Alaska Department of Law

List of Federal Issues and Conflicts

January, 2020

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 C. Brooking	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 Supreme Court heard the case again and ruled in Mr. Sturgeon's favor.	The State is not a party to the case but participated as an amicus, including supporting Mr. Sturgeon's second cert. petition to the U.S. Supreme Court. In March 2019 the U.S. Supreme Court ruled 9-0 in Mr. Sturgeon (and the State's) favor; holding that the State's navigable waters are not transformed into federal lands by virtue of falling within conservation system units created by the Alaska National Interest Lands Conservation Act (ANILCA). The case has been remanded to the lower courts for ministerial follow-up.
Kuskokwim River/ Interior Board of Land Appeals (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, IBLA and the Bureau of Land Management (BLM) did not preserve Alaska Native Claims Settlement Act (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. BLM voluntarily dismissed its appeal in November 2019.

Middle Fork, North Fork, and Dennison Fork of the Fortymile River – navigability AAG J. Alloway,	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 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 Fall 2020.
Navigable Waterways/ Togiak Public Use Management Plan (PUMP) AAG A. Nelson	Not aligned.	The PUMP asserts jurisdiction over, and directs the United States Fish and Wildlife Service (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 M. Gramling S. Lynch	Not aligned.	State challenged the application of the roadless rule in Alaska as well as nationwide. The roadless rule prohibits the building of roads in Inventoried Roadless Areas of national forests, which essentially shuts down resource development in many areas of the Tongass. On a parallel track, the State is pursuing regulatory relief for the Tongass.	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. The State continues to object to the abeyance. On the rulemaking, the USDA proposed an exemption for the Tongass to the roadless rule. The public comment period for the proposed rule ended in December.
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	Resolved in State's favor	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 the Court heard motions for summary judgment on all 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 National Environmental Policy Act (NEPA) or National Forest Management Act (NFMA) requirements for these easements. In the State's companion suit against the USFS, on June 11, 2019 the court issued a summary judgment order providing clear and particular declarations on the scope and requirements for the 4407 easements With the favorable decision on all causes of action, DOT&PF anticipates the acceleration of certain project timelines in Southeast Alaska.
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 trial is anticipated in the fall of 2020.

King Cove Road *Friends of Izembek NWF v. Bernhardt (3:19-cv-00216)* AAGs S. Lynch, M. Gramling	Aligned	For many years, residents of King Cove have been trying to get a road from the village to the airport at Cold Bay. The road would be primarily for health and safety purposes, as the airport at Cold Bay is the nearest location where large planes can land in the area's often poor weather conditions. A road directly connecting these two towns would have to cross federally designated wilderness in the Izembek National Wildlife Refuge.	There have been three attempts to complete a land exchange with federal administrations. The State has participated as an intervenor-defendant and 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. On January 8, 2020, the State moved to intervene in the case in support of the agreement and the road.
2016 Amendment to the Tongass Land Resources Management Plan (TLMP) AAGs M. Gramling, 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 effectively amend the roadless rule by promulgating a state specific rule to manage roadless areas in Alaska. USDA published a Notice of Intent to commence the rulemaking on August 30, 2018. A final rule is expected by summer of 2020. But, the USDA declined the State's request to simultaneously amend the 2016 TLMP concluding that any amended 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.
2019 Amendment to the Chugach Land Resources Management Plan AAG S. Lynch	Not Aligned	The new Chugach NF Plan established de facto Conservation System Units (CSUs) in violation of ANILCA's prohibition of additional CSUs except by Act of Congress. The unauthorized CSU's 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 USFS both formally and informally. On October 29, 2019 the State filed its formal objections, under USFS NEPA procedures, to the draft ROD in support of USFS's new Chugach NF Plan. Objection resolution meetings are scheduled for mid-January 2020. The final (and judicially challengeable) ROD and Chugach NF Plan are expected in May 2020.

Eastern Interior Resource Management Plan (EIRMP) 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, although BLM has lifted the withdrawals in some of the less controversial areas., facilitating conveyance of certain statehood selections.	The Government Accountability Office determined in 2017 that the EIRMP is a rule under the Congressional Review Act - Congress has 60 session days to repeal rules. 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 options, including administrative action and litigation. We also continue to monitor implementation decisions made under EIRMP.
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. The State submitted comments to Interior of January 25, 2019.
Arctic National Wildlife Refuge (ANWR) Boundary IBLA Appeal AAGs M. Schechter	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.	IBLA denied BLM's motion to dismiss and has consolidated the State's two appeals. Briefing was completed in May 2018 and the case is now awaiting a decision from the IBLA, which continues to deal with a significant case backlog. The IBLA denied a joint motion to expedite the case in June 2019
ANWR Section 1002 AAG J Hartz	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.	BLM finalized the EIS on September 12, 2019 and issued a notice that the final EIS was available for review on September 25, 2019. BLM must wait at least 30 days after that date to issue a Record of Decision that chooses BLM's preferred alternative for conducting a lease sale program in the ANWR1002 area. BLM has not issued a record of decision as of the time this report was provided

Native Village of Eklutna v. United States Department of the Interior et al (D.C. District Court No. 1:19-cv-02388) AAG L Harrison	Aligned	The Native Village of Eklutna requested a determination from the Department of the Interior that a certain Alaska Native allotment is "Indian lands" eligible for gaming under the Indian Gaming Regulatory Act. 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 plaintiff has challenged the denial in D.C. District Court pursuant to the Administrative Procedures Act. The State has moved to intervene in defense of the Department's denial.	This case is in its early stages. The plaintiff filed the Complaint on August 7, 2019, the federal defendants filed their Answer on December 17, 2019 and the State moved to intervene on December 31, 2019, and the motion was granted The administrative record has not yet been certified. No substantive briefing has yet been filed.

CLEAN AIR ACT			
Case or Matter	**Alignment with Feds**	**Brief Description**	**Status**
2017 Regional Haze State Implementation Plan Rule - *State v. Environmental Protection Agency (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 (CPP) established 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.	President Trump signed an executive order calling on the EPA to review the CPP and end the moratorium on coal mining on federal lands. On August 21, 2018, EPA announced it was proposing a new rule, the Affordable Clean Energy rule ("ACE"), to replace the CPP.. On June 19, 2019, EPA issued the final ACE rule "replacing the prior administration's overreaching CPP with a rule that restores the rule of law and empowers states to continue to reduce emissions while providing affordable and reliable energy for all Americans." [EPA News Release 6/19/2019]
Affordable Clean Energy Rule (ACE) AAG. Mulder	Aligned	The Affordable Clean Energy (ACE) rule and took effect on September 6, 2019. ACE 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.	Legal challenges have been filed by various groups and states asking the court to toss the ACE rule and reinstitute the CPP. *Am. Lung Assoc. v. EPA*, No. 19-1140 (July 8, 2019 D.C. Circuit); *New York v. EPA*, No. 19-1166 (Aug. 14, 2019 D.C. Circuit). Numerous industry groups and power providers are seeking to intervene in the litigation to support EPA's ACE rule. Alaska and several other states intervened in *New York v. EPA*

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 A. Roberts	Uncertain.	State joined a coalition of 12 states challenging the 2015 "waters of the U.S." (WOTUS) 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 still has not been scheduled. Meanwhile EPA and the Army Corps of Engineers initiated a 2-step process for revising the rule. Step 1, repealing the 2015 rule, has been completed – reinstating the prior definition. Step 2, a rulemaking to redefine WOTUS has been through public comment. On January 23, 2020 EPA issued the final rule. The affected state agencies are currently reviewing the final rule for impact.

FISH AND GAME			
Case or Matter	**Alignment with Feds**	**Brief Description**	**Status**
NPS and USFWS Rules on Management of Fish and Game - *State v. Bernhardt* (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 parties agreed to delay action in the case pending further rulemaking. A briefing schedule anticipates opening briefs to be filed January 6 2020.
Congressional Review Act Resolution CRA) on USFWS Rules - *Center for Biological Diversity v Bernhardt* (3:17-cv- 00091) AAGs C. Brooking, J. Alloway	Generally aligned.	The Center for Biological Diversity (CBD) filed a lawsuit to challenge Pub. L. 115-20 which was adopted under the rules established in the CRA Pub. L115-20 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 FWS 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.
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 A. Peterson	Aligned.	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	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

		areas was the Cook Inlet EEZ, which is the focus of the lawsuit.	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.

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 E. Fossum	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. . Both parties have since filed supplemental authorities. The case was reassigned to J. Rudolph Contreras on November 27, 2019. We are awaiting the court's decision.
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Hard Rock Mining - *Idaho Conservation League v. Pruitt* (D.C. Cir., 18-1141) AAG E. Fossum	Aligned.	The State intervened with 13 other states in a lawsuit concerning the EPA decision not to impose a federal requirement for financial assurances under the 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.	Appellant's petition for review denied by the D.C. Circuit on July 19, 2019. The appellate court deferred to the EPA's interpretation of setting financial responsibility on financial risks, not risks to health/environment; and also that EPA's financial and economic risk analyses were neither arbitrary nor capricious. No petition for certiorari was filed. The case is closed.
Wishbone Hill Mine - *Castle Mountain Coalition v. OSMRE* (State intervened in support of defendant) AAG C. Moore	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 November2018, 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

OIL AND GAS			
Case or Matter	**Alignment with Feds**	**Brief Description**	**Status**
Reversal of Ban on Offshore Development –*Trump v. League of Conservation Voters* (Nos. 19-35460, 19-35461. 19-35462) AAG L. Fox	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 order. 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 President Trump's executive order.	At the 9th Circuit in the briefing stage argument expected in June 2020.. In district court on March 29, 2019 Judge Gleason granted summary judgment to the League of Conservation Voters (and denied summary judgment to Trump and 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.

ENDANGERED SPECIES ACT			
Case or Matter	**Alignment with Feds**	**Brief Description**	**Status**
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 AAG C. Brooking	Aligned	Three lawsuits were filed challenging regulations adopted in 2019 by the US Fish and Wildlife Service and National Marine Fisheries Service. 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.	In December 2019 and January 2020, Alaska joined twelve other states to move to intervene in all three cases to defend the new rules.
Seismic testing in Cook Inlet - *Cook Inletkeeper et al., v. Ross, et al.* (D. Alaska 3:19-cv-00238-SLG) AAG C. Brooking	Aligned	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.