

Department of Law

Statehood Defense Litigation Update Senate Resources Committee

CORI MILLS, DEPUTY ATTORNEY GENERAL, CIVIL DIVISION

SEAK Chinook Fishery Biological Opinion

THAD ADKINS

Wild Fish Conservancy v. Rumsey, et. al.

No. 2:20-cv-00417

- •In early 2020 the Wild Fish Conservancy sued the United States, arguing that the Southeast Alaska Chinook Biological Opinion related to Southern Resident Killer Whales was flawed and that take of their food (chinook salmon) was unlawful
- •Alaska intervened to defend the Biological Opinion
- •The court granted the plaintiff summary judgment, finding that the Biological Opinion violated the ESA and National Environmental Policy Act
- •The parties have briefed remedy and the issue is ripe for a final order from the District Court judge

Marine Mammal Litigation

RON OPSAHL

Marine Mammal Litigation

•Defense of nonlethal incidental take of polar bears for oil and gas activities

• Alaska Wildlife Alliance v. Haaland (U.S. Dist. Alaska)

•Challenge to negative 90-day finding regarding State's petition to delist Arctic ringed seal

 Alaska v. National Marine Fisheries Service (U.S. Dist. Alaska)

•Challenge to critical habitat designations for Arctic ringed seal and bearded seal

 Alaska v. National Marine Fisheries Service (U.S. Dist. Alaska)

Methods and Means of Hunting

JESSIE ALLOWAY

SOLICITOR GENERAL

State v. Haaland

No. 22-401

Alaska Wildlife Alliance v. Haaland

No. 3:20-cv-209-SLG

- •The Alaska Statehood Act grants the State of Alaska the authority to manage wildlife, including on federal property
- Historically, this authority included the ability to manage the methods and means of hunting
- When it passed ANILCA, Congress meant to preserve the State's traditional authority
- The U.S. Fish and Wildlife Service and the National Park Service have promulgated rules that impact the State's traditional authority
- One rule applies on the Kenai Refuge and the other applies on National Preserves
- •These two cases are related in that they address the federal agencies' authority to preempt state law
- The State filed a petition for certiorari with the Supreme Court, asking it to consider the Ninth Circuit's conclusion that the federal agency had "plenary authority" to preempt state law

GMU 13 Hunting

JESSIE ALLOWAY

SOLICITOR GENERAL

State v. Federal Subsistence Board

Case # 22-0195

•In August 2020, the State challenged the Federal Subsistence Board ("FSB") decision to close moose and caribou hunting in GMU 13A and 13B for two years to non-federally qualified hunters only

•The State also challenged FSB's delegation of authority to local federal land managers to open emergency hunts and to delegate hunt administration outside of a federal agency

•In December 2021, the Alaska federal district court issued a decision favorable to the FSB

•The State appealed and oral argument was held before the Ninth Circuit Court of Appeals in December

Navigability

RON OPSAHL

Alaska State Submerged Lands

•Middle Fork and North Fork of Fortymile River • Alaska v. United States (U.S. Dist. Alaska)

•Middle Fork of Koyukuk River, Dietrich River, and Bettles River

• Alaska v. United States (U.S. Dist. Alaska)

•Mulchatna River, Chilikadrotna River, Twin Lakes, and Turquoise Lake

• Alaska v. United States (U.S. Dist. Alaska)

•Mendenhall Lake and River

• Alaska v. United States (U.S. Dist. Alaska)

•Kobuk River, "Walker" River, and Walker Lake

 Alaska v. United States (not yet filed, anticipated May/June 2023)

Tongass Roadless Rule

THAD ADKINS

Reinstatement of Roadless Rule

•On October 29, 2020, the Alaska Roadless Rule took effect following a State rulemaking petition under 36 CFR Subpart B

•January 20, 2021, President Biden issued Executive Order 13990 directing all agencies to review and address federal regulations passed by the Trump administration

•November 19, 2021, USDA proposed AK Roadless Rule repeal

•January 27, 2023, final repeal took effect, reinstating application of the 2001 Roadless Rule to the Tongass National Forest

JULIE PACK

WOTUS

What has the State done?

STATE CAPITOL P.O. Basi 10000 Tancas, AK 29581-6000 907-465-300		550 West, Seventh Avenue, Suite 1700 Archonage, AK 79501 507-260-7450	
	Governor Mike Dunleavy		
	STATE OF ALASKA		
			 N. As an
February 7, 2022			 No. 21-454
Mr. Damaris Christens Oceans, Wetlands and Office of Water (4504	Communities Division Office of the Assista	ant Secretary of the Army	In the Supreme Court of the United States
Environmental Protecti 1200 Pennsylvania Av			
Washington, DC 2046			 MICHAEL SACKETT, ET UX.,
Re: State of Alaska's C	comments in Response to the Revised Definition	of "Waters of the United	 Petitioners,
	lean Water Act ("Proposed Rule"); Docket # EP.		 υ.
Dear Mr. Christensen a	nd Ms. Jensen,		 ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Thank you for the orno	rtunity to comment on the proposed definition of	"Waters of the United	 Respondents.
States" ("WOTUS"), w	hich establishes the scope of federal jurisdiction	under the Clean Water Act	 On Writ of Certiorari to
("CWA"). Because of its unique characteristics, Alaska stands to be disproportionately affected by the Proposed Rule, and particularly, by the vast expansion of federal jurisdiction it will inflict on			The United States Court of Appeals
states. As the Supreme	Court has noted, expanded CWA jurisdiction has	high costs and lengthy	 For the Ninth Circuit
delays resulting from th average producer for a	te federal government's heavy hand with Army C n individual permit spends 788 days and \$271,59	Corps permitting, "The 6 in completing the process	BRIEF OF AMICUS CURIAE STATE OF
not counting expressions of mitigation. Over \$1.7 billion is spent each year by the private and public sectors obtaining wethands permits. These costs cannot be avoided because the Clean Water Act imposes eriminal liability as well as steep evil fines on a broad range of ordinary industrial and commercial			ALASKA IN SUPPORT OF PETITIONERS
activities."	i as steep eivit tines on a broad range of ordinary	industrial and commercial	 TREG R. TAYLOR Attorney General
Alasha hadi sa			State of Alaska
Alaska's climate and geography are incredibly hydrologically diverse. We have areas receiving less than five inches of annual precipitation, areas experiencing over 150 inches of annual precipitation, areas that are semi or permanently frozen, and areas somewhere in between. By any metric, Alaska			DAVID A. WILKINSON*
			JULIE PACK Assistant Attorneys General
has significantly more water than all other states: Alaska has roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; nearly 27,000 miles of coastline; and more wetlands			1031 W, 4th Ave., Ste 200
than every other state combined. ² A large percentage of Alaska's lands are potential wetlands, 43			Anchorage, AK 99501
percent, compared to other states, which average less than five percent.3 Alaska needs regulations			(907) 269-5100
			david.wilkinson@alaska.gov *Counsel of Record
¹ Raponer n. United States, 547 Remolecting for Linuxieum Art. A.	U.S. 715 (2016) (plarshty op.) (citing Sunding & Zilbenn susmut of Recort Changes to the Webland Permitting Process, 42.1	m, The Economics of Exerimentead National Research 1, 50, 74, 76, 81	counter of record
(2002)).	ion's total wetlends. Hall, Ionathan V, W.F. Frazer and B		
Withney, 1994, available at 3	https://www.fus.gov/wetlands/documents/status of alasi	in-wetlands.rdf. Every other state	
clocks in well below the nur accessible at https://www.u	nhers listed above. Sw U.S. Geological Survey, Land Ann nus.nov/special-tonics/water-science-school/science/how	and Water Area of Early State,	
state (numbers based on U.)	5. Census Bureau, Generativy: State Area Measurements (2010).		
National Hydrography Daturel (Alifermation (2014) (lakar cosant) ³ Hall, Jonathan V, W.F. Ferger and Bill O. Wiler, Status of Alaskar Wintandi; 1914, at 3, available at https://www.fws.gov/weitandi/Advancement/status of alaska-weitandi.eddf.			
https://www.fws.gov/weth	nds/documents/status of alaska weilands.pdf.		

- WOTUS comments laying foundation for WOTUS lawsuit
- Challenged the current test as applied to wetlands in the Supreme Court – Sackett v. EPA amicus brief
- The State argued that this test:
 - disproportionately affects Alaska,
 - impinges on Alaska's right to manage its own natural resources
 - contrary to the CWA (section 101(b))
 - contrary to U.S. Constitution (10th Amendment)
 - is arbitrary and capricious for its lack of Alaskaspecific science supporting the existence of a hydrological connection between waters in Alaska (e.g., permafrost wetlands) and waters that are traditionally navigable

404(c) Veto

JULIE PACK

EPA's 404(c) Veto Determination

- EPA's veto:
 - **Vetoes** the current (nonexistent) permit
 - Prohibits all "future proposals to construct and operate a mine to develop the Pebble deposit" that result in any "<u>one</u>" of the stream or wetland losses serving as a basis for the permit denial
 - **Restricts** development in a specified 309 square-mile area of primarily state-owned land

- Multistate comment letter calling out the 404(c) action for inconsistency with President Biden's renewable energy goals. Available at https://dec.alaska.gov/
 - Thanks to Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, Nebraska, South Carolina, Texas, Utah, West Virginia and Wyoming for the support!
- Western States Water Council (representing 18 western states) passes Resolution #486 chiding EPA for faulty process and calling for limitations on 404(c). https://westernstateswater.org/resolutions/

We look forward to meeting EPA in court.

- Attorney General Treg Taylor



Questions?

PARKER W. PATTERSON

ASSISTANT ATTORNEY GENERAL

PARKER.PATTERSON@ALASKA.GOV

(907) 465-6544