



Department of Law

Statehood Defense Litigation Update
Senate Resources Committee

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CIVIL DIVISION

SEAK Chinook Fishery Biological Opinion

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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

ASSISTANT ATTORNEY GENERAL

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

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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

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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

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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

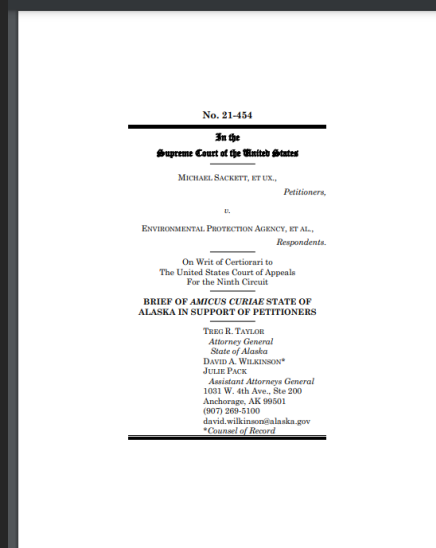
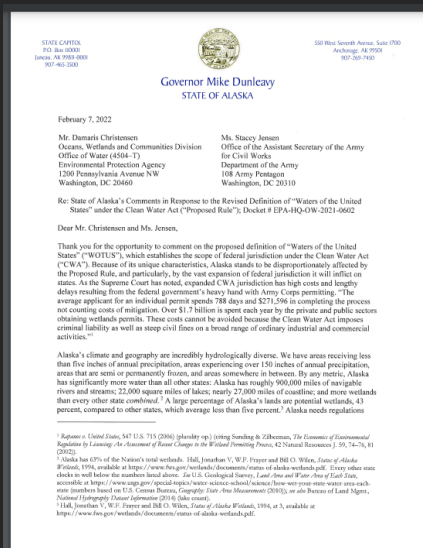
WOTUS

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What has the State done?

- 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 Alaska-specific 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

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EPA's 404(c) Veto Determination

- EPA's veto:
 - **Veto**s the current (nonexistent) permit
 - **Prohibits** all "future proposals to construct and operate a mine to develop the Pebble deposit" that result in any "**one**" 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?

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