Alaska Department of Law

Federal Laws and Litigation Report

In compliance with AS 44.23.020(h)

Dated: January15, 2020

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 Assistant Attorney General Allison Radford, at (907) 465-1042 or allison.radford@alaska.gov.

TABLE OF CONTENTS

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 argued that 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 initially involved in two separate cases relating to this regulation. The only case that remained in 2019 was *Sturgeon v. Frost, discussed below.*

Litigation – *Sturgeon v. Frost, et al.* (Sup. Ct., 17-949)

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. Since the Ninth Circuit's dismissal of the State's case, the State has participated as an amicus to support Mr. Sturgeon in his case. 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 went back before the Ninth Circuit where the court again upheld the NPS regulations. Mr. Sturgeon then filed a petition for writ of certiorari with the U.S. Supreme Court. The U.S. Supreme Court accepted the petition and heard oral argument on November 5, 2018. In March 2019, the Court ruled 9-0 in Mr. Sturgeon's (and the State's) favor and held that the State's navigable waters are not

transformed into federal lands by virtue of falling within conservation system units created by the ANILCA. The case was remanded to the lower courts for ministerial follow-up.

2. Bureau of Land Management (BLM) refusal to recognize State's ownership in the submerged lands underlying certain rivers.

Description of the Issues Identified – Under the equal footing doctrine 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 or lawfully conveyed by the federal government prior to statehood or waters determined to be "non-navigable." There are a number of ongoing disputes with BLM where the agency has refused to recognize the State's interest in the land underlying rivers that the State believes are navigable. The State has had recent success in lawsuits where BLM filed a disclaimer of interest rather than defending against the State's claim of ownership. The following cases are still pending or were recently resolved.

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

b. 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 asserted is a state navigable waterway. The State appealed the approval of the land selection to IBLA**,** and before the IBLA matter concluded, the parties settled the easement issue to preserve public access. On the issue of navigability, the State brought a lawsuit in April 2017 to challenge the BLM determination that the river was not navigable. BLM responded by reversing its previous determination and filing a formal disclaimer of interest. The State was awarded costs, but BLM appealed the cost decision. BLM voluntarily dismissed its appeal in November 2019.

c. Middle Fork, North Fork, and Dennison Fork of the Fortymile River

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 filed an answer denying the navigability of the disputed portions of the Middle Fork and North Fork of the Fortymile. The parties are engaged in discovery; trial is anticipated in the fall of 2020.

3. Application of 2001 Roadless Rule in areas including 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 Alaska District 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.

The State has pursued litigation to either invalidate the roadless rule or re-instate an exemption for Alaska, and, more recently, the State has pursued a regulatory fix. The State entered into a memorandum of understanding for cooperating agency status with the U.S. Department of Agriculture (USDA) to work on a Tongass specific rule to replace the roadless rule. The rulemaking process resulted in the USDA proposing an exemption for the Tongass to the roadless rule. The public comment period for the proposed rule ended in December 2019.

Litigation – *State of Alaska v. U.S. Dept. of Agriculture* (D.C. Cir., 17-5260)

Status of Litigation – After the Alaska District Court struck down the exemption, the State filed a separate lawsuit in the D.C. District Court challenging the Roadless Rule and its application to Alaska. The district court upheld the Roadless Rule and dismissed the State's case. The State appealed to the D.C. Circuit Court of Appeals. Briefing has been completed, but the appellate court granted an intervenor's request to put the case on hold until the rulemaking is done. The state continues to object to the abeyance.

4. 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 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 in the area surrounding Chicken, Alaska owned by the U.S. and others, including Native allotment owners. The Ninth Circuit Court of Appeals held that the State needed to condemn the rights-of-way across any Native allotments. 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; trial is anticipated in the fall of 2020.

5. U.S. Forest Service failure to recognize 4407 easement for Shelter Cove road in Ketchikan

Description of the Issues Identified – Environmental groups challenged USFS' environmental review and permit for building of Shelter Cove Road, and the State intervened to defend the project. However, the environmental groups' litigation did not directly address the scope or validity of the 4407 easement. To ensure the issues were addressed, the State filed its own action in district court seeking to compel USFS 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 lawsuits were consolidated and the court heard motions for summary judgment on all issues.

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 –In the environmental groups' 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 based on a finding that there are no National Environmental Policy Act (NEPA) or National Forest Management Act (NFMA) requirements for these easements. In the State's companion suit against the USFS, the court issued a summary judgment order providing clear and particular declarations on the scope and requirements for the 4407 easements. With a favorable decision on all causes of action, the Department of Transportation and Public Facilities anticipates the acceleration of certain project timelines in Southeast Alaska.

6. 2016 Amendment to the Tongass Land Resources Management Plan (TLMP)

Description of the Issues Identified – 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 will effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry is likely to be forced out of business while utilities, mining, and other industries will be substantially harmed. The Secretary of Agriculture granted the State's petition for a rulemaking to amend the 2016TLMP, 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 However, the USDA declined the State's request to simultaneously amend the 2016 TLMP concluding that any amendment to the TLMP must be a second process after the regulation has been changed. There is no specific plan or time table to amend the TLMP.

7. Bureau of Land Management's Eastern Interior Resource Management Plan

Description of the Issues Identified – The Eastern Interior Resource Management Plan (EIRMP), adopted January 6, 2017, covers approximately 6.5 million acres of public land, including White Mountains National Recreation Area, the Steese National Conservation Area, and the Fortymile area. The State believes the EIRMP recommends unjustified mineral closures

and conservation designations that are inconsistent with the Alaska National Interest Lands Conservation Act 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, although BLM has lifted the withdrawals in some of the less controversial areas, facilitating conveyance of certain statehood selections. We continue to monitor agency action on the issue and evaluate our options, including administrative action, and litigation. We also continue to monitor implementation decisions made under EIRMP.

8. Dispute over Arctic National Wildlife Refuge boundary with the Bureau of Land Management

Description of the Issues Identified – It has long been the State's position that the western boundary of Arctic National Wildlife Refuge (ANWR) 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 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 (IBLA) 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. The IBLA denied BLM's motion to dismiss and has consolidated the two appeals. Briefing has been completed and the case is now pending with the IBLA, which has a significant case backlog. The IBLA denied a joint motion to expedite the case in June of 2019.

9. 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 (CPP) established mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. The EPA contemplated that state plans required by the rule would 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 granted the 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 the exemption might only be temporary. Although Alaska was not included, the State continued to monitor the implementation of the rule and the lawsuits that were brought by other states to challenge the rule.

In late 2017, the EPA proposed to repeal the CPP, and, in 2018, the EPA announced it was proposing a new rule, the Affordable Clean Energy rule (ACE rule), to replace the CPP. In June of 2019, the EPA issued the final ACE rule replacing the CPP. The ACE rule took effect on September 6, 2019.

Legal challenges have been filed by various states and other stakeholders asking the court to strike the ACE rule and reinstitute the CPP. Alaska and several other states intervened in litigation in favor of retaining the ACE rule.

10. 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." In 2015, the EPA and the Corps adopted a rule that attempted 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 rule expanded what fell 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 was 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.

Under the current federal administration, the EPA and the Corps initiated a two-step process for revising the rule. The first step, repealing the 2015 rule, has been completed, and the prior definition was reinstated, effective December 23, 2019. The second step, a rulemaking to redefine "waters of the United States", has been through public comment and a final rule is expected in 2020.

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 2015 rule. Among other claims, the states assert that the 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 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. A date for oral argument has not been set.

Although the 2015 rule is no longer in effect, a ruling from the court could be important if the withdrawal of the 2015 rule is challenged successfully or to provide guidance for future rulemaking efforts.

11. National Park Service (NPS) and U.S. Fish and Wildlife Service (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. 27030 (May 5, 2016)

Description of the Issues Identified – The National Park Service (NPS) and the U.S. Fish and Wildlife Service (USFWS) adopted regulations that conflict with state management of wildlife on federal land. The NPS regulations for national preserves 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 National Wildlife Refuge 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.

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

Status of Litigation – The State filed a lawsuit challenging both NPS and USFWS. The State's case was consolidated with two other cases. In July 2017, NPS and USFWS were directed to initiate new rulemaking. In June 2018, NPS published a proposed rule that would reverse much of the 2015 rule challenged in the litigation. The comment period closed on October 5, 2018, and review of the comments and proposed rule is complete, but NPS determined that publication of a final rule is not a priority. USFWS has not published a proposed new rule as of December 2019. The litigation was stayed for several months pending possible rulemaking that might render moot portions of the lawsuit. The parties agreed to delay action in the case pending further rulemaking. A new briefing schedule anticipates that opening briefs will be filed in early 2020. The state and Safari Club International filed a joint opening brief on January 6, 2020 challenging the rule adopted by the Kenai National Wildlife Refuge.

12. Bureau of Indian Affairs evaluation of lands into trust in Alaska

Citation to Federal Statute or Regulation – Solicitor's Opinion M-37053

Description of the Issues Identified – After the district court in *Akiachak v. Dept. of Interior* ruled that lands can be taken into trust by the Bureau of Indian Affairs in Alaska, a new Solicitor's Opinion was issued citing the court's opinion, and the Department of Interior (DOI) changed its regulations to permit lands in Alaska to be taken into trust in January 2017. Because DOI changed its regulations, the D.C. Circuit Court of Appeals, where the appeal of the district court's ruling was pending, dismissed the case as moot, vacating the district court's decision. In June of 2018, the Department of Justice rescinded the Solicitor's Opinion, and DOI began a consultation process to determine if it should change its regulations. The state submitted comments to DOI on January 25, 2019. The DOI stated that it will not process any new applications, but federal representatives have stated since that pending applications would continue to be processed.

13. 2019 Amendment to the Chugach Land Resources Management Plan

Citation to Federal Statute or Regulation – ANILCA Section 1326(b); 16 U.S.C. 3213(b).

Description of the Issues Identified – The new Chugach National Forest Plan established de facto conservation system units (CSUs) in violation of ANILCA's prohibition of additional CSUs except by Act of Congress. The

unauthorized CSUs overlap existing highways, railways, and utilities and will make it difficult to impossible to expand or improve these facilities.

The State sought resolution of these issues with the United States Forest Service (USFS) both formally and informally. In October, 2019, the State filed its formal objection, under USFS procedures, to the draft record of decisions (ROD) in support of USFS' new Chugach National Forest Plan. Objection resolution meetings are scheduled for mid-January 2020. The final (and judicially challengeable) ROD and Chugach National Forest Plans are expected in May 2020.

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

1. 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 the validity of 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. At the district court level, briefing was completed and oral argument was held on October 27, 2017. Both parties have since filed supplemental authorities. The case was reassigned in November 2019. We are awaiting the court's decision.

2. 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 federal Office of Surface Mining Reclamation and Enforcement (OSMRE). The permits were valid while the administrative process played out. On remand, the federal agency found that the State had "good cause" to not take action because the State needed additional time to determine whether a violation of the State program existed. The State issued a decision at the end of November 2018 upholding the validity of the permits. OSMRE subsequently determined that it did not have sufficient reason to believe a violation existed, and therefore did not issue a ten-day notice or order an inspection. At this time, no party has requested further review.

3. **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 (FMP) for Salmon Fisheries in the Exclusive Economic Zone (EEZ) 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 Cook Inlet EEZ, 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 Amendment 12 was contrary to law to the extent it removed the Cook Inlet EEZ from the FMP. The court explained that the MSA allows delegation to the state under an FMP, but does not excuse the federal government's obligation to adopt an FMP when it opts for state management. The U.S. Supreme Court denied the State's request to hear the case. The district court retained jurisdiction to oversee adoption of a new plan. The North Pacific Fishery Management Council continues to work through the issues. The plaintiffs filed a motion to enforce judgement, seeking the court's intervention in the creation of the FMP and oversight of the fishery until the plan is in place. The district court denied the plaintiff's motion, and ordered that the Council adhere to their estimated timeline and adopt a final FMP amendment by December 31, 2020, with final agency action to occur within one year thereafter.

4. **Repeal of USFWS Fish and Game Regulations through the Congressional Review Act – *Center for Biological Diversity v. Bernhardt* (AK Dist. Ct.,3:17-cv-00091)**

   The Center for Biological Diversity (CBD) filed a lawsuit to challenge Pub. L. 115-20 which was adopted under the rules established in the Congressional Review Act (CRA). 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 intervened on behalf of the federal defendants. CBD argued that Public Law No. 115-20 adopted under the CRA violated the Take Care clause of the US Constitution because it prevented USFWS from carrying out its statutory responsibilities under existing laws. The district court dismissed the litigation in June 2018. In August 2018, plaintiff appealed to the Ninth Circuit. In December 2019 the Ninth Circuit issued an opinion that resolved all claims in favor of defendants

5. **Reversal of Former President Obama's offshore development ban — *League of Conservation Voters v. Trump* (Nos. 19-35460,19-35461, 19-35462)**

   Former President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all leasing in certain off-shore areas, including large portions of the Chukchi and Beaufort Seas. Upon taking office, President Trump rescinded the ban by the issuance of an executive order. The executive order was then challenged by various environmental groups. The State intervened to defend President Trump's executive order rescinding the leasing ban. The plaintiffs filed a motion for summary judgment, and the State filed its own motion for summary judgment and an opposition to plaintiff's motion. In March of 2019, Judge Gleason granted summary judgment to the League of Conservation Voters (and denied summary judgement to President Trump and the State) ruling that the Outer Continental Shelf Lands Act's language permitting a president to "from time to time withdraw" unleased lands from disposition did not permit President Trump to undo a previous withdrawal that had been ordered by President Obama. The case is moving forward on appeal and is in the briefing stage, with argument expected in June of 2020.

6. **CERCLA Hard Rock Mining – *Idaho Conservation League v. Pruitt* (D.C. Cir., 18-1141)**

   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. In July 2019, the appellate court deferred to the EPA's interpretation on setting financial responsibility and ruled that the EPA's financial and economic risk analyses were neither arbitrary or capricious. No petition for certiorari was filed. This case is now closed.

7. **Indian Gaming Regulatory Act—*Native Village of Eklutna v. U.S. Dept. of Interior et al* (D.C. Dist. Ct., 1:19-cv-02388).**

The Native Village of Eklutna filed a lawsuit pursuant to the Administrative Procedures Act challenging the Department of the Interior's denial of its request that a certain allotment be considered "Indian lands" eligible for gaming under the Indian Gaming Regulatory Act (IGRA). The Department denied the request primarily on the grounds that the plaintiff does not have jurisdiction or "exercise governmental power" over the allotment, as required to meet IGRA's definition of "Indian lands." The State moved to intervene in defense of DOI's denial, and the motion was granted. The administrative record has not been certified, and no substantive briefing has been filed as yet.

8. **Affordable Clean Energy Rule (ACE) —*New York v. EPA* (No. 19-1166 (Aug. 14, 2019 D.C)**

   The Affordable Clean Energy rule (ACE rule) took effect on September 6, 2019. The ACE rule repeals the Clean Power Plan (CPP), issues emissions guidelines for greenhouse gas emissions, and revises the emission guidelines implementing regulations under the Clean Air Act. Various environmental groups and some states filed legal challenges seeking to repeal the ACE rule and reinstitute CPP. Numerous industry groups, power providers, and states are seeking to intervene in the litigation to support the EPA's ACE rule. Alaska joined several other states to intervene in New York v. EPA in support of the ACE rule.

9. **Izembek National Wildlife Refuge/King Cove to Cold Bay Road— *Friends of Alaska NW Refuges. v. Bernhardt* (AK Dist. Ct., 3:19-CV-00216 (JWS)**

   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.

   There have been three attempts to complete a land exchange with federal administrations. The State has participated as an intervenor-defendant and as an amicus curiae in past litigation.

   Most recently, King Cove Corporation and the U.S. Dept. of Interior (DOI) entered into a 2019 land exchange agreement, which, like previous similar agreements, has been challenged by environmental groups. In January of 2020, the State filed to join as a defendant intervenor to present arguments regarding the purpose, need, and environmentally cognizant design of its proposed road.

Answers to the Complaint were filed in October of 2019. Briefing on the merits is expected in March of 2020.

10. **Endangered Species Act Rules — *California v. Bernhardt,* (N.Cal. Dist. Ct., 4:19-cv-06013-JST); *Animal Legal Defense Fund v. Bernhardt,* (N.Cal. Dist. Ct., 4:19-cv-06812-JST0; and *Center for Biological Diversity v. Bernhardt,* (N.Cal. Dist. Ct., 4:19-cv-05206-JST0**

    Three lawsuits were filed challenging regulations adopted in 2019 by the US Fish and Wildlife Service and National Marine Fisheries Service. In December 2019 and January 2020, Alaska joined twelve other states to move to intervene in all three cases to defend the new rules. Among other things, the rules clarified the meaning of "foreseeable future" in determining whether a species is threatened, allows economic factors to be considered while still making decisions based on the best scientific and commercial data, and provided guidance on when to consider unoccupied areas as critical habitat for listed species.

11. **Seismic testing in Cook Inlet — *Cook Inletkeeper et al., v. Ross, et al.* (D. Alaska 3:19-cv-00238-SLG)**

    Cook Inletkeeper and others sued to challenge permission given to Hilcorp Alaska to conduct seismic testing in Cook Inlet. The testing is permitted by the National Marine Fisheries Service under the Marine Mammal Protection Act and the Endangered Species Act. The permission includes conditions to avoid and limit impacts on beluga whales. Cook Inlet belugas are listed as a distinct population segment. In December 2019 the court granted Alaska's motion to intervene. The federal record is scheduled to be filed by February 7, 2020.

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

The following list summarizes, in roughly chronological order, cases involving the federal government or the potential federal preemption of state law in which the State of Alaska either filed or joined in an amicus brief in 2019.

1. ***Brackeen v. Bernhardt*** (amicus brief in the Fifth Circuit). Alaska joined California's amicus brief supporting the federal government in its defense of the constitutionality of the federal Indian Child Welfare Act (ICWA). The Fifth

Circuit reversed the district court and concluded that ICWA is constitutional. A petition for en banc review is pending.

2. ***Kisor v. Wilkie*** (amicus brief on the merits in the U.S. Supreme Court). Alaska joined Utah's amicus brief supporting the argument that the Supreme Court should overrule its line of decisions holding that federal courts should defer to a federal agency's reasonable reading of its own genuinely ambiguous regulations. The court reversed and remanded the case, but rejected the argument to overrule precedent.

3. ***Moda Health Plan v. United States*** (amicus brief supporting certiorari in the U.S. Supreme Court). Alaska joined Oregon's amicus brief supporting Moda Health Plan's position that the federal Affordable Care Act created an obligation for the federal government to make risk-corridor payments without regard to budget neutrality, and that Congress did not amend or repeal that obligation through later-enacted riders. Certiorari was granted and the case is pending (and has been consolidated with related matters).

4. ***Zabriskie v. Federal National Mortgage Association*** (amicus brief supporting rehearing in the Ninth Circuit). Alaska joined Washington's amicus brief supporting the argument that the Federal National Mortgage Association (Fannie Mae) can be sued under the federal Fair Credit Reporting Act as a consumer reporting agency over errors created by the automated loan underwriting software that it licenses to lenders. Rehearing was denied.

5. ***New Hampshire Lottery Commission v. Barr*** (amicus brief in New Hampshire federal district court). Alaska joined Michigan's amicus brief supporting New Hampshire's argument that the federal Wire Act, 18 U.S.C. §1084(a), criminalizes only interstate wire transmissions concerning sports gambling, not all types of gambling (such as government-operated lottery games). New Hampshire prevailed in the district court and the federal government has appealed to the First Circuit, where the case is pending.

6. ***Hoopa Valley Tribe v. FERC*** (amicus brief supporting en banc rehearing in the D.C. Circuit). Alaska joined Oregon's amicus brief supporting the argument that states do not waive authority over water quality certification under the federal Clean Water Act by allowing applicants to withdraw and resubmit the request for certification. Rehearing en banc was denied, and then a petition for certiorari was filed which was also denied.

7. ***Cedar Band of Paiutes v. U.S. Dept. of Housing and Development*** (amicus brief in Utah federal district court). Alaska joined Washington's amicus brief supporting the U.S. Department of Housing and Urban Development's defense

of the policy that down payment assistance providers are limited to governmental providers, which are only authorized to act in their respective jurisdictions. The district court preliminarily enjoined the policy.

8. ***Kansas v. Garcia*** (amicus brief on the merits in the U.S. Supreme Court). Alaska joined Illinois's amicus brief supporting Kansas's argument that the federal Immigration Reform and Control Act does not preempt states from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and Social Security number, in a prosecution of any person (citizen or alien). The case is pending.

9. ***Tennessee v. Lindenberg*** (amicus brief supporting certiorari in the U.S. Supreme Court). Alaska joined Ohio's amicus brief in support of Tennessee's argument that a federal court exercising its diversity jurisdiction should certify an important state constitutional issue of first impression to the state's highest court before declaring, on its own, that the state statute violates the state constitution. Certiorari was denied.

10. ***Cowpasture River Preservation Association v. U.S. Forest Service*** (amicus brief supporting certiorari in the U.S. Supreme Court). Alaska joined West Virginia's amicus brief supporting the U.S. Forest Service's position that the federal Mineral Leasing Act and National Trails System Act give the Forest Service authority to grant rights-of-way through national forest lands traversed by the Appalachian National Scenic Trail. Certiorari was granted and the case is pending.

11. ***Bostock v. Clayton County, Georgia; Altitude Express v. Zarda; and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC***. Alaska joined Tennessee's amicus brief supporting the position (also supported by the federal government) that discrimination against an employee because of sexual orientation does not constitute prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964. The case is pending.

12. ***Trump v. NAACP and McAleenan v. Vidal*** (amicus brief on the merits in the U.S. Supreme Court). Alaska joined Texas's amicus brief supporting the federal government's defense of the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals (DACA) immigration policy. The case is pending.

13. ***Pennsylvania v. Navient*** (amicus brief in the Third Circuit). Alaska joined New York's amicus brief supporting Pennsylvania's position that a state can bring a concurrent enforcement action under the federal Consumer Financial Protection Act after the Consumer Financial Protection Bureau has already

filed suit, and that the Higher Education Act does not preempt the state's state-law loan-servicing claims. The case is pending.

14. ***Maine Community Health Options v. United States and Moda Health Plan, Inc. v. United States*** (amicus brief on the merits in the U.S. Supreme Court). Alaska joined Oregon's amicus brief supporting Moda Health Plan and others in the position that the federal Affordable Care Act created an obligation for the federal government to make risk-corridor payments without regard to budget neutrality, and that Congress did not amend or repeal that obligation through later-enacted riders. The case is pending.

15. ***Little Sisters of the Poor v. Pennsylvania*** (amicus brief supporting certiorari in the U.S. Supreme Court). Alaska joined Texas's amicus brief supporting the petitioners, who argue that the federal government lawfully exempted religious objectors from the federal regulatory requirement to provide health plans that include contraceptive coverage. The petition is pending.

16. ***U.S. v. Florida*** (amicus brief supporting en banc review in the Eleventh Circuit). Alaska joined Texas's amicus brief supporting Florida's argument that Title II of the federal Americans with Disabilities Act does not confer standing on the U.S. Attorney General to sue states regarding alleged violations of Title II in administering Medicaid. The case is pending.

17. ***Poole v. N.Y. State Citizens' Coalition for Children*** (amicus brief supporting certiorari in the U.S. Supreme Court). Alaska joined Connecticut's amicus brief supporting New York's argument that the federal Adoption Assistance and Child Welfare Act of 1980 does not grant foster parents the right to bring a private cause of action against the state to challenge the adequacy of foster care maintenance payments under federal standards. The petition is pending.

18. ***USFS v. Cowpasture River Assoc***. (amicus brief on the merits in the U.S. Supreme Court). Alaska joined West Virginia's amicus brief supporting the U.S. Forest Service's position that the federal Mineral Leasing Act and National Trails System Act give the Forest Service authority to grant rights-of-way through national forest lands traversed by the Appalachian National Scenic Trail. The case is pending.

19. ***Impax v. FTC*** (amicus brief in the Fifth Circuit). Alaska joined Mississippi and Washington's amicus brief supporting the Federal Trade Commission's position that it properly applied the rule of reason when it concluded that an agreement between two opioid drug manufacturers unreasonably restrained trade. The case is pending.

20. ***Brackeen v. Bernhardt*** (amicus brief in the en banc Fifth Circuit). Alaska again joined California's amicus brief supporting the federal government in its defense of the constitutionality of the federal Indian Child Welfare Act (ICWA), this time at the en banc stage. The case is pending.

21. ***DHS v. Thuraissigiam*** (amicus brief on the merits in the U.S. Supreme Court). Alaska joined Arizona's amicus brief supporting the federal government's position that 8 U.S.C. § 1225(b)(1)(A)(ii) is not unconstitutional under the Suspension Clause for restricting arriving aliens claiming asylum from petitioning federal courts for habeas review. The case is pending.