Western Distinct Population of Stellar Sea	The court of appeals upheld the biological opinion. State is currently evaluating its options.
<i>State of Alaska v. Lubchenko</i>	1:10-cv-00927	State challenged listing of the distinct population segment of beluga whales in Cook Inlet as an endangered species.	Case closed; trial court upheld the listing decision.
<i>Center for Biological Diversity v. Lubchenko</i> (Alaska intervened in support of defendant)	(9th Cir.) 11-15169	State intervened to support the federal government's decision not to list the ribbon seal as endangered or threatened.	Case closed. Plaintiffs voluntarily dismissed following status review finding that the listing of the ribbon seal was not warranted.
<i>Native Village of Chickaloon v. National Marine Fisheries Service</i> (Alaska intervened in support of defendant)	3:12-cv-00102-SLG	State intervened to ask the court to uphold NMFS' decision to allow underwater seismic surveys in Cook Inlet.	Trial court, for the most part, upheld NMFS' decision.

\*\*This list includes all of the litigation that could be identified at this time.

**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>ENDANGERED SPECIES ACT CONT.</b>			
<i>State of Alaska v. National Marine Fisheries Service</i>	4:13-cv-00021-RRB	The state filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future.	At the trial court level.
<b>CLEAN AIR ACT</b>			
<i>State of Alaska v. Kerry</i>	3:12-cv-00142-SLG	State challenged Secretary of State Clinton's extension of Emission Control Area to coastal areas of Alaska.	At the trial court level.
<i>White Stallion Energy Center LLC v. EPA</i> (Alaska intervened in support of plaintiffs)	(DC Cir.) 12-1272	Plaintiffs are challenging EPA's rule, which sets new Clean Air Act emission standards for power plants. <b>This case was consolidated with several other petitions.</b>	At the court of appeals; this is a direct appeal from an EPA decision.
<i>Coalition for Responsible Regulation v. EPA</i> (Alaska intervened in support of plaintiff)	(DC Cir.) 09-1322	State intervened to join in the challenge to EPA's Greenhouse Gases Endangerment finding.	<b>Court of appeals upheld finding; Alaska and U.S. Chamber of Commerce filed a petition for certiorari with the U.S. Supreme Court.</b>
<i>U.S. v. Alaska Industrial Development Energy Authority (and GVEA)</i>	4:12-cv-00025	U.S., GVEA and AIDEA filed a consent decree resolving disputes over the Healy Clean Coal Plant.	Case closed. The court approved the consent decree in November 2012.



**Alaska Department of Law**  
**List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013**  
**(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>ACCESS AND LAND CONT.</b>			
<i>State of Wyoming v. U.S. Dept. of Agriculture</i> (State filed amicus briefs in support of plaintiff)	(10th Cir.) 08-8061	State filed amicus briefs in support of Wyoming's challenge to the roadless rule.	Case closed; the court of appeals upheld the roadless rule and the U.S. Supreme Court denied the petitions for review.
<i>Tongass Conservation Society v. U.S. Forest Service</i> (Alaska intervened in support of defendant)	(9th Cir.) 10-35232	State intervened to join the USFS in defending the Logjam Timber Sale in the Tongass National Forest.	Case closed; the court of appeals upheld the timber sale.
<i>Sturgeon v. Masica (and Dept. of Interior)</i> (Alaska intervened in support of plaintiff)	3:11-cv-00183-HRH	State intervened to challenge the U.S. Department of Interior's application of National Park Service regulations to state navigable waterways.	At the trial court level.
<i>Wilde v. U.S.</i> (State filed amicus briefs)	4:10-cr-21	State filed amicus briefs. The issue is whether the National Park Service has jurisdiction to conduct U.S. Coast Guard style boat safety inspections on navigable waters within units of the National Park System in Alaska and arrest someone who refuses to consent to the boat safety check and fees.	At trial court level.
<i>State of Alaska v. U.S.</i>	4:13-cv-00008	State sued the U.S. and others to quiet title to a number of R.S. 2477 rights-of-way near Chicken, Alaska.	At trial court level.
<i>Uintah County v. Jewell</i> (consolidated with <i>State of Utah v. Jewell</i> ) (State filed amicus briefs in support of Utah)	(UT Dist. Ct.) 2:10-cv-970	State filed amicus briefs in <i>Utah v. Jewell</i> . The issue is whether BLM's Wild Land's policy violates the Administrative Procedure Act, Federal Advisory Committee Act, the Wilderness Act, and other federal statutes.	At trial court level.

**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>WATER</b>			
<i>State of Alaska v. U.S.</i> (consolidated with <i>John v. U.S.</i> )	(9th Cir.) 09-36125	State challenged the U.S. regulatory process used to assert federal reserved water rights.	<b>Court of appeals upheld the regulatory process. State is evaluating its options.</b>
<i>Native Village of Point Hope v. U.S. Environmental Protection Agency</i> (Alaska filed amicus brief in support of defendants)	(9th Cir.) 12-35976	State filed amicus brief in support of the EPA's decision to approve ADEC's site-specific criteria for water discharge in Red Dog Creek.	At the court of appeals after the trial court upheld the EPA's decision.
<i>Decker (Oregon State Forester) v. Northwest Environmental Defense Center</i> (Alaska joined amicus brief in support of Oregon)	(U.S. Sup. Ct.) 11-338	State joined in an amicus brief in support of Oregon to overturn the Ninth Circuit's decision that an NPDES permit was required for run-off from forest maintenance roads.	<b>Case closed. The U.S. Supreme Court found in favor of Oregon.</b>
<i>Sackett v. Environmental Protection Agency</i> (Alaska filed an amicus brief in support of plaintiff)	(U.S. Sup. Ct.) 10-1062	State filed amicus brief in support of the Sacketts' argument that the EPA's order to tear out their construction or be fined was subject to judicial review.	Case is on-going but state is not involved; U.S. Supreme Court held in favor of the Sacketts.
<i>Nukapigek v. U.S. Army Corps of Engineers</i> (Alaska moved to intervene in support of defendant)	3:13-cv-00044	State moved to intervene to support the 404 permit issued by USACE to ConocoPhillips allowing discharge of fill material into waters of the U.S. to construct the CD-5 drill pad.	At the trial court level.
<b>RAIL</b>			
<i>Alaska Survival v. Surface Transportation Board</i> (Alaska intervened in support of defendant)	(9th Cir.) 12-70218	State intervened to support the U.S. Surface Transportation Board's approval of Port MacKenzie rail line extension and National Environmental Policy Act review.	<b>Case closed. Court of appeals upheld approval of the rail line extension.</b>



**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>MINING</b>			
<i>Earthworks v. U.S. Dept. of Interior</i> (Alaska intervened in support of defendant)	1:09-cv-01972	Plaintiffs challenged the 2008 Mining Claim Rule.	At the trial court level.
<i>Farrell-Cooper Mining Co. v. Office of Surface Mining and Reclamation Enforcement</i> (State joined amicus brief in support of Oklahoma)	(10th Cir.) 12-7045, 12-7048	State joined an amicus brief supporting Oklahoma's position that the federal government may not use 10-day notices to challenge the validity of permits issued under state programs it has approved.	At the court of appeals.
<i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i> (Alaska intervened in support of Coeur)	129 S. Ct. 2458	SEACC challenged the USACE's issuance of a 404 permit for the Kensington Mine project.	Case closed; U.S. Supreme Court upheld the permit.
<i>National Mining Association v. McCarthy</i> (Alaska joined amicus brief in support of Kentucky)	(D.C. Cir.) 12-5310	State joined amicus brief supporting Kentucky's assertion that the EPA exceeded its statutory authority by imposing an enhanced review process for dredge and fill permits and substantive standards for coal mining regulation.	At the court of appeals.
<b>FISH AND GAME</b>			
<i>Jensen v. Locke</i> (Alaska intervened in support of defendant)	(9th Cir.) 10-35062	Plaintiffs challenged state salmon management authority in Prince William Sound.	Case closed. The court upheld the salmon management plan.

**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>FISH AND GAME CONT.</b>			
<i>United Cook Inlet Drift Association v. National Marine Fisheries Service</i> (Alaska will move to intervene in support of defendants)	1:13-cv-82	UCIDA challenged Amendment 12 to the Salmon Fishery Management Plan in Alaska that ensured Alaska retained full authority over salmon management in three historical areas beyond the three-mile limit, as it has since statehood.	At the trial court level.
<i>State of Alaska v. Gould</i>	3:10-cv-00113	State challenged the U.S. Fish and Wildlife Service's decision to deny the state access to Unimak Island to conduct predator control necessary to protect the local caribou herd from local extermination.	Case closed. The court dismissed the case in favor of the defendant.
<i>U.S. v. State of Washington</i>	W. WA Dist. Ct., C70-9213	The issues are whether Alaska's catch of far north migrating Chinook and certain sockeye stocks should be counted as part of the 50% that goes to the states under the Baldridge Stipulation or not. State's position is that Alaska's catch is not subject to the stipulation.	At the trial court level. Proceedings are inactive as long as the parties' issues are being addressed through the Pacific Salmon Treaty.

<b>OUTER CONTINENTAL SHELF</b>			
<i>Native Village of Point Hope v. Salazar</i> (Alaska intervened in support of defendant)	(9th Cir.) 12-35287	Plaintiff challenged the Bureau of Ocean Energy Management's Lease Sale 193 in the Chukchi Sea.	At the court of appeals after the trial court dismissed plaintiff's claims.
<i>REDOIL v. EPA</i> (Alaska filed amicus briefs in support of defendants)	(9th Cir.) 12-70518	Plaintiffs challenged the EPA's grant of air permits for Shell's outer continental shelf activities. State filed amicus briefs in support of Shell and the EPA.	Case closed. Court of appeals upheld the grant of the air permits.

**Alaska Department of Law  
List of Federal Litigation For 2008-present\*\***

**Dated: August 2, 2013  
(Updates since February 12, 2013 are in red.)**

Case Name	Case No.	Brief Description	Status
<b>OUTER CONTINENTAL SHELF CONT.</b>			
<i>Alaska Wilderness League v. U.S. EPA</i> (Alaska filed amicus briefs in support of defendants)	(9th Cir.) 12-71506	Plaintiffs challenged the EPA's grant of air permits for the exploratory activities by Shell's rig, the Kulluk. State filed amicus briefs in support of Shell and EPA.	At the court of appeals; this is a direct appeal from an EPA decision.
<i>Native Village of Point Hope v. Salazar; consolidated with Alaska Eskimo Whaling Commission v. Salazar</i> (Alaska intervened in support of defendants)	(9th Cir.) 09-73944, 09-73944, 10-70166	State intervened in support of the Department of Interior's approval of Shell's exploration plans for the Beaufort and Chukchi Seas for 2010. These are multiple appeals on the two exploration plans Shell had filed.	Case closed; the court of appeals upheld the exploration plans.
<i>Native Village of Point Hope v. Salazar; Inupiat Community of the Arctic v. Salazar</i> (Alaska intervened in support of defendants)	(9th Cir.) 11-72891, 11-72943, 12-70440, 12-70459	State intervened in support of the Department of Interior's approval of Shell's 2012 exploration plans for the Beaufort and Chukchi Seas. These are multiple appeals on the two exploration plans Shell had filed.	Cases closed; the court of appeals upheld the exploration plans.
<b>VOTING RIGHTS ACT</b>			
<i>State of Alaska v. Holder; Shelby County v. Holder</i>	1:12-cv-1376; (U.S. Sup. Ct.) 12-96	State challenged Section 5 of the Voting Rights Act requiring Alaska to obtain Department of Justice preclearance of any changes to elections. In a similar case in the U.S. Supreme Court, <i>Shelby County</i> , state filed an amicus brief in support of Shelby County.	<b>U.S. Supreme Court struck down Section 4 of the Voting Rights Act (<i>Shelby County</i>); at the trial court level but expect dismissal based on <i>Shelby County</i> (<i>State v. Holder</i>).</b>

Alaska Department of Law  
**List of Federal Litigation For 2008-present\*\***

Dated: August 2, 2013  
 (Updates since February 12, 2013 are in red.)

Case Name	Case No.	Brief Description	Status
<b>AFFORDABLE CARE ACT</b>			
<i>National Federation of Independent Businesses v. Sebelius</i> (Alaska filed amicus briefs in support of plaintiffs)	(U.S. Sup. Ct.) 11-393	State filed amicus briefs in support of overturning the Affordable Care Act.	Case closed; U.S. Supreme Court upheld the majority of the Act.
<b>DEFENSE OF MARRIAGE ACT</b>			
<i>U.S. v. Windsor</i> (Alaska joined an amicus brief)	(U.S. Sup. Ct.) 12-307	State joined an amicus brief supporting the validity of the Defense of Marriage Act.	<b>U.S. Supreme Court struck down the Defense of Marriage Act.</b>

Department of Law  
**Table of OCS Cases Resulting in Damages or Settlement Amounts  
From the Past Ten Years**

August 6, 2013

Approximate Total Number of OCS Tort Liability Cases in the Past 10 Years: 30

Approximate Number of OCS Tort Liability Cases Resulting in Damages Awards or Settlement Amounts: 12

Approximate Amount of Settlement Amounts and Damages: \$7.96 million

Approximate Amount of Damages Currently on Appeal: \$2 million

Number of OCS Tort Liability Cases Pending: 7 in Trial Court, 1 on Appeal (*see Mullins* below)

Case Name	Summary of Facts/Claims	Resolution
<i>Mullins v. Dominick, State/OCS</i>	<p>Plaintiffs were removed from the home due to substance abuse and domestic violence issues. Plaintiffs were placed with their maternal grandparents, initially as a foster-care placement and later as plaintiffs' legal guardians. Years later, plaintiffs revealed that they had been sexually abused by their maternal grandfather during this placement and that their grandmother emotionally and physically abused them. Plaintiffs filed suit against OCS and their grandfather. The State joined plaintiffs' grandmother and biological mother as parties for their alleged negligence and intentional conduct.</p> <p>Plaintiffs claimed that OCS and its social workers were negligent in placement decisions and investigation, and liable for their grandfather's sexual abuse and grandmother's emotional/physical abuse. OCS denied that its social workers were negligent and asserted that grandfather was responsible for his own intentional acts of sexual abuse.</p>	<p>Jury Verdict:  <b>\$2,050,000 million</b></p> <p>Fault Allocation:</p> <ul style="list-style-type: none"> <li>• <b>95% OCS</b></li> <li>• <b>5% biological mother</b></li> <li>• <b>0% grandparents</b> despite grandfather's criminal conviction for sexual abuse of the plaintiffs</li> </ul> <p><b>Case on appeal to Alaska Supreme Court.</b></p>
<i>Combs, Ireland v. State/DFYS/OCS</i>	<p>The Combs were foster parents licensed by OCS and were an approved foster-care placement for minors in the custody of the Division of Juvenile Justice (DJJ). Plaintiffs rented a home owned by Ireland and the home was destroyed by fire. Combs claimed the fire was set by a DJJ foster-child who had been placed with them. Plaintiffs sued OCS for negligent failure to adequately advise them of the foster child's past history. OCS denied that it was negligent.</p>	<p>Settlement with home-owner, Ireland:  <b>\$175,000</b></p> <p>Settlement with Combs:  <b>\$200,000</b></p>

Department of Law  
**Table of OCS Cases Resulting in Damages or Settlement Amounts  
From the Past Ten Years**

August 6, 2013

<b>Case Name</b>	<b>Summary of Facts/Claims</b>	<b>Resolution</b>
<i>Beaver v. State/OCS</i>	14-year-old in a relative foster-care placement died of hypothermia after consuming alcohol with other teens. Plaintiff alleged negligent placement and investigation decisions including that OCS should have conducted additional investigation of the foster parent based on family complaints that she was abusing alcohol and neglecting plaintiff. OCS denied the allegations.	Settlement amount: <b>\$255,000</b>
<i>C.M. v. State, OCS</i>	<p>OCS assumed custody of plaintiff as a minor while biological mother sought treatment for her substance abuse. Plaintiff was maintained in mother's home. Mother invited older adult to reside in home with her and children, and left plaintiff in the care of the older adult who sexually abused plaintiff. Plaintiff stated that he told his mother about the sexual abuse but mother did nothing to stop it. Adult caretaker was criminally convicted for sexual abuse of plaintiff.</p> <p>Minor plaintiff sued OCS through his guardian ad litem alleging negligent placement and investigation decisions, and alleged that OCS was liable for caretaker's sexual abuse. OCS denied that it was negligent and joined caretaker and plaintiff's mother as third-party defendants.</p>	Jury Verdict: OCS 7% liable; Retrial ordered on damages, then settled. <b>\$225,000</b>
<i>A.D. v. State/OCS</i>	In 1998, an emotionally disturbed 11-year-old was mistakenly released by DFYS to his biological father's custody and was thereafter assaulted by his father. Thereafter, the boy was returned to foster-care placement and later adopted by his paternal aunt and uncle. He was then alleged to have been sexually assaulted in his adoptive home by another foster child who had been placed with the family by OCS.	Settlement amount: <b>\$1.5 million</b>
<i>Sullivan, Doherty v. State, DFYS/OCS</i>	Plaintiff alleged that OCS social workers were negligent and had intentionally misrepresented facts to the mother and Court during the course of the underlying CINA proceeding. OCS denied all allegations.	Settlement amount: <b>\$282,500</b>
<i>AJ/DD v. State, et al.</i>	Two foster children placed in home where another foster child died raised claims re failure to protect & negligent foster placements.	Settlement amount: <b>\$2.4 million</b>

Department of Law  
**Table of OCS Cases Resulting in Damages or Settlement Amounts  
 From the Past Ten Years**

August 6, 2013

<b>Case Name</b>	<b>Summary of Facts/Claims</b>	<b>Resolution</b>
<i>Malloy v. State, DHSS</i>	Former foster child asserted injury claims arising out of sexual abuse by foster parent a decade earlier.	Settlement amount: <b>\$240,000</b>
<i>Gilbert v. State</i>	Claim re negligent licensing of foster home.	Settlement amount: <b>\$7,500</b>
<i>Ruby v. Gilbertson, et al.</i>	Father's claim re due process violations.	Settlement amount: <b>~\$14,000</b>
<i>Espy v. State, DHSS</i>	Claim of failure to remove child & protect from abusive father.	Settlement amount: <b>~\$260,000</b>
<i>Bush v. Kromer</i>	Foster child bitten in face by dog in foster home.	Settlement amount: <b>\$350,000</b> (inc. <b>\$50,000</b> from 3rd party insurer)

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>NAVIGABLE WATERWAYS</b>			
<p>Navigable Waterways - <i>Sturgeon v. Masica (and Dept. of Interior)</i> (Alaska intervened in support of plaintiff; after State's case dismissed, filed amicus) (9th Cir., 13-36165; 13-36166) AAGs R. Botstein, J. Hafner</p>	Not aligned.	<p>State intervened to challenge the U.S. Department of Interior's (DOI) application of National Park Service (NPS) regulations to state navigable waterways. The Ninth Circuit originally ruled in favor of the DOI and dismissed the State's independent challenge for lack of standing. State filed an amicus brief supporting Sturgeon's challenge at the U.S. Supreme Court. The Supreme Court reversed the Ninth Circuit's decision and remanded for further proceedings.</p>	<p>On remand to the court of appeals, 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.</p>
<p>Mosquito Fork - <i>State of Alaska v. U.S.</i> (9th Cir., 16-36088, 17-35025) AAGs J. Alloway, M. Schechter</p>	Not aligned.	<p>State sought to quiet title to submerged land underlying Mosquito Fork of the Fortymile River. Ultimately, the U.S. disclaimed its interest in the Mosquito Fork, but the court also found the U.S. had acted in bad faith. The case is now on appeal on the issue of attorneys fees.</p>	<p>The U.S. appealed the award of \$582,629 in attorney fees and \$10,372.71 in costs to the State. 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 is scheduled to begin in April.</p>
<p>Stikine River - <i>State v. U.S.</i> (3:15-cv-00226) AAG J. Alloway</p>	Not aligned.	<p>State sought to quiet title to submerged land underlying the Stikine River. The U.S. issued a disclaimer of interest in lieu of filing an answer.</p>	<p>The U.S. appealed the district court's finding that the State was the prevailing party for purposes of costs. The appeal is related to legal issues in the Mosquito Fork appeal. Briefing is stayed pending the U.S. obtaining final approval from the Solicitor General.</p>



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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>NAVIGABLE WATERWAYS CONT.</b>			
Kuskokwim River/IBLA Appeal AAG J. Alloway	Not aligned.	The State requested a recordable disclaimer of interest on the Kuskokwim River to resolve a dispute over ownership of a portion of the riverbed. The Bureau of Land Management (BLM) denied the request, and the State appealed to Interior Board of Land Appeals.	Briefing is complete and we are awaiting a decision by the IBLA.
Knik River/Eklutna, Inc.'s Selection Application/IBLA Appeal AAG J. Alloway	Not aligned.	In approving Eklutna, Inc.'s selection application, Interior Board of Land Appeals and BLM did not preserve ANCSA 17(b) easements and purported to convey portions of the bed of the Knik River, which the State asserts is a state navigable waterway.	The State appealed the approval of the land selection, 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.
Navigable Waterways/ Togiak Public Use Management Plan (PUMP) AAG A. Nelson	Not aligned.	The PUMP asserts jurisdiction over, and directs USFWS to adopt regulations to limit unguided use on, state navigable waterways in the Togiak National Wildlife Refuge.	The USFWS has not proposed the regulations yet and will likely not do so until the <i>Sturgeon</i> case is decided.
<b>ACCESS AND LAND</b>			
Roadless Rule - <i>State of Alaska v. U.S. Dept. of Agriculture</i> (1:11-cv-01122-RJL) AAG T. Lenhart	Not aligned.	State challenged the application of the roadless rule in Alaska. The roadless rule prohibits the building of roads in wilderness areas, which essentially shuts down resource development in many areas of the Tongass.	At the district court on the merits. We are awaiting a decision.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>ACCESS AND LAND CONT.</b>			
King Cove Road - <i>Agdaagux Tribe of King Cove v. Jewell</i> (State intervened in support of plaintiff) (9th Cir., 15-35875) AAG T. Lenhart	Not aligned.	State intervened to challenge Secretary Jewell's decision to not allow the building of an emergency road out of King Cove. The State is also working on other options to get the road built.	At the court of appeals, after the district found in favor of Secretary Jewell. The briefing is complete and oral argument has not been set.
R.S. 2477 Rights of Way - <i>State of Alaska v. U.S.</i> (4:13-cv-00008) AAG K. Sullivan	Not aligned.	State sued the U.S. and others to quiet title to a number of R.S. 2477 rights-of-way near Chicken, Alaska.	At the district court following an appellate court ruling that State must seek to condemn parts of rights-of-way over property of Native allottees. State is seeking to condemn the rights-of-way.
Big Thorne Timber Sale - <i>SEACC v. U.S. Forest Service</i> (Alaska intervened in support of defendant) (1:14-cv-00013) AAG T. Lenhart	Aligned.	Plaintiffs are seeking injunctions to prevent U.S. Forestry Service's Big Thorne Timber sale on Prince of Wales Island.	At the court of appeals after the district court upheld the timber sale. We are awaiting the decision.
Shelter Cove Road - <i>State v. U.S. Forest Service</i> (1:16-cv-00018); <i>Greater Southeast Alaska Conservation Community v. Stewart</i> (State intervened in support of defendant) (1:16-cv-00009) AAG S. Lynch	Aligned on end result but not on justification.	The State intervened to defend the building of Shelter Cove Road in Ketchikan. Contrary to the federal government's position, the State asserts that it has a Section 4407 easement for the road. This would mean no environmental review is needed. Despite recent legislation shepherded by Senator Sullivan, the federal government still refuses to recognize the 4407 easement. To ensure the 4407 issue is addressed, State brought a separate lawsuit on that issue. The lawsuits have been consolidated.	Briefing on the lawsuit challenging the State's project concluded on December 14. On the second complaint filed by the State and consolidated with the original lawsuit, we are awaiting the federal government's response.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>ACCESS AND LAND CONT.</b>			
Lands into Trust - <i>Akiachak Native Community v. DOI</i> (D.C. Dist. Ct., 1:06-cv-969) AAGs A. Nelson; D. Wilkinson	Aligned at the district court.	State intervened to maintain the prohibition against taking land into trust for Alaska Natives. After the district court found in favor of plaintiffs, DOI changed its regulations to permit lands in Alaska to be taken into trust. Moving forward, the Bureau of Indian Affairs must give the State an opportunity to comment on an application.	Case closed. The court of appeals dismissed case on procedural grounds. The State has commented on one application from the Craig Tribal Association for a one-acre parcel in downtown Craig. The Bureau of Indian Affairs granted the application.
ANWR Boundary IBLA Appeal AAGs M. Schechter; A. Brown	Not aligned.	BLM denied the State's request for conveyance of 20,000 acres, based on dispute over western boundary of ANWR. The State also objected to a survey plat of the area directly south of the area requested for conveyance.	The State has moved to consolidate the two IBLA appeals. The initial conveyance appeal has been fully briefed.
ANWR Section 1002 AAG M. Schechter	Not aligned.	Section 1002 of the Alaska National Interest Lands Conservation Act (ANILCA) set aside the coastal plain of the Arctic National Wildlife Refuge for further investigation of its oil and gas potential. Any oil and gas production activities as well as exploratory drilling in the 1002 area cannot occur until authorized by an act of Congress. The investigations in the late 1980s recommended that the 1002 area be opened to production, but Congress has failed to pass a bill implementing the recommendations.	Senators Murkowski and Sullivan introduced Senate Bill 49, the Alaska Oil and Gas Production Act, on January 5, 2017, that would allow exploration and production in a portion of the 1002 Area.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>ENDANGERED SPECIES ACT</b>			
Bearded Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (9th Cir., 14-35811) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future.	The court of appeals reversed the district court's decision that found in favor of the state. The State, along with other appellees, filed a petition for rehearing en banc, and we are awaiting a decision on the petition.
Ringed Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (9th Cir., 16-35380) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the ringed seal as threatened under the ESA based on climate model projections 100 years into the future.	At the court of appeals after the district court found in favor of the state. The State's responsive brief is due February 21, 2017.
Critical Habitat - <i>Alabama v. NMFS</i> (AL Dist. Ct. 1:16-CV-00593) AAG B. Meyen	Not aligned.	The State joined 17 other states to challenge two new rules regarding the designation of critical habitat. The new rules greatly expand the types of areas that can be designated, without much, if any, connection to the presence of the protected species. The Attorney General also joined a letter with several other attorneys general asking the new federal administration to review and withdraw these rules.	At the district court level. The federal government has moved for dismissal, and the State is working on its response.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>ENDANGERED SPECIES ACT CONT.</b>			
Polar Bear Critical Habitat - <i>State of Alaska v. Jewell</i> (9th Cir., 13-35667) AAG B. Meyen	Not aligned.	State challenged the final designation of critical habitat for the polar bear.	The court of appeals reversed the district court's decision and upheld the designation of critical habitat. State and other plaintiffs filed a petition for certiorari with the U.S. Supreme Court and await a decision.
<b>CLEAN AIR ACT</b>			
Clean Power Plan (40 C.F.R. 60.5700-.5820)	Not aligned generally.	The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. EPA excluded Alaska and Hawaii from the final rule, but EPA indicated that they would likely include Alaska in the future after accruing more evidence.	Other states sued challenging the rule, and the State continues to monitor.
<b>WATER</b>			
"Waters of the U.S." Rule - <i>North Dakota v. EPA</i> (ND Dist. Ct. 3:15-cv-00059) AAG A. Brown	Not aligned.	State joined a coalition of 12 states challenging the new "waters of the U.S." rule. Among other things, the new rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within certain geographical limits to downstream waters already covered by federal law.	The district court action is currently stayed pending further decision by the Sixth Circuit Court of Appeals or the U.S. Supreme Court.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>WATER CONT.</b>			
Stream Protection Rule - Targets Coal Mines AAG A. Brown	Not aligned.	DOI released its final Stream Protection Rule, which goes into effect January 19, 2017. The rule directly impacts coal mines. State submitted comments on the draft rule objecting to the "one size fits all" approach and the failure to consider Alaska's unique conditions.	State joined a multi-state lawsuit challenging the rule on January 17, 2017. We are awaiting the federal government's response. The Attorney General also joined several other attorneys general in a letter requesting Congress to overturn the rule under the
Bristol Bay Watershed Assessment AAG A. Brown	Uncertain.	In July 2014, EPA published a proposed Section 404(c) veto decision based on the Bristol Bay Watershed Assessment that would preemptively restrict resource development in the entire watershed. The State has submitted comments on numerous occasions. EPA has not yet published its final decision.	Pebble Limited Partnership is currently in litigation with the federal government over some procedural issues. The State is not involved.
<b>FISH AND GAME</b>			
Salmon Fishery Management Plan - <i>United Cook Inlet Drift Association v. National Marine Fisheries Service</i> (Alaska intervened in support of defendants) (3:13-cv-0104) AAG S. Beausang	Aligned.	UCIDA challenged Amendment 12 to the Salmon Fishery Management Plan in Alaska that ensured Alaska retained full authority over salmon management in three historical areas beyond the three-mile limit, as it has since statehood. The court of appeals found in favor of the plaintiffs, reversing the district court's decision upholding state management.	The State is considering filing a petition for certiorari with the U.S. Supreme Court. The case has been remanded to the district court for determination of the terms of the judgment to be entered in favor of UCIDA.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>FISH AND GAME CONT.</b>			
NPS and USFWS Rules on Management of Fish and Game - <i>State v. Jewell</i> (3:17-cv-00013) AAGs C. Brooking, J. Alloway	Not aligned.	The State is challenging regulations from both the National Park Service and the U.S. Fish and Wildlife Service that impact state fish and game management. 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. USFWS adopted regulations preempting state management of wildlife when the federal agency determines the state action relates to predator control, prohibiting several means of take for predators, and changing public participation procedures for hunting and fishing closures.	The State filed the lawsuit on January 13, 2017 and is awaiting a response from the federal government.
NPS Subsistence Collection Rule AAG C. Brooking	Not aligned.	Over the objections of subsistence users, the State, and others, National Park Service published a final rule on January 12, 2017 that, among other things, would restrict the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade.	The State is evaluating all options.
Federal Subsistence Board/ Ninilchik AAG S. Beausang	Not aligned.	The Federal Subsistence Board is allowing the community of Ninilchik to use a gillnet to harvest salmon in the federal waters of the Kenai River. The State believes this will endanger the populations of king salmon and rainbow trout.	The State has filed a request for reconsideration with the board and is awaiting a decision.

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

**Dated: January 23, 2017**

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
<b>MINING</b>			
2008 Mining Claim Rule - <i>Earthworks v. U.S. Dept. of Interior</i> (Alaska intervened in support of defendant) (D.C. Dist. Ct. 1:09-cv-01972) AAGs E. Romerdahl, A. Brown	Aligned.	Plaintiffs challenged the 2008 Mining Claim Rule. State intervened to support the federal rule, which eliminated some of the regulatory hurdles for miners.	At the district court level. Briefing schedule has been set with the State's brief due in May 2017.
Wishbone Hill Mine - <i>Castle Mountain Coalition v. OSMRE</i> (State intervened in support of defendant) AAGs A. Brown, J. Hutchins	Not generally aligned.	The State intervened to defend the validity of the state-issued mine permits, which plaintiffs asserted had automatically terminated. The district court found in favor of plaintiffs and remanded the decision back to the agency.	In the court case, Usibelli moved to certify a question for appeal and the State joined the motion. Responses are due January 19, 2017. On remand, the federal agency issued a decision finding the State's determination that the permits were valid arbitrary and capricious. The State is evaluating options for seeking review of the decision.
<b>OIL AND GAS</b>			
Ban on Offshore Development AAG C. Moore	Not aligned.	President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all drilling in certain offshore areas, including large portions of the Chuckchi and Beaufort Seas.	State is evaluating all options, including whether there is any legal recourse.



DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/05/2013

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
TAPS Interstate and Intrastate Tariffs Strategic Reconfiguration (SR)	December 2004	<p><b>Issue:</b> Were \$100's of millions spent on pipeline capital project prudent expenditures? Project is currently about \$500 million over budget at project approval. There are other issues related to these tariffs (Phase II) that will be heard after the prudence phase (Phase I).</p> <p><b>Status:</b> State, shippers, and carriers concluded an additional four weeks of concurrent hearings before the FERC and RCA in September 2012. The parties have each filed two rounds (450 pages) of post-hearing briefs with the Commissions and, after the FERC ALJ issues a recommended decision, the parties will file responses to that proposed decision. We anticipate that the initial decision will issue in March or April 2013. Considering the amounts in controversy, we anticipate that the parties will then file briefs on exceptions to elements of the initial decision of the FERC ALJ, and that a final decision by the full FERC commission will be issued several months later.</p>	<p><b>DOL Expenditures as of 12/30:</b> \$16,560,104</p> <p><b>Anticipated Future Costs:</b> \$1.6 million through initial decisions by the Federal Energy Regulatory Commission and the Regulatory Commission of Alaska.</p>	\$15-20 million in refunds, \$100's of millions impact on future royalty and production tax
Tesoro Corporate Income Tax Case (1994-1998)	2004	<p><b>Issue:</b> Whether a company should have filed its tax returns on a unitary, combined basis and is subject to penalties.</p> <p><b>Status:</b> Superior court ruled in favor of the state. Tesoro appealed to the Alaska Supreme Court and oral argument was held September 12, 2012.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$2,311,750</p> <p><b>Anticipated Future Costs:</b> \$0</p>	Approx. \$13 million.

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/05/2013

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Corporate Income Tax Case	Confidential	<b>Status:</b> Confidential	<b>DOL Expenditures as of 11/30:</b> \$127,679  <b>Anticipated Future Costs:</b> \$250,000	Confidential
TAPS Property Tax Case (Nonconfidential)	<p>June 2006</p> <p>June 2007</p> <p>June 2008</p> <p>June 2009</p> <p>June 2010</p> <p>June 2011</p> <p>June 2012</p>	<p><b>Issue:</b> Whether DOR properly assessed property tax value of TAPS in 2006, 2007, 2008, 2009, 2010 and 2011. 2007-2009 cases were consolidated for trial.</p> <p><b>Status:</b> Nine week trial ended in November 2011 on consolidated 2007-2009 assessments. Judge Gleason entered a decision on December 29, 2011. 2010 and 2011 appeals awaiting scheduling for trial.</p> <p>The 2006 TAPS valuation appealed to and argued before Alaska Supreme Court in December 2012. Decision anticipated sometime within the year. Judge Gleason's 2007-2009 decision increased the assessed values for all three years, and is consistent with her decision in the 2006 case. This decision also appealed to Alaska Supreme Court and opening briefs due on February 22, 2013.</p> <p>SARB appeal of Department of Revenue's 2012 property tax valuation of \$8.25 billion stayed pending resolution of 2006 TAPS valuation appeal to Alaska Supreme Court.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$2,438,554</p> <p><b>Anticipated Future Costs:</b> \$1.0 million through trial on the 2010-2012 assessments and Alaska Supreme Court appeals of the 2006-2009 superior court decisions.</p>	<p>State directly receives approximately 48% of TAPS property tax revenue with remainder apportioned among North Slope and Fairbanks Boroughs and City of Valdez. Superior court 2006 decision resulted in approx. \$112 million in additional property tax revenues.</p> <p>The superior court's 2007-2009 decision substantially increased the assessed value of TAPS, which will result in higher property taxes, but also higher TAPS tariffs because property taxes are an allowable pipeline expense in ratemaking methodology. The higher property taxes will be shared by the municipalities and the state, and the state's share will be offset to some degree by the higher tariff's effect on production tax and royalty revenues.</p>

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/05/2013

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
ELF Aggregation	Jan. 2013	<p><b>Issue:</b> Whether OAH erred by determining that DOR Tax Division decision aggregating PAs constituted invalidly adopted regulation that violated state and federal due process guarantees.</p> <p><b>Status:</b> The working interest owners of the various PAs filed their notice of appeal on Jan. 9, 2013. The case has been assigned to Judge Sen Tan and a scheduling order has not been issued.</p>	<p><b>DOL Expenditure as of 11/30:</b> \$72</p>	The value is several hundreds of millions of production tax revenue.
Point Thomson Unit	The DNR unit default decision in 2005.	<p><b>Issue:</b> Whether DNR's decision to terminate the Point Thomson Unit (PTU) due to the producers' refusal to commit to development of the unit should be upheld.</p> <p><b>Status:</b> The PTU litigation was settled in March 2012. Under the settlement the PTU lessees have agreed to develop the unit and build a common carrier pipeline and other infrastructure to produce gas liquids. The settlement agreement has been challenged. The superior court ruled in favor of the state on December 7, 2012, and the challenger has appealed to the Alaska Supreme Court.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$2,836,494</p> <p><b>Anticipated Future Costs:</b> \$50,000</p>	Hundreds of millions in additional tax and royalty if the PTU is developed.

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/05/2013

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Royalty Audit <b>Anadarko</b>	2008	<p><b>Issue:</b> Audit of 2004 – 2007 audit returns focusing on destination value.</p> <p><b>Status:</b> Anadarko filed an administrative appeal in November 2011.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$15,000.</p> <p><b>Anticipated Future Costs:</b> \$150,000</p>	\$1-9 million
Royalty Settlement Agreement Reopener – <b>BP</b>	Late 2008	<p><b>Issue:</b> The State is preparing to assess a claim under the Royalty Settlement reopener provisions regarding capital construction funds and other tax benefits that reduce BP's transportation costs.</p> <p><b>Status:</b> Preparing arbitration claim. Anticipate resolution in 2013.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$413,401</p> <p><b>Anticipated Future Costs:</b> \$1,000,000 through arbitration.</p>	\$15-20 million
Royalty <b>BP</b> Audit 2007 - 2010	Late 2010	<p><b>Issue:</b> Value and transportation costs in the 2007 – 2010 period. Approximate audit claim of \$6 million which includes approximately \$4 million related to the aforementioned Royalty Settlement Agreement Reopener – CCF issue.</p> <p><b>Status:</b> DNR audit is in progress. Anticipate resolution in 2013 for leases not subject to royalty settlement.</p>	<p><b>DOL expenditures as of 06/30:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$50,000</p>	\$6 million
Net Profit Share Audit <b>BP</b> in the MPU	2011	<p><b>Issue:</b> BP NPSL development and operating costs and revenue at the Milne Point Unit 2006-2007.</p> <p><b>Status:</b> DNR issued and settled audit with DOL assistance.</p>	<p><b>DOL Expenditures as of 11/30:</b> in-house DOL staff only</p> <p><b>Anticipated Future Costs:</b></p>	\$7,450,000 million

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
CP North Slope Oil Royalty Audit	2008	<p><b>Issue:</b> 2004 – 2005 audit of CP new form leases on the North Slope, including CRU.</p> <p><b>Status:</b> Audit issued 7/28/11; ConocoPhillips filed an administrative appeal in January 2012.</p>	<p><b>DOL Expenditures as of 11/30:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$400,000</p>	\$0-7 million
Net Profit Share Audit CP in the Colville River Unit	Mid-2009	<p><b>Issue:</b> NPSL audit regarding development costs back to 1991.</p> <p><b>Status:</b> Audit in progress.</p>	<p><b>DOL Expenditures as of 11/30:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$50,000</p>	Not determined.
CP Royalty Audit Beluga River Unit	Late 2010	<p><b>Issue:</b> Cook Inlet audit BRU.</p> <p><b>Status:</b> Audit Issued June 2011 for years 2007 through 2009. Working on confidentiality agreement for information sharing and case preparation.</p>	<p><b>DOL Expenditures as of 11/30:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$100,000</p>	\$5 million
Northstar Production Allocation Dispute - BP	Late 2009	<p><b>Issue:</b> Dispute between the state and Murphy Exploration (Alaska) Inc. regarding allocation of production from the Northstar participating area between state and federal leases.</p> <p><b>Status:</b> A week-long evidentiary hearing was held before a DNR hearing officer March 12-16, 2012, followed by post-hearing briefing. The matter is currently pending before the Commissioner.</p>	<p><b>DOL Expenditure as of 11/30:</b> approximately \$1 million</p> <p><b>Anticipated additional expenditure:</b> \$200,000</p>	\$160 million plus

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Net Profit Share Audit BP in Endicott	2011	<p><b>Issue:</b> BP NPSL development and operating costs and revenue at the Endicott 2006-2007.</p> <p><b>Status:</b> DNR issued and settled audit with DOL assistance.</p>	<p><b>DOL Expenditures as of 01/24:</b> \$0</p> <p><b>Anticipated additional expenditure:</b> \$0</p>	\$2,650,000
Marathon Royalty Audit	2010 Appeal	<p><b>Issue:</b> Cook Inlet Production 2003 – 2006.</p> <p><b>Status:</b> Appeal in process.</p>	<p><b>DOL Expenditures as of 1/24:</b> \$0</p> <p><b>Anticipated additional expenditure:</b> \$100,000</p>	\$4.5 million
Gas Pipeline	January 1, 2007	<p><b>Issue:</b> DOL provides legal advice to DOR and DNR concerning Alaska gas pipeline projects, including the AGIA license and advancing the state's efforts to promote a large-scale gasline from the North Slope to markets.</p> <p><b>Status:</b> DOL continues to provide advice on gasline matters, including due diligence on AGIA license implementation – costs, license reimbursements, compliance, proposed commercial and financial arrangements, fiscal matters, and confidentiality issues. DOL also provides legal advice regarding TransCanada's and the North Slope gas producers' alignment to evaluate viability of a large-diameter liquefied natural gas (LNG) pipeline to tidewater in Alaska for in-state use and export. OGM Section attorneys manage specialized outside legal counsel to provide advice on federal jurisdictional, statutory, regulatory and other issues that affect the gasline projects.</p>	<p><b>DOL Expenditures as of 11/30:</b> \$2,576,566</p> <p>Approx. \$7.096 million Total to date</p> <p><b>Anticipated Future Costs:</b> \$2.0 million in FY 2014.</p>	

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
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02/05/2013

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
CINGSA Pore Space	2012	<p><b>Issue:</b> Ownership of subsurface for purposes of mineral storage.</p> <p><b>Status:</b> In discovery, depositions are being scheduled.</p>	<p><b>DOL Expenditures as of 11/30:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$0</p>	<p>\$0</p> <p>Effects statewide ownership of subsurface storage rights.</p>

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/06/2014

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
TAPS Interstate and Intrastate Tariffs Strategic Reconfiguration (SR)	December 2004	<p><b>Issue:</b> Were \$100's of millions spent on pipeline capital project prudent expenditures? Project is currently more than \$500 million over the budget at project approval. The remedy for imprudent expenditures is removal of the capital costs from rate base, so any reductions result in refunds and increased State royalty and production tax revenues for 2009 through 2014, and lower tariff rates going forward.</p> <p><b>Status:</b> The State, shippers, and TAPS carriers concluded two series of concurrent hearings at the RCA and the FERC in winter 2011-12 and fall 2012 and have filed over 1800 pages of legal briefs based on a record containing over 2000 exhibits (some of several volumes), and over 12,000 pages of hearing transcripts. The FERC Chief Judge has set a date for issuance of an Initial Decision (ID) by the Administrative Law Judge on February 28, 2014. We anticipate the RCA will also issue its separate decision in spring of 2014. The RCA decision will likely be appealed to the Alaska Superior Court resulting in additional briefing and oral argument in an on-the-record review that we anticipate will result in a decision in 2015. At the FERC, following issuance of the ALJ's recommended decision the parties will file additional briefs and the entire record will be transmitted to the full Commission for review. We anticipate that a final FERC decision and order will then be issued in early 2015.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$17,450,593</p> <p><b>Anticipated Future Costs:</b> \$1 to 1.5 million through Final Decision and Order by the FERC and appellate review of the RCA decision at the Alaska Superior Court.</p>	Approximately \$60 million in increased royalties and production taxes from tariff refunds for 2009 through 2014; \$100's of millions impact on future royalty and production tax

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/06/2014

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Tesoro Corporate Income Tax Case (1994-1998)	2004	<p><b>Issue:</b> Whether a company should have filed its tax returns on a unitary, combined basis and is subject to penalties.</p> <p><b>Status:</b> Superior court ruled in favor of the state. Tesoro appealed to the Alaska Supreme Court and oral argument was held September 12, 2012. DOR's assessment was upheld by the Alaska Supreme Court on October 25, 2013. The U.S. Supreme Court has granted Tesoro until February 24, 2014 to file its petition for certiorari.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$2,312,440</p> <p><b>Anticipated Future Costs:</b> \$0</p>	Approx. \$13 million.
Corporate Income Tax Case	Confidential	<p><b>Issue:</b> Whether DOR properly adjusted a taxpayer's Alaska apportionable income and sales factors.</p> <p><b>Status:</b> Confidential</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$0</p> <p><b>Anticipated Future Costs:</b> \$250,000</p>	Confidential
TAPS Property Tax Case	<p style="text-align: center;">June 2006</p> <p style="text-align: center;">June 2007</p> <p style="text-align: center;">June 2008</p> <p style="text-align: center;">June 2009</p> <p style="text-align: center;">June 2010</p> <p style="text-align: center;">June 2011</p>	<p><b>Issue:</b> Whether DOR properly assessed property tax value of TAPS in 2006, 2007, 2008, 2009, 2010 and 2011. 2007-2009 cases were consolidated for trial.</p> <p><b>Status:</b> Nine week trial ended in November 2011 on consolidated 2007-2009 assessments. Judge Gleason entered a decision on December 29, 2011. 2010 and 2011 appeals awaiting scheduling for trial.</p> <p>The 2006 TAPS valuation appealed to and argued before Alaska Supreme Court in December 2012. Decision anticipated sometime in 2014. Judge Gleason's 2007-2009 decision increased the assessed values for all three years, and is</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$2,625,093</p> <p><b>Anticipated Future Costs:</b> \$1.0 million through trial on the 2010-2013 assessments and Alaska Supreme Court appeals of the 2006-2009 superior court decisions.</p>	<p>State directly receives approximately 48% of TAPS property tax revenue with remainder apportioned among North Slope and Fairbanks Boroughs and City of Valdez. Superior court 2006 decision resulted in approx. \$112 million in additional property tax revenues.</p> <p>The superior court's 2007-2009 decision substantially increased the assessed value of TAPS, which will result in higher property taxes, but also higher</p>

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DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
	June 2012  June 2013	<p>consistent with her decision in the 2006 case. This decision also appealed to Alaska Supreme Court and briefing is complete. Awaiting decision from Alaska Supreme Court on 2006 appeals and scheduling order for oral argument on 2007-2009 appeals.</p> <p>SARB appeal of Department of Revenue's 2012 property tax valuation of \$8.25 billion stayed pending resolution of 2006 TAPS valuation appeal to Alaska Supreme Court.</p> <p>The 2013 SARB assessment of \$11.9 billion has been appealed to superior court.</p>		TAPS tariffs because property taxes are an allowable pipeline expense in ratemaking methodology. The higher property taxes will be shared by the municipalities and the state, and the state's share will be offset to some degree by the higher tariff's effect on production tax and royalty revenues.
ELF Aggregation	Jan. 2013	<p><b>Issue:</b> Whether OAH erred by determining that DOR Tax Division decision aggregating PAs constituted invalidly adopted regulation that violated the Alaska Administrative Procedure Act and both state and federal due process guarantees.</p> <p><b>Status:</b> The working interest owners of the various PAs filed their notice of appeal on Jan. 9, 2013. The case is assigned to Judge Sen Tan and briefing will be complete this spring.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$72</p> <p><b>Anticipated Future Costs:</b> \$0</p>	The value is several hundred million dollars of production tax revenue.
Point Thomson Unit	The DNR unit default decision in 2005. PTU settlement executed in March 2012.	<p><b>Issue:</b> Whether DNR's decision to terminate the Point Thomson Unit (PTU) due to the producers' refusal to commit to development of the unit should be upheld.</p> <p><b>Status:</b> The PTU litigation was settled in March 2012. Under the settlement the PTU lessees have agreed to develop the unit and build a common carrier pipeline and other infrastructure to produce gas liquids. The settlement agreement has been</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$20,837 (settlement case)</p> <p><b>Anticipated Future Costs:</b> \$50,000</p>	Hundreds of millions in additional tax and royalty dollars if the PTU is developed.

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/06/2014

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
		challenged. The superior court ruled in favor of the state on December 7, 2012, and the challenger has appealed to the Alaska Supreme Court. Oral argument is scheduled for March 11, 2014.		
CP Royalty Audit Beluga River Unit	Late 2010	<b>Issue:</b> Cook Inlet audit BRU.  <b>Status:</b> Audit Issued June 2011 for years 2007 through 2009. Lack of confidentiality agreement has precluded moving the case forward. DOL is working on alternative means for disclosing transactions DNR relied on.	<b>DOL Expenditures from start of case through 12/31/13:</b> in-house DOL staff only.  <b>Anticipated Future Costs:</b> \$100,000	\$5 million
CP Royalty Audit North Slope 2007	February 2013	<b>Issue:</b> North Slope production audit  <b>Status:</b> working on new form lease valuation and valuation of some DL-1 leases not subject to RSA	<b>DOL Expenditures:</b> \$0  <b>Anticipated Future Costs:</b> \$100,000	\$700,000
Unocal 2007 Gas Cook Inlet	February 2013	<b>Issue:</b> Cook Inlet Gas production audit  <b>Status:</b> Working on confidentiality agreements	<b>DOL Expenditures:</b> \$0  <b>Anticipated Future Costs:</b> 50,000	\$350,000
Northstar Production Allocation Dispute	Late 2009	<b>Issue:</b> Dispute between the state and Murphy Exploration (Alaska) Inc. regarding allocation of production from the Northstar participating area between state and federal leases.  <b>Status:</b> A week-long evidentiary hearing was held before a DNR hearing officer March 12-16, 2012, followed by post-hearing briefing. The Commissioner issued a decision on June 6, 2013, which Murphy appealed to superior court. Briefing and argument on Murphy's requested for trial de novo is complete.	<b>DOL Expenditures from start of case through 12/31/13:</b> \$28,757  <b>Anticipated additional expenditure:</b> \$200,000	\$160 million plus

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Marathon Royalty Audit	2010 Appeal	<p><b>Issue:</b> Cook Inlet Gas Production 2003 – 2006.</p> <p><b>Status:</b> On December 6, 2013, DNR Commissioner issued a final decision on this appeal upholding the audit with one adjustment.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> In-house DOL staff only</p> <p><b>Anticipated additional expenditure:</b> \$0</p>	\$4.5 million
Gas Pipeline	July 1, 2007	<p><b>Issue:</b> DOL provides legal advice to DOR and DNR concerning Alaska gas pipeline projects, including the AGIA license and advancing the state's efforts to promote a large-scale LNG project, including treatment, pipeline and liquefaction plant, from the North Slope to markets involving the North Slope Producers, TransCanada and a state subsidiary.</p> <p><b>Status:</b> Regarding the Governor's initiative to advance development of a large LNG project, DOL OGM Section attorneys manage specialized outside legal counsel to provide advice on federal jurisdictional, statutory, regulatory and other issues regarding TransCanada's and the North Slope gas producers' alignment to develop a large-diameter liquefied natural gas (LNG) pipeline to tidewater in Alaska for in-state use and export; provides legal assistance on complex matters concerning associated transactional developments, commercial and financial arrangements, federal tax issues, federal regulatory, proposed fiscal matters, confidentiality issues and gas pipeline best practices; also due diligence on AGIA license implementation – costs, license reimbursements, compliance and statutory requirements.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> \$10,135,596</p> <p><b>Anticipated Future Costs:</b> \$2.0 million in FY 2014.</p>	Major tax and royalty revenues

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
CINGSA Pore Space	2012	<p><b>Issue:</b> Ownership of subsurface for purposes of mineral storage.</p> <p><b>Status:</b> All parties have filed summary judgment motions. Oral argument has not been scheduled.</p>	<p><b>DOL Expenditures from start of case through 12/31/13:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$0</p>	<p>\$0</p> <p>Effects statewide ownership of subsurface storage rights.</p>

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

DEPARTMENT OF LAW OIL, GAS AND MINING SECTION  
MAJOR LITIGATION

02/13/2015

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
TAPS Interstate and Intrastate Tariffs Strategic Reconfiguration (SR)	December 2004	<p><b>Issue:</b> Were \$100's of millions spent on pipeline capital project prudent expenditures? Project is currently more than \$500 million over the budget at project approval. The remedy for imprudent expenditures is removal of the capital costs from rate base, so any reductions result in refunds and increased State royalty and production tax revenues for 2009 through 2014, and lower tariff rates going forward.</p> <p><b>Status:</b> The State, shippers, and TAPS carriers concluded two series of concurrent hearings at the RCA and the FERC in winter 2011-12 and fall 2012 and filed over 1800 pages of legal briefs based on a record containing over 2000 exhibits and over 12,000 pages of hearing transcripts. An Initial Decision (ID) was issued by the FERC ALJ on February 27, 2014 which held that approximately \$480 million of the capital expenditures made for the SR Project were imprudently incurred and thus not subject to any recovery from ratepayers, and that the additional \$225 million expended could be recovered by amortization over the remaining life of the pipeline but without any return on that investment. All parties filed briefs taking exception with certain portions of the ID. Those two rounds of briefing were completed in July 2014 and a Final Decision and Order from the FERC is anticipated to be issued in the first half of 2015. The TAPS Carriers expressly chose to not challenge the determination of imprudence of \$153.8 million dollars of their SR capital expenditures and have thereby waived any recovery of that amount. Due to the substantial amounts in controversy we expect that the Final</p>	<p><b>DOL Expenditures from start of case through 12/31/14:</b> \$18,876,745</p> <p><b>Anticipated Future Costs:</b> \$500,000 to 600,000 for outside counsel assistance through appeal of the FERC Final Decision at the US Court of Appeals and initial work in response to an RCA decision.</p>	Approximately \$130 million in increased state royalties and production taxes from tariff refunds for 2009 through 2014; \$100's of millions impact on future royalty and production tax based on lower tariffs over the operating life of the pipeline.

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
		Decision will likely be appealed to the US Court of Appeals at the DC Circuit. We also anticipate the RCA will issue its separate decision sometime in 2015 and that the RCA decision will likely be appealed to the Alaska Superior Court and Alaska Supreme Court resulting in additional briefing and oral argument.		
Corporate Income Tax Case	Confidential	<b>Issue:</b> Whether DOR properly adjusted a taxpayer's Alaska apportionable income and sales factor.  <b>Status:</b> Confidential	<b>DOL Expenditures from start of case through 12/31/14:</b> \$0  <b>Anticipated Future Costs:</b> \$250,000	Confidential
TAPS Property Tax Case	June 2006 June 2007 June 2008 June 2009 June 2010 June 2011	<b>Issue:</b> Whether DOR properly assessed property tax value of TAPS in 2006, 2007, 2008, 2009, 2010, 2011, 2013 and 2014. 2007-2009 cases were consolidated for trial.  <b>Status:</b> Nine week trial ended in November 2011 on consolidated 2007-2009 assessments. Judge Gleason entered a decision on December 29, 2011. 2010-2011 and 2013-2014 appeals awaiting scheduling for trial.  The 2006 TAPS valuation appealed to and argued before Alaska Supreme Court in December 2012. Decision issued on February 19, 2014. Judge Gleason's 2007-2009 decision increased the assessed values for all three years, and is consistent with her decision in the 2006 case. This decision also appealed to Alaska Supreme Court and briefing is complete. Oral argument was held on December 16, 2014.	<b>DOL Expenditures from start of case through 12/31/14:</b> \$2,737,491  <b>Anticipated Future Costs:</b> \$1.0 million through trial on the 2010-2014 assessments.	State directly receives approximately 48% of TAPS property tax revenue with remainder apportioned among North Slope and Fairbanks Boroughs and City of Valdez. Superior court 2006 decision resulted in approx. \$112 million in additional property tax revenues.  The superior court's 2007-2009 decision substantially increased the assessed value of TAPS, which will result in higher property taxes, but also higher TAPS tariffs because property taxes are an allowable pipeline expense in ratemaking methodology. The higher

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
	June 2013  June 2014	The 2013 and 2014 SARB assessments of \$11.9 \$10.2 billion, respectively, have been appealed to superior court.		property taxes will be shared by the municipalities and the state, and the state's share will be offset to some degree by the higher tariff's effect on production tax and royalty revenues.
ELF Aggregation	January 2013	<p><b>Issue:</b> Whether OAH erred by determining that DOR Tax Division decision aggregating PAs constituted invalidly adopted regulation that violated the Alaska Administrative Procedure Act and both state and federal due process guarantees.</p> <p><b>Status:</b> The working interest owners of the various PAs filed their notice of appeal on Jan. 9, 2013. The case is assigned to Judge Michael Corey. Briefing is complete but oral argument has not yet been scheduled.</p>	<p><b>DOL Expenditures from start of case through 12/31/14:</b> \$72</p> <p><b>Anticipated Future Costs:</b> \$0</p>	The value is several hundred million dollars of production tax revenue.
CP Royalty Audit Beluga River Unit	Late 2012	<p><b>Issue:</b> Cook Inlet audit BRU.</p> <p><b>Status:</b> Audit Issued June 2011 for years 2007 through 2009. DOL is working on alternative means for disclosing transactions. DNR relied on a valuation that avoids the confidentiality issues that have held this audit appeal up.</p>	<p><b>DOL Expenditures from start of case through 12/31/14:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$100,000</p>	\$5.25 million
CP Royalty Audit North Slope 2007	February 2013	<p><b>Issue:</b> North Slope production audit.</p> <p><b>Status:</b> Working on new form lease valuation and valuation of some DL-1 leases not subject to RSA.</p>	<p><b>DOL Expenditures:</b> \$0</p> <p><b>Anticipated Future Costs:</b> \$100,000</p>	\$700,000

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.



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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
Unocal 2007 Gas Cook Inlet	February 2013	<p><b>Issue:</b> Cook Inlet Gas production audit.</p> <p><b>Status:</b> Working on confidentiality agreements.</p>	<p><b>DOL Expenditures:</b> \$0</p> <p><b>Anticipated Future Costs:</b> 50,000</p>	\$350,000
Gas Pipeline	July 1, 2007	<p><b>Issue:</b> DOL provides legal advice to DOR and DNR concerning Alaska gas pipeline projects, including the AKLNG project to advance the state's efforts to promote a large-scale LNG project, including treatment, pipeline and a liquefaction plant, from the North Slope to in-state markets and for export. The AKLNG project involves the three major North Slope Producers, TransCanada, the Alaska Gasline Development Corporation and the state.</p> <p><b>Status:</b> Under SB 138, DOL OGM Section attorneys manage specialized outside legal counsel to provide advice on federal jurisdictional, statutory, regulatory and other issues regarding the development of a large-diameter liquefied natural gas (LNG) pipeline to tidewater in Alaska for in-state use and export; provides legal assistance on complex matters concerning associated transactional developments, commercial and financial arrangements, federal tax issues, federal regulatory, proposed fiscal matters, and confidentiality issues.</p>	<p><b>DOL Expenditures from start of case through 12/31/14:</b> \$12,700,484</p> <p><b>Anticipated Future Costs:</b> \$5.0 million in FY 2016.</p>	Major tax and royalty revenues

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Costs *</u>	<u>Value</u>
CINGSA Pore Space	2012	<p><b>Issue:</b> Ownership of subsurface for purposes of mineral storage.</p> <p><b>Status:</b> The superior court granted summary judgment to the State on June 3, 2014. The City of Kenai has appealed that decision to the Alaska Supreme Court where the issue is currently being briefed.</p>	<p><b>DOL Expenditures from start of case through 12/31/14:</b> in-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$0</p>	Effects statewide ownership of subsurface storage rights.

\* Costs are from inception of case. Anticipated Future Costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

DEPARTMENT OF LAW, NATURAL RESOURCES SECTION  
MAJOR OIL & GAS LITIGATION

2/10/2016

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Outside Counsel/Expert Costs *</u>	<u>Value</u>
TransAlaska Pipeline System (TAPS) Interstate and Intrastate Tariffs Strategic Reconfiguration (SR)	December 2004	<p><b>Issue:</b> Were \$100s of millions spent on pipeline capital project prudent expenditures? A project ran more than \$500 million over budget. The remedy for imprudent expenditures is to remove capital costs from the calculation of tariff rates. Removal results in refunds and increases State royalty and production tax revenues for all impacted years.</p> <p><b>Status:</b> The State, shippers, and TAPS carriers concluded concurrent hearings at the Regulatory Commission of Alaska (RCA) and the Federal Energy Regulatory Commission (FERC) in 2011-12. In November 2015, the FERC found approximately \$480 million of expenditures to be imprudent. All the carriers appealed the decision to the D.C. Circuit. The RCA has not yet issued its decision.</p> <p>The FERC required the carriers to file new tariffs for 2009 and 2010 that remove the imprudent expenditures. These filings will be reviewed for compliance with FERC's order. The parties are working with the Administrative Law Judge on a process to address the 2011 – 2016 tariffs and future years which will be impacted by Order 544.</p>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> Approximately \$19,000,000</p> <p><b>Anticipated Future Costs:</b> \$200,000 to \$300,000 for outside counsel and expert assistance through appeal to the D.C. Circuit, and initial work relating to the 2009 and 2010 tariff filings.</p> <p style="text-align: center;">----</p> <p>The cost to address the 2011-2016 and future tariff filings not yet determined. The Department of Law (DOL) will use in-house counsel as much as practicable to avoid cost of outside counsel, but still will need to retain counsel with FERC expertise to assist in some capacity. DOL estimates needing about \$300,000 a year for outside counsel, and \$300,000 a year for expert consultants.</p>	Approximately \$234 million in increased state royalties and production taxes from tariff refunds for 2009 and 2010. \$100s of millions impact on future royalty and production tax based on lower tariffs over the operating life of the pipeline.

\* Costs are from inception of case and represent only outside counsel and expert witnesses. The identified costs do not include costs for department staff incurred in litigating these cases. Anticipated future costs will change as a result of scheduling and substantive decisions from the tribunal, decisions by client agencies, and positions taken by opposing parties. Some of the cases, such as tariff disputes, property tax litigation, and royalty reopeners recur every year and the new cases may be consolidated with existing cases. These estimates do not reflect costs for the new cases.

DEPARTMENT OF LAW, NATURAL RESOURCES SECTION  
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2/10/2016

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Outside Counsel/Expert Costs *</u>	<u>Value</u>
TAPS Property Tax Case	June 2007 June 2008 June 2009 June 2010 June 2011 June 2013 June 2014 June 2015	<p><b>Issue:</b> Whether DOR properly assessed the property tax value of TAPS in 2007, 2008, 2009, 2010, 2011, 2013, 2014 and 2015. Tax years 2010-2015 cases are consolidated for trial.</p> <ul style="list-style-type: none"> <li>○ <b>Status:</b> In August 2015, the Alaska Supreme Court upheld TAPS property tax value decisions by the superior court for 2007 (\$8.94B), 2008 (\$9.64B), and 2009 (\$9.25B).</li> <li>○ The SARB TAPS property tax decisions for 2010 (\$9.6B), 2011 (\$8.6B), 2013 (\$11.9B), 2014(\$10.2B) and 2015 (\$9.6B) are on appeal to the superior court for de novo review. An eleven week trial is scheduled in 2017. The TAPS property tax appeal for 2012 settled with an assessment of \$8.25B.</li> </ul>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> \$2,737,491</p> <p><b>Anticipated Future Costs:</b> \$1.0 million through trial on the 2010-2015 assessments.</p>	<p>State directly receives approximately 48% of TAPS property tax revenue with the remainder apportioned among North Slope and Fairbanks Boroughs and the City of Valdez. The 2006 decision resulted in approx. \$112 million in additional property tax revenues.</p> <p>The superior court's 2007-2009 decision substantially increased the assessed value of TAPS, which will result in higher property taxes, but also higher TAPS tariffs because property taxes are an allowable tariff deduction. The higher property taxes will be shared by the municipalities and the state, and the state's share will be offset to some degree by the higher tariff's effect on production tax and royalty revenues.</p>

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<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Outside Counsel/Expert Costs *</u>	<u>Value</u>
Economic Limit Factors (ELF) Aggregation	November 2008	<p><b>Issue:</b> Whether the Office of Administrative Hearings (OAH) erred when it determined that a Department of Revenue (DOR), Tax Division decision aggregating participating areas of the Prudhoe Bay Unit was valid and permissible under existing law. Taxpayers claim the aggregation was invalid without DOR first adopting a regulation defining a statutory term and that by proceeding as it did, DOR violated the Alaska Administrative Procedure Act and both state and federal due process guarantees.</p> <p><b>Status:</b> The superior court ruled in favor of DOR's Tax Division. The owners of the participating areas appealed to the Alaska Supreme Court, which will hear oral argument on February 17, 2016.</p>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> \$49,761</p> <p><b>Anticipated Future Costs:</b> \$0</p>	The value is several hundred million dollars of production tax revenue.
Gas Pipeline	July 2007	<p><b>Issue:</b> DOL provides legal advice to DOR, Department of Natural Resources (DNR) and the Alaska Gasline Development Corporation (AGDC) concerning the Alaska Liquefied Natural Gas (AKLNG) project to commercialize North Slope gas, including a gas treatment plant, pipeline and liquefaction plant.</p> <p><b>Status:</b> Under SB 138, DOL in-house attorneys work with specialized outside legal counsel to provide legal assistance on commercial and regulatory matters concerning gas supply and balancing, governance, fiscal issues, financing, tax issues, confidentiality and other issues.</p>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> \$19,724,099</p> <p><b>Anticipated Future Costs:</b> \$15.5 million in FY2017.</p>	Major tax and royalty revenues.

DEPARTMENT OF LAW, NATURAL RESOURCES SECTION  
 MAJOR OIL & GAS LITIGATION

2/10/2016

<u>Case</u>	<u>Approx. Start Date</u>	<u>Issue(s) and Status</u>	<u>Outside Counsel/Expert Costs *</u>	<u>Value</u>
CINGSA Pore Space	2012	<p><b>Issue:</b> Ownership of subsurface for purposes of mineral storage.</p> <p><b>Status:</b> The superior court granted summary judgment to the State on June 3, 2014. The City of Kenai has appealed that decision to the Alaska Supreme Court where the issue is awaiting decision.</p>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> In-house DOL staff only.</p> <p><b>Anticipated Future Costs:</b> \$0</p>	Affects statewide ownership of subsurface storage rights.
Corporate Income Tax Case	Confidential	<p><b>Issue:</b> Whether DOR properly adjusted a taxpayer's foreign income taxes.</p> <p><b>Status:</b> Confidential</p>	<p><b>DOL Expenditures from start of case through 12/31/15:</b> \$4,400</p> <p><b>Anticipated Future Costs:</b> \$250,000</p>	Confidential.