Alaska Department of Law

List of Federal Issues and Conflicts

January 21, 2019

NAVIGABLE WATERWAYS

Case or Matter	Alignment with Feds	Brief Description	Status
Navigable Waterways - *Sturgeon v. Frost* (in official capacity at Dept. of Interior) (Alaska intervened in support of plaintiff; after State's case dismissed, filed amicus) (Sup. Ct., 17-949) AAG K. Vogel	Not aligned.	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. On remand the Ninth Circuit again found for the DOI.	The State is not a party to the case but continues to participate as an amicus, including supporting Mr. Sturgeon's second cert. petition to the U.S. Supreme Court. The U.S. Supreme Court granted the cert. petition, and the State submitted an amicus brief on the merits on August 14, 2018. Oral argument was held on November 5. We are awaiting a decision.
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 - *State v. U.S.* (3:17-cv-00090) 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 settled the easement issue to preserve public access. The State filed a lawsuit challenging the navigability finding. BLM reversed its previous navigability determination and filed a formal disclaimer of interest. The State was awarded $400 in costs, and BLM appealed the cost decision to the Ninth Circuit. To avoid the appeal over costs, the parties are considering ways for BLM to improve its RDI process. The briefing schedule has been vacated pending those discussions.

Middle Fork, North Fork, and Dennison Fork of the Fortymile River - navigability AAGs J. Alloway, A. Brown	Not aligned.	BLM previously found portions of the Middle Fork of the Fortymile, North Fork of the Fortymile, Dennison Fork, and West Fork of the Dennison Fork non-navigable. In response to the State's notice of intent to sue, BLM reversed its position on the Dennison Fork and the West Fork of the Dennison Fork, but not the other two rivers. The State filed a quiet title action on those rivers in October 2018.	BLM has yet to file a response. It's response will be due 30 days after the end of the federal government's partial shutdown.
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.

ACCESS AND LAND

Case or Matter	Alignment with Feds	Brief Description	Status
Roadless Rule - *State of Alaska v. U.S. Dept. of Agriculture* (D.C. Cir., 17-5260) AAGs T. Lenhart, S. Lynch	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. On a parallel track, the State is pursuing a regulatory fix for Alaska.	On the regulatory fix, the State recently entered into an MOU for cooperating agency status with the U.S. Department of Agriculture to work on a Tongass state specific rule to replace the roadless rule. The rulemaking process is anticipated to take 18 months. In the litigation, the district court upheld the roadless rule, and the State appealed. Briefing has been completed, but the appellate court granted intervenor's request to put the case on hold until the rulemaking is done.
Shelter Cove Road - *State v. U.S. Forest Service* (1:16-cv-00018); *Greater Southeast Alaska Conservation Community v. Stewart* (State intervened in support of defendant) (1:16-cv-0009) 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 asserted that it has a Section 4407 easement for the road. This would mean no environmental review is needed. To ensure the 4407 issue is addressed, State brought a separate lawsuit on that issue. The lawsuits have been consolidated and, in an effort to end both cases, the USFS issued the 4407 easement just prior to the State's motion for summary judgment on all remaining issues.	In the environmental group's challenge to the State's road project, the court issued partial summary judgment in the State's favor on all environmental permitting issues, and dismissed all 4407 issues with prejudice on a finding of no NEPA of NFMA requirements for these easements. In the State's companion suit against the USFS, on November 9, 2018 the State filed a motion for summary judgment seeking declaratory judgment on the scope and requirements for the 4407 easements. The USFS response is due after the federal government shutdown. Construction on the road continues while the case proceeds.

R.S. 2477 Rights of Way - *State of Alaska v. U.S.* (4:13-cv-00008) AAGs J. Alloway, M. Schechter	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 level. The State successfully condemned the rights-of-way across Native allotment lands, which was necessary before the case proceeded on the main issues relating to land owned by the federal government. The Native allotment owners appealed that decision to the Ninth Circuit, but the remainder of the case is proceeding. The case is currently in the discovery phase and there will likely be some fieldwork next summer to gather evidence for trial.
King Cove Road AAG T. Lenhart	Not aligned.	After attempts under the previous federal administration to complete a land exchange, King Cove and the U.S. Dept. of Interior entered into a 2017 land exchange which has been challenged by environmental groups. The purpose of the land exchange is to build a road between the community of King Cove and Cold Bay Airport, specifically for emergency purposes. The State is not a party to the litigation but will monitor the case closely.	On August 24, 2018, the State filed an amicus brief in support of the briefs filed by the U.S. Dept. of Interior and the King Cove Group, seeking to uphold the land exchange. The case has been fully briefed, and the parties are awaiting a decision from the court.
2016 Amendment to the Tongass Land Resources Management Plan (TLMP) AAGs T. Lenhart, S. Lynch	Uncertain.	The 2016 TLMP amendment fully incorporated both the Roadless Rule and the Secretary of Agriculture's directive to rapidly transition timber harvest from old growth to young growth. The result would effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry would likely be forced out of business while utilities, mining and other industries would be substantially harmed.	The Secretary of Agriculture granted the State's petition for a rulemaking to amend the TLMP, along with the State's petition for a rulemaking on the Roadless Rule. USDA published a Notice of Intent to commence the rulemaking on August 30, 2018. A final rule is expected by summer of 2020.
Eastern Interior Resource Management Plan (BLM) AAG A. Nelson	Not aligned.	The EIRMP, adopted January 6, 2017, recommends unjustified mineral closures and conservation designations that are inconsistent with Alaska National Interest Lands Conservation Act (ANILCA) and Federal Land Policy Management Act's multiple use mandate. The EIRMP also fails to provide for lifting outdated ANCSA d-1 withdrawals unless new conservation withdrawals are implemented.	The Government Accountability Office determined in November 2017 that the EIRMP is a rule under the Congressional Review Act (CRA), which means Congress has 60 session days to repeal it. However, BLM has not submitted the Plan to Congress as required by the Act and it's unclear whether the 60-day period has already run or has yet to begin. We continue to monitor congressional and agency action on the issue and evaluate our options, including administrative action, litigation, or working with Congress to repeal it.

Lands into Trust AAG A. Nelson	Uncertain	After the district court in *Akiachak v. Dept. of Interior* found in favor of plaintiffs, DOI changed its regulations to permit lands in Alaska to be taken into trust. This summer, the Department of Justice rescinded the Solicitor's Opinion on which the DOI relied to change its regulations. DOI has stated it will not process any new applications, but federal representatives have stated that pending applications would continue to be processed.	The State commented on six applications before the DOI embarked on the new rulemaking process--one from the Craig Tribal Association, three from the Central Council Tlingit and Haida Indian Tribes of Alaska, one from the Ninilchik Traditional Council, and one from the Native Village of Fort Yukon. BIA has granted the Craig application, but has not acted on the other applications. The BIA held public meetings and consultations with tribes throughout the State. Written comments are due by January 25, 2019.
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 Arctic National Wildlife Refuge (ANWR). The State also objected to a survey plat of the area directly south of the area requested for conveyance.	IBLA denied BLM's motion to dismiss and has consolidated the State's two appeals. Briefing has been completed and the case is now pending with the IBLA, which has a significant case backlog and is unlikely to issue a decision before late 2019 at the earliest.
ANWR Section 1002 AAG M. Schechter	Aligned	The Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, opened the ANWR 1002 area to oil and gas exploration and leasing.	The Draft EIS is out for public comment. State agencies are to submit comments on the Draft EIS to the state Office of Project Management and Permitting (OPMP) by January 24. OPMP will submit the State's comment letter to BLM by Monday, Feb. 11 on behalf of the State.

CLEAN AIR ACT

Case or Matter	Alignment with Feds	Brief Description	Status
2017 Regional Haze State Implementation Plan Rule - *State v. EPA; Texas v. EPA* (D.C. Cir., 17-1074) AAG S. Mulder	Uncertain.	The State, along with North Dakota, Texas, and Arkansas, challenged the 2017 Regional Haze State Implementation Plan Rule, which imposed quantification requirements on international air emission contributions to regional haze affecting national parks and wilderness areas. The State is concerned about having international contributions to haze, that are beyond the State's control, count against Alaska and other states. The State also objects to the Environmental Protection Agency (EPA) shifting its modeling responsibilities and modeling costs to Alaska.	At the appellate court level. Briefing is currently on hold, while EPA revisits aspects of the rule and engages in a new rulemaking process.

Clean Power Plan (40 C.F.R. 60.5700-.5820) AAG S. Mulder	Uncertain.	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. President Trump signed an executive order calling on the EPA to review the Clean Power Plan and end the moratorium on coal mining on federal lands. The EPA proposed to repeal the Clean Power Plan in October 2017 and the EPA has not made a final decision. On August 21, 2018, EPA announced it is proposing a new rule, the Affordable Clean Energy rule ("ACE"), to replace the Clean Power Plan. The comment period closed on October 30, 2018. We are now awaiting EPA's decision on the rulemaking.

WATER

Case or Matter	Alignment with Feds	Brief Description	Status
"Waters of the U.S." Rule - *North Dakota v. EPA* (ND Dist. Ct. 3:15-cv-00059) AAG E. Pokon	Uncertain.	State joined a coalition of 12 states challenging the 2015 "waters of the U.S." rule. Among other things, the 2015 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 proceeding in North Dakota Federal District Court. The WOTUS rule has been stayed by the court as to the states that are a party to this case, including Alaska. Summary judgment briefing is complete. The federal government is no longer defending the merits of the 2015 rule, though intervening environmental groups are. Oral argument has not been scheduled. On August 16, 2018, a federal judge in South Carolina enjoined the Trump administration's order suspending the rule; that court decision resulted in the WOTUS rule going into effect for 26 states but does not affect the North Dakota court's stay. Meanwhile the federal rulemaking process proceeds to withdraw or replace the rule. EPA and the Army Corps of Engineers released a pre-publication version of a revised rule in December 2018. A 60-day public comment period will run from the date the formal notice is published in the federal register.

FISH AND GAME

Case or Matter	Alignment with Feds	Brief Description	Status
NPS and USFWS Rules on Management of Fish and Game - *State v. Zinke* (3:17-cv-00013) AAGs C. Brooking, J. Alloway	Not aligned.	The State is challenging regulations adopted by the National Park Service affecting hunting on preserve lands throughout Alaska and regulations adopted by the U.S. Fish and Wildlife Service restricting hunting on the Kenai National Wildlife Refuge (NWR). Three cases were filed and consolidated. The NPS regulations preempted state management of wildlife, prohibited several means of take for predators, and changed public participation procedures for hunting and fishing closures. The USFWS regulations prohibit certain activities within the Kenai NWR and the State is objecting to the prohibition on taking brown bears at black bear baiting stations, a practice that is allowed under state regulations.	In July 2017, NPS and USFWS were directed by the Acting Assistant Secretary for Fish and Wildlife and Parks to initiate rulemaking procedures to reconsider their rules. In June 2018, NPS published a proposed rule that would reverse much of the 2015 rule challenged in the litigation, and the comment period closed October 5, 2018. USFWS has not published a proposed new rule. The litigation has been stayed for several months pending possible rulemaking that might moot portions of the lawsuit. The case is stayed for 30 days as a result of the federal government shutdown. A status report is to be filed February 6, 2019.
Congressional Review Act Resolution on USFWS Rules - *Center for Biological Diversity v. Zinke* (3:17-cv-00091) AAGs C. Brooking, J. Alloway	Generally aligned.	The Center for Biological Diversity filed a lawsuit to challenge Pub. L. 115-20 which was adopted under the rules established in the Congressional Review Act. Pub. L. 115-20 revoked a rule adopted by the USFWS that would have restricted hunting and affected refuge closure procedures on all refuges throughout Alaska. The State and other groups intervened on behalf of the federal defendants. Because the plaintiffs are challenging the constitutionality of the Congressional Review Act, this case could impact prior actions taken by Congress and the President under the CRA.	The district court dismissed the litigation in June 2018. In August 2018, plaintiff appealed to the Ninth Circuit. Appellant's opening brief was filed. Briefing by federal defendants and intervenors has been extended as a result of the federal government shutdown. Oral argument has not yet been scheduled.
Salmon Fishery Management Plan - *United Cook Inlet Drift Association v. National Marine Fisheries Service* (Alaska intervened in support of defendants) (3:13-cv-0104) AAG B. Meyen	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. The U.S. Supreme Court denied the State's request for review of the Ninth Circuit's decision. The district court has retained jurisdiction to oversee adoption of a new plan, and there continues to be litigation over attorneys' fees. The North Pacific Fishery Management Council continues to work through the issues. It will likely take awhile for any final management measures to be adopted.

Critical Habitat - *Alabama v. NMFS* (AL Dist. Ct. 1:16-CV-00593) AAG B. Meyen	Uncertain.	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.	On March 14, 2018, settlement was reached whereby plaintiff states dismissed the case without prejudice and the federal government agreed to submit revised rules. Revised rules have now been proposed, and the comment period closed in December. We are now awaiting a decision on the proposed rule.

MINING

Case or Matter	Alignment with Feds	Brief Description	Status
2008 Mining Claim Rule - *Earthworks v. U.S. Dept. of Interior* (Alaska intervened in support of defendant) (D.C. Dist. Ct. 1:09-cv-01972) AAG 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 has been completed and oral argument was held on October 27, 2017. We are awaiting the court's decision.
CERCLA Hard Rock Mining - *Idaho Conservation League v. Pruitt* (D.C. Cir., 18-1141) AAG A. Brown	Aligned.	The State intervened with 13 other states in a lawsuit concerning the Environmental Protection Agency's (EPA) decision not to impose a federal requirement for financial assurances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) on hard rock mines. The EPA recognized that states, such as Alaska, have robust financial bonding and regulatory requirements in place to protect the environment, making a federal requirement unnecessary. Environmental groups sued the EPA, asserting that it must adopt regulations imposing financial assurances on hard rock mines.	At the appellate court level. The State's intervention was accepted. Briefing was completed in December 2018. Oral argument has not yet been scheduled.
Wishbone Hill Mine - *Castle Mountain Coalition v. OSMRE* (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. On remand, the federal agency ultimately found that the State had "good cause" to not take action because it needed additional time to come to a decision. The State issued a decision at the end of November. Currently, there are no pending court cases or administrative proceedings.

OIL AND GAS

Case or Matter	Alignment with Feds	Brief Description	Status
Reversal of Ban on Offshore Development - *League of Conservation Voters v. Trump* (3:17-cv-00101) AAG J. Douglas	Aligned.	Before leaving office, former President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all leases in certain off-shore areas, including large portions of the Chukchi and Beaufort Seas. President Trump issued an executive order rescinding the ban, and environmental groups have challenged the plan. BOEM is gathering comments on a new proposed five-year National Offshore Oil and Gas Leasing Program, for years 2019-2024. The State intervened in a lawsuit to support and defend the President's executive order.	At the district court level. The plaintiffs filed a motion for summary judgment on June 8, 2018, and the State filed its own motion for summary judgment and an opposition to plaintiff's motion. Briefing was completed, and oral argument was held on November 9, 2018. We are awaiting the court's decision.