

**ALASKA STATE LEGISLATURE  
JOINT MEETING  
SENATE JUDICIARY STANDING COMMITTEE  
HOUSE JUDICIARY STANDING COMMITTEE**

February 14, 2011

1:02 p.m.

**MEMBERS PRESENT**

SENATE JUDICIARY

Senator Hollis French, Chair  
Senator Bill Wielechowski, Vice Chair  
Senator Joe Paskvan  
Senator John Coghill

HOUSE JUDICIARY

Representative Carl Gatto, Chair  
Representative Steve Thompson, Vice Chair  
Representative Wes Keller  
Representative Bob Lynn  
Representative Lance Pruitt  
Representative Max Gruenberg

**MEMBERS ABSENT**

SENATE JUDICIARY

Senator Lesil McGuire

HOUSE JUDICIARY

Representative Lindsey Holmes  
Representative Mike Chenault

**COMMITTEE CALENDAR**

OVERVIEW: DEPARTMENT OF LAW

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

## **WITNESS REGISTER**

JOHN BURNS, Attorney General Designee  
Department of Law (DOL)  
Anchorage, AK

**POSITION STATEMENT:** Delivered an overview of the Department of Law.

Rick Svobodny, Deputy Attorney General  
Department of Law (DOL)  
Juneau, AK

**POSITION STATEMENT:** Answered questions about the Department of Law Criminal Division.

## **ACTION NARRATIVE**

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**CHAIR CARL GATTO** called the joint meeting of the Senate and House Judiciary Standing Committees to order at 1:02 p.m. Senators Wielechowski, Coghill, Paskvan, and French; and Representatives Thompson, Keller, and Gatto were present at the call to order.

### **OVERVIEW: DEPARTMENT OF LAW**

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CHAIR GATTO announced the business before the committees would be to hear an overview of the Department of Law (DOL) by Attorney General Designee John Burns.

REPRESENTATIVE PRUITT joined the committee.

JOHN BURNS, Attorney General Designee, Department of Law (DOL), said it's a privilege to present an overview of the Department of Law to the judiciary committees. While he is honored to fulfill the position of Attorney General, it is not one he sought. He informed the committees that as a lifelong Alaskan, he is committed to bettering the state in a meaningful way. Growing up in Nome gave him an appreciation for life in rural Alaska, and provided an opportunity to spend time in unique places like King Island and Diomedes. In 1970 he moved to Fairbanks and has resided there since except that he spent summers working for Fish and Game in Western Alaska and Prince William Sound. Since graduating from UAA and then Puget Sound Law School approximately 25 years ago, he has been in private practice specializing predominately in commercial law, doing business transactions and insurance defense work. In the last

eight weeks he has met with members of the DOL in Anchorage, Fairbanks and Juneau to become familiar with the issues. He has also spent time in Nome, Bethel, and Barrow meeting with law enforcement, DOL personnel, judges, Youth Court facilities, and women's shelters to gain a better understanding of how the DOL can meet the various needs.

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REPRESENTATIVE GRUENBERG joined the committee.

ATTORNEY GENERAL BURNS stated that his objective as Attorney General is to uphold the constitution and laws of the state of Alaska with dignity and integrity, consistent with his ethical obligations as an attorney.

The mission of the Department of Law (DOL) is to prosecute crime and provide legal services to state government for the protection and benefit of Alaska's citizens. This is accomplished by three divisions: the Criminal Division, the Civil Division, and the Administrative Services Division. The Criminal Division has 13 offices and the Civil Division has 14 sections.

DOL's core services are fourfold.

- I. Protecting the safety and financial wellbeing of Alaskans.
- II. Fostering conditions for responsible development of natural resources.
- III. Protecting the fiscal integrity of the state.
- IV. Promoting good governance.

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As of FY11, 284 attorneys provide services to the DOL. They hope to add two more attorneys in FY12 for a total of 286. These will be a district attorney in Kotzebue and a public records attorney in Anchorage.

The FY12 budget request by core services includes:

- Sixty-two percent to protect Alaskans, predominantly through the Criminal Division; and the Child Protection Services Section, Commercial and Fair Business Section, and Environmental Section within the Civil Division.
- Nineteen percent for state fiscal protection.
- Ten percent for governance.
- Nine percent for economic opportunity and resource development.

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For FY10, the return on investment for the department was nearly \$7 to every \$1 spent; costs were \$85.4 million and collections were \$576 million. The benefits and collections were concentrated in the Civil Division where the return was nearly \$12 to every \$1 spent. The costs were \$48.9 million and collections were \$576 million. To date for FY11 the awards and collections total \$108 million.

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SENATOR WIELECHOWSKI asked if the awards include the \$500 million recovery from Mercer; and if the costs are all in-house or a combination of in-house and outside counsel.

ATTORNEY GENERAL BURNS replied the FY10 data did include the \$500 million recovery from Mercer and the costs reflect both in-house and outside counsel.

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SENATOR WIELECHOWSKI asked how much the state paid in attorney fees to recover the \$500 million.

ATTORNEY GENERAL BURNS said he understands it was a contingency arrangement, but he would follow up with the information. Collections fluctuate, but they are typically closer to \$76 million.

The Criminal Division takes up the majority of the DOL budget carrying out the core function of protecting Alaskans. He highlighted the following:

- Thirteen District Attorney Offices are located in Ketchikan, Kodiak, Kenai, Kotzebue, Barrow, Bethel, Anchorage, Dillingham, Palmer, Fairbanks, Nome, and Sitka.
- The Office of Special Prosecutions handles cold cases; Medicaid; welfare, PFD, insurance, and workers' compensation fraud; cybercrimes; fish and game crimes; environmental crimes; alcohol interdiction; criminal non-payment of child support; and violations of state tax law.
- Appeals.
- The Rural Prosecution Unit assists rural offices when workload demands outstrip available staff or expertise.

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ATTORNEY GENERAL BURNS displayed a state map that showed the numbers of prosecutors in each of the statewide offices. Sitka, Kotzebue, and Barrow each have one prosecutor; Kodiak, Dillingham, and Nome each have two; Juneau and Ketchikan each

have three; Bethel has seven prosecutors; Kenai has nine; Palmer has 11; Fairbanks has 14; and Anchorage has 35 prosecutors.

REPRESENTATIVE GRUENBERG asked if Bethel has seven prosecutors because it's a heavy crime area compared to the rest of the state.

ATTORNEY GENERAL BURNS replied he didn't have the statistics, but that seems to be the case.

RICK SVOBODNY, Deputy Attorney General, Criminal Division, Department of Law (DOL), said a lot of violent crimes are committed in the Yukon/Kuskokwim Delta, which is an area that's about the size of Oregon. When he last checked, Bethel had one more sexual assault than the entire Anchorage area.

REPRESENTATIVE GRUENBERG highlighted that there are as many district attorneys in Bethel as in the entire Southeast region. He expressed concern and said he'd like to know more about what's going on in that region.

CHAIR GATTO asked what population the Bethel office serves.

MR. SVOBODNY said he didn't know the population of the Yukon/Kuskokwim Delta, but the Bethel office serves 47 villages. By comparison, the Juneau office serves five locations.

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ATTORNEY GENERAL BURNS said he personally intended to spend a significant amount of time addressing that issue.

The Civil Division has seven offices statewide with a number of attorneys in each, predominantly in Fairbanks, Anchorage, and Juneau. Six sections in the Civil Division handle the core function of protecting Alaskans.

- Child Protection - 23 attorneys.
- Commercial and Fair Business - 18 attorneys.
- Human Services - 9 attorneys.
- Regulatory Affairs and Public Advocacy - 3 attorneys.
- Environmental Section - 10 attorneys.
- Labor and State Affairs - 19 attorneys.

Attorneys working in the Child Protection Section handle 3,000 Child in Need of Aid (CINA) cases every year; 2,000 of these cases are ongoing at any time, rolling from year-to-year. Each child protection attorney handles 113 cases, which exceeds the

recommended national average of 100 cases. These attorneys are very busy and very successful. They prevailed in eleven of eleven recent Alaska Supreme Court appeals of superior court orders terminating parental rights. This says that the Office of Child Services is doing an outstanding job in making the determination as to which cases warrant moving forward.

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The Commercial and Fair Business Section handles consumer complaints. The Consumer Protection Unit handled the DIRECTV case; negotiated a \$300,000 settlement from Publishers Clearing House; a \$425,000 settlement from Dannon Yogurt; and has thus far recovered \$13 million from "Average Wholesale Price," which was drug litigation related to overcharging the Alaska Medicaid program. These were all associated with false advertizing. The unit also handled the lawsuit in which jewelers doing business in Juneau falsely advertised "40-75% off" sales.

At the request of the Legislature, DOL in 2010 did a study to determine why rural fuel costs were so high. The University of Alaska Anchorage Institute of Social and Economic Research (ISER) also did a study and concurred with DOL that there was no evidence of price-fixing. Nevertheless, DOL continues to monitor this issue.

ATTORNEY GENERAL BURNS made special mention of the Florida court that threw out as unconstitutional the entire Patient Protection and Affordable Care Act (PPACA). The court determined that the valid portions could not be severed from the unconstitutional aspects and therefore, the entire Affordable Care Act was unconstitutional. DOL continues to advise the Department of Health and Social Services (DHSS), the Division of Insurance, and the Division of Retirement and Benefits on how PPACA, if it is constitutional, will affect the Alaska. The Department of Justice will probably appeal that decision, but because 13-14 other states have similar suits, the U.S. Supreme Court will ultimately have to weigh in on the issue.

CHAIR GATTO asked if the state is investing funds to implement part of the PPACA.

ATTORNEY GENERAL BURNS said he wasn't sure of the answer.

CHAIR FRENCH noted that when the Florida district court decision was announced Governor Parnell indicated he would ask the attorney general the legal status of the federal law. Senator

French asked what his advice is to the governor in the face of that ruling.

ATTORNEY GENERAL BURNS said Alaska intervened in that case and that remains the binding law, as relates to Alaska, at this time. All the governors that were impacted by that decision sent a letter urging the Obama administration to move forward with an appeal directly to the Supreme Court. It's a matter that needs to be addressed and it won't find resolution until it reaches the highest court, he said.

CHAIR GATTO asked him to describe the term "nonseverability."

ATTORNEY GENERAL BURNS explained that the Florida district court determined that the healthcare mandate was so intricately tied to the other aspects of the Affordable Care Act, that it could not be pulled out or severed and leave the remaining part able to be enforced. The court couldn't make a determination as to whether or not the PPACA could survive if the healthcare mandate was severed and therefore it had to be thrown out entirely.

CHAIR FRENCH asked if the federal judge in Florida issued an injunction against further application of the law.

ATTORNEY GENERAL BURNS answered no.

CHAIR FRENCH asked if it means that Alaska would be breaking the law if it continued to abide by the PPACA, in light of his advice to the governor that the decision by the judge in Florida was binding on the state.

ATTORNEY GENERAL BURNS replied it was the decision of the Florida court that the PPACA was unconstitutional so our position is that we're not obligated to follow the PPACA.

CHAIR FRENCH asked if the governors who are party to the lawsuit and also taking steps to ready their states for the PPACA were breaking the law

ATTORNEY GENERAL BURNS replied, "Not at all." Each state is taking different steps to evaluate the law and just how it will be evaluated remains to be seen.

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CHAIR FRENCH said he's unclear as to the binding affect of the Florida court ruling on the State of Alaska.

ATTORNEY GENERAL BURN replied the court's determination was that it was unconstitutional. "That is the law as it relates to the State of Alaska, its position vis-a-vis that act," he added.

CHAIR FRENCH noted the absence of an injunction, and asked if he's saying that the State of Alaska is relieved of all its obligations under the federal PPACA because of the decision in Florida.

ATTORNEY GENERAL BURNS replied there is no obligation on the State of Alaska to follow the federal mandate, but it could elect to move forward and evaluate independently whether to pursue a [healthcare] exchange.

CHAIR GATTO asked if an injunction was necessary, or was there an implied consent that allows any state operating under the PPACA to make an independent decision as to whether it will move forward.

ATTORNEY GENERAL BURNS replied that's right; it was implied.

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REPRESENTATIVE LYNN joined the meeting.

SENATOR COGHILL asked if the reason that an injunction was not issued related to the timeline.

ATTORNEY GENERAL BURNS said the court didn't indicate whether or not the timelines were relevant to not issuing an injunction, but a number of timelines do apply. The court emphasized and the parties all recognized the importance of getting this decision to the U.S. Supreme Court on an expedited basis because of the potential cost.

SENATOR COGHILL asked if there was a reason the suit wasn't filed under an original jurisdiction question rather than the federal court.

ATTORNEY GENERAL BURNS said he didn't know.

CHAIR FRENCH said in the face of this decision in Florida he hopes the governor doesn't decide that it is elective on him as to whether or not to follow federal law and allow state employees to keep their children on their health insurance until age 26, starting in August 2011. I hope, he urged, that you advise the governor that in the absence of an injunction, that I

believe that the State of Alaska has to continue to abide by that federal law.

ATTORNEY GENERAL BURNS said he understands that the governor is evaluating that point.

CHAIR GATTO asked if it's true that retired state employees would not have the ability to keep a child on their retiree state insurance policy until age 26; the cutoff would be age 23.

ATTORNEY GENERAL BURNS replied he didn't have an answer.

CHAIR GATTO said the State of Alaska was the only state that declined \$1 million to implement the mandated [healthcare exchange,] indicating that the governor made a decision earlier than the Florida court decision.

ATTORNEY GENERAL BURNS said, "I'm not aware of any decline."

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SENATOR WIELECHOWSKI asked, since the governor has declined to work under the federal law, if he would advocate for the governor to propose legislation to provide healthcare for children up to age 26, ban discrimination against preexisting conditions, and prohibit lifetime monetary limits on healthcare.

ATTORNEY GENERAL BURNS replied he had had no conversation with the governor on that and did not know his position.

CHAIR GATTO asked if it's his job to defend the state's position, but not to take a position himself.

ATTORNEY GENERAL BURNS replied he would defend the state's position to the extent that the position was constitutional and consistent with the statutes.

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He continued with the overview.

The Human Services Section defends the Department of Health and Social Services in lawsuits related to foster care, public assistance and Medicaid overpayments. Recently an independent auditor indicated that there had been excessive charges and DOL was able to recover \$1.9 million.

The Environmental Section filed litigation against BP Exploration Alaska to recover civil assessments and revenue

losses related to the 2006 Prudhoe Bay pipeline shutdown due to corrosion. The Environmental Section also handled the Cruise Ship Initiative. HB 134 regulating wastewater discharges allowed cruise ship owners and operators until 2016 to fully comply with the new water quality standards.

The Regulatory Affairs and Public Advocacy (RAPA) Section advocates the public interests in regulated utility matters before the Regulatory Commission of Alaska (RCA). For example, DOL was instrumental in the evaluation of the Cook Inlet Natural Gas Storage Alaska (CINGSA). The RCA approved that facility on January 31, 2011. The DOL through RAPA is also monitoring the \$5.7 million in refunds that the RCA ordered Enstar to return to eligible customers as a result of overbilling.

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The Department of Law played a key role in developing the 10-year Sexual Assault Domestic Violence Initiative. They are collaborating with agencies and non-profits to support the initiative, doing public services announcements like "Choose Respect", and sponsoring pro-bono summits.

Four sections within the Civil Division handle the second core function of fostering responsible development.

- Oil Gas and Mining - 14 attorneys.
- Transportation and Public Facilities - 8 attorneys.
- Environmental - 10 attorneys.
- Natural Resources - 13 attorneys.

DOL, through the Oil Gas and Mining Section, is continuing to pursue resolution of the Point Thomson litigation with ExxonMobil.

The Transportation and Public Facilities Section is advising the Department of Transportation and Public Facilities (DOTPF) and defending the state on building projects such as Goose Creek Prison, the Alaska Marine Highway System headquarters and Ketchikan dry dock expansion, the Juneau access road, the Knik Arm Crossing, and instate gas pipeline and propane projects.

DOL, through the Environmental Section, prevailed in the U.S. Supreme Court, which allowed the Kensington Mine to open. This resulted in jobs for 300 workers during construction and 200 workers during production, 85 percent of which are Alaska-hire.

CHAIR GATTO noted that the 25-30 legislators who visited Kensington yesterday learned what a great resource it is for the

state. It cost \$450 million to put the mine in place and it is expected to generate about \$1 billion per year before expenses.

ATTORNEY GENERAL BURNS added that DOL received many letters of appreciation for its efforts to open the mine. A similar positive result was the Red Dog Mine. The Environmental Protection Agency (EPA) withdrew key components of the water pollution discharge permit and DOL assisted the Department of Environmental Conservation (DEC) in promulgating new regulations. This allowed the mine to continue operation and preserved 516 direct and 2,800 ancillary jobs. In a side note he related how the mine came to be named after a bush pilot's red dog.

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The Oil Gas and Mining Section within DOL fostered responsible development defending the Outer Continental Shelf (OCS) leases in court challenges including Lease 193 and Interior's approval of Shell's Beaufort and Chukchi Sea OCS exploration plans. This is an example of the state working in tandem with the federal government for positive results. Likewise, DOL challenged the Interior Department's purported imposition of a moratorium on development in Alaska and the OCS. The court recently dismissed *Alaska v. Salazar*, based on the fact that the Interior Department unequivocally asserted in filings that there was no moratorium.

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Through the DOL Natural Resources Section, the state partners with the U.S. Forest Service (USFS) in management of the Tongass National Forest. DOL has supported "Tongass Exemptions" to the USFS "Roadless Rule," and USFS authorization of the Logjam timber sale. If successful, this will preserve jobs.

DOL is also seeking to develop a comprehensive strategy to deal with issues related to the Endangered Species Act. It is challenging a number of unwarranted listings and unwarranted critical habitat designations. These listings and designations can have a significant effect on transportation, resource development, sport and subsistence hunting and fishing. ESA listing petitions that have been sought include polar bears, beluga whales in Cook Inlet, Steller sea lions, humpback whales, Pacific walrus, ringed and bearded seals, and SE Alaska Pacific herring. These have significant impact to the state. Critical habitat designations have been made for the Cook Inlet beluga whale and 187,000 square miles of the state have been designated as critical habitat for the polar bear. The state filed intent

to sue challenging this critical habitat designation for the polar bear. The Arctic Slope Regional Corporation, North Slope Borough, and industry have also filed separate notices of intent to sue.

In addition to the listings, a number of lawsuits and appeals are appending for the polar bear, beluga whales, Steller sea lions, humpback whales, and ribbon seal. The state has been petitioning to de-list the eastern stock of the Steller sea lion based on population densities. The effect of the western stock listing was a fishery closure, which significantly impacted the community of Adak.

DOL has budgeted \$1,396,875 in FY11 to challenge the ESA listings. The budget for FY12 is roughly the same, but the actual amount will depend on the additional listings that come forward.

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The Oil Gas and Mining Section also assists DNR and DEC in requesting prompt federal review of challenges to petroleum exploration in the National Petroleum Reserve-Alaska (NPR-A). The Clean Water Act wetlands fill permit for the CD-5 project was initially denied despite overwhelming stakeholder support. However, that decision was remanded to the Corps for further evaluation. DOL is optimistic that the Corps will act promptly to reevaluate that permit.

Likewise, DOL advised DNR on responses to BLM Wilderness and "Wild Lands" designations. Interior Secretary Salazar ordered the evaluation of 72 million acres of federal land in Alaska for wilderness characteristics. The potential of that would be creation of a de-facto wilderness in Alaska without congressional oversight. This affects permitting and right of way determinations. The U.S. Fish and Wildlife Service is evaluating revisions to the Arctic National Wildlife Refuge (ANWR) Comprehensive Conservation Plan. DOL provided legal advice to the governor who wrote to urge President Obama to respect ANILCA

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The Environmental Section of DOL continues to assist DEC in requesting EPA action on Shell Oil's Clean Air Act permit application. Because of the delays, Shell has indicated that nothing will be done in 2011. The Alaska congressional delegation unanimously denounced the EPA action in this instance.

The Environmental and Natural Resources Sections of DOL continue to work on aspects of the Clean Water Act. Under a memorandum of agreement (MOA) with the Army Corps of Engineers, the EPA can invoke 404(c) to veto Corps permit decisions. This authority has been used very sparingly, but the EPA indicated it would evaluate the Pebble Mine in this regard.

The Environmental Section also defended the state in the Nunamta Aulukestai v. State suit alleging constitutional violations in statutes and regulations that authorize temporary land and water use permits for mineral exploration at the Pebble project. The plaintiffs want these temporary permits to be publicly noticed and best interest findings to be established before permits are issued.

The Natural Resources Section is defending Alaska fisheries management. The state intervened in the Upper Cook Inlet Drift Association v. Locke lawsuit where UCIDA wanted to preempt ADF&G management of salmon fisheries in Cook Inlet. The expectation is that this will be resolved amicably.

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Four sections within the Civil Division handle the third core function of protecting fiscal integrity.

- Collections and Support - 8 attorneys.
- Oil Gas and Mining - 14 attorneys.
- Labor and State Affairs - 19 attorneys.
- Torts and Workers' Compensation - 15 attorneys.

The Collections and Support Section collects criminal fines and surcharges owed to the state and restitution owed to third parties. In FY10 they collected \$7.3 million, \$1.1 million of which was for victim restitution. A pie chart reflected the following recoveries for FY10: civil - \$32,121.23; cost of appointed counsel - \$758,197.26; cost of incarceration - \$798,070.89; correctional facility surcharge - \$285,276.80; court fines - \$3,026,028.55; forfeited bonds - \$31,473.67; minor offense - \$1,228,392.06; criminal restitution - \$85,919.46; and juvenile restitution - \$329,867.60.

State operating revenues come from oil and gas corporate income taxes, production taxes, property taxes and royalties on Alaska North Slope crude oil. The Oil Gas & Mining Section collected nearly \$82 million in additional taxes and royalties in calendar year 2010 and \$95.9 million in FY11 through February 8, 2011.

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SENATOR WIELECHOWSKI said testimony in the Senate Resources Committee indicates that virtually every day the state is blowing the statute of limitations for filing lawsuits on royalty cases due to a lack of computer equipment, proper auditing equipment, and databases. He asked if this was a DNR issue or if DOL had suggestions on how this can be remedied.

ATTORNEY GENERAL BURNS said he was unaware that the state was blowing statutes of limitations, but he would meet with Tina Kobayashi, the head of the Oil Bas & Mining Section, to check on that.

SENATOR WIELECHOWSKI reiterated that it might be a Department of Natural Resources issue.

SENATOR PASKVAN agreed that this was an internal issue that bears scrutiny. The statute of limitations passed and the state didn't know if monies were owed because audits hadn't been conducted. The question was whether to conduct an audit when something was past the statute of limitations, if at the end of the audit there was no capacity to do anything other than in the general context that if an audit is completed, the state generally seeks and recovers additional monies.

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ATTORNEY GENERAL BURNS directed attention to a pie chart of oil, gas, and mining decisions and settlements FY00-FY10 totaling \$1.95 billion. This was a combination of oil and gas taxes, tariffs, royalties, and non oil and gas taxes, which would be property-related. The next slide shows the breakdown of oil, gas, and mining decisions and settlements FY11 through February 8, 2011 totaling \$95.9 million.

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CHAIR GATTO asked if the state ever loses these lawsuits and if the totals reflect total wins or the balance of the wins minus the losses.

ATTORNEY GENERAL BURNS replied he was not aware that the state had ever lost a case wholesale, but the state often asserts that a significantly larger amount was owed than was recovered. He understands that a vast majority of these cases are settled.

CHAIR GATTO recalled a large case of pipeline tariff overcharges in which the state gave up recovery beyond a certain look-back

period. He asked if the state was being efficient in its actions this time.

ATTORNEY GENERAL BURNS agreed that the issue needed to be evaluated to determine if the state was losing money. If it was, quick and decisive corrective measures are in order.

CHAIR GATTO surmised that there might be a benefit to adding attorneys to pursue these law suits; the Legislature would make a decision about that addition to the DOL budget.

ATTORNEY GENERAL BURNS reiterated that he would follow up and find the answers to those issues.

SENATOR WIELECHOWSKI expressed concern that some leaseholders were sitting on their leases. He asked if DOL had taken steps to ensure that the leaseholders of mining leases and oil and gas leases were fully engaged in their duty to produce.

ATTORNEY GENERAL BURNS replied he assumes that DNR would be reviewing the leases from that perspective, but he didn't know that for certain. The Department of Law was not reviewing leases from that perspective at this time.

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DOL is currently engaged in TAPS tariff litigation questioning the rates for 2005. Other ongoing litigation relates to the TAPS Strategic Reconfiguration case, which is currently before the Federal Energy Regulatory Commission (FERC) and the Regulatory Commission of Alaska (RCA). The state challenged TAPS owners for including hundreds of millions of dollars in imprudent capital project expenditures in the tariffs. The status of that case is that an eight-week hearing before FERC and RCA was scheduled for November 2011.

The ongoing litigation in which DOL is representing the Department of Revenue (DOR) in superior court on the 2006 TAPS property tax valuation is currently on appeal. That determination could have significant financial ramifications to municipalities. There is also an eight-week trial set for September 2011 regarding TAPS property tax litigation for 2007-2009. Ms. Kobayashi will give a presentation to the House Finance Committee tomorrow on the specific issues relative to oil and gas and how it affects that budget component.

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The Commercial and Fair Business Section and the Labor and State Affairs Section worked on the cruise ship initiative and passenger tax issues. The cruise ship initiative made income from cruise ship water activities subject to Alaska net income tax and imposed a gambling tax and a \$46 head tax. When the cruise industry sued over the head tax, DOL defended the Department of Revenue and assisted in negotiating a settlement. The Legislature passed a new law reducing the head tax to \$34.50 and the cruise industry dropped their lawsuit. This will preserve payment of about \$34 million per year to defray costs of services and facilities to accommodate passenger visits.

CHAIR GATTO said in addition to the reduction in the head tax, the state agreed to pay what had been an additional \$15 local head tax in Juneau and Ketchikan and so much per port of call. In the end, it looked like this essentially wiped out the head tax and conceivably the state was subsidizing the cruise ships. He asked Mr. Burns if he had followed the math as that legislation passed in the waning hours of the 26th legislative session.

ATTORNEY GENERAL BURNS replied the only thing he knew about that issue was that the current tax is \$34.50.

SENATOR WIELECHOWSKI agreed that the state came out on the short end of the stick; that decision was based on the legal advice to settle the case. The result was supposed to be that more cruise ships would come back but he was only aware that one did so. He asked if more did in fact return.

ATTORNEY GENERAL BURNS offered to find out how many cruise ships came back.

SENATOR WIELECHOWSKI said he'd like to know because the state gave back tens of millions of dollars in exchange for agreeing to settle the lawsuit. To his knowledge there's never been a follow-up as to what the state actually received.

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He continued the presentation.

The Labor and State Affairs Section handled the state's lawsuit against Mercer, the actuary for the state PERS and TRS pension plans. The suit was settled and Mercer paid \$500 million.

The Natural Resources Section represented the state in Carlson v. State. This was a 26 year lawsuit by nonresident fishermen

who sought refunds of commercial fishing permit fees, which were three times higher than resident fees. The court ruled against the state and the principal in that judgment was \$12 million. Adding the interest and attorney fees brought the total to \$82.3 million. The state appealed to the supreme court the 11 percent prejudgment interest and the attorney fees. A successful outcome could mean a \$60 million savings for the state. The judgment was fully funded and it just awaits a final determination by the court as to the appropriate interest rate.

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SENATOR PASKVAN asked if the \$60 million potential savings reflected the difference between a 3.5 interest rate as opposed to an 11 percent rate.

ATTORNEY GENERAL BURNS answered yes, and the amount of attorney fees, which were calculated on the full amount.

CHAIR GATTO asked if there was ever any question about the legality of charging nonresident commercial boats more.

ATTORNEY GENERAL BURNS replied he only knows the facts as they exist today, but the focus of the appeal was the 11 percent prejudgment interest that was compounded quarterly.

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The Transportation Section is handling litigation involving the boat builder and the manufacturer of the fast ferries, M/V Fairweather and M/V Chenega. The state wasn't able to resolve this and had to file a lawsuit to preserve the statute of limitations. The M/V Fairweather is currently out of service but neither vessel lived up to what was represented.

REPRESENTATIVE GRUENBERG asked if those ferries would have made money for the state, had they been operating. He added that he was thinking about consequential damages.

ATTORNEY GENERAL BURNS replied he doesn't know that the state is pursuing damages as much as it is focused on getting those ferries to perform as warranted.

REPRESENTATIVE GRUENBERG commented that he hopes the state is looking for all the damages it can get. "If not, I would like to know why not," he said.

ATTORNEY GENERAL BURN assured him that it was a component of the damage claim.

CHAIR FRENCH commented that it might save money to keep them tied up.

CHAIR GATTO said he understands that the state collects about \$.35 for every \$1 that it spends to operate these ferries.

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ATTORNEY GENERAL BURNS said regardless of whether or not they make money, these ferries aren't living up to what was represented.

ATTORNEY GENERAL BURNS said the last slide regarding protecting fiscal integrity reflects that DOL successfully defended over 200 tort claims with no adverse judgments against the state. DOL is obviously doing a good job handling those cases but this also indicates that the other departments are doing a very good job. This also speaks to the good communication between the DOL and the agencies. This includes the Department of Corrections, the Office of Child Services, and the other agencies that have historically been named defendants.

CHAIR GATTO asked if the state was released from the obligation of medical care once a prisoner is released from incarceration.

ATTORNEY GENERAL BURNS offered to look into that, but his sense was that the obligation to provide services would end upon release.

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Three sections within the Civil Division handle the fourth core function of promoting good governance.

- Natural Resources - 13 attorneys.
- Opinions, Appeals and Ethics - 11 attorneys.
- Labor and State Affairs - 19 attorneys.

The DOL was heavily involved in the 2010 federal elections lawsuits related to a write-in candidate's name, Miller public records, Miller state, Miller federal, Voting Rights Act, and others. Legislation has been introduced to address some of the issues that came up in that last election.

The Labor and State Affairs Section also defended and settled the Nick v. State elections lawsuit in Western Alaska. The result was that enhancements to the language assistance for Yup'ik speaking voters will be available at elections in the Bethel area.

The Opinions, Appeals and Ethics Section and the Labor and State Affairs Section defended the initiative process in *Planned Parenthood v. Campbell* and "The Natural Right to Life Initiative." DOL also provided advice on the Executive Branch Ethics Act; new regulations were adopted including standards governing state reimbursement of attorneys fees incurred by state officers exonerated in an ethics complaint proceeding. They also do ethics training for senior managers and boards and serve advisory opinions and investigations. The Opinions, Appeals and Ethics Section is also involved in the issues related to the burgeoning public records requests, including requests for 26,500 pages of former Governor Palin's emails. The definitive date for production through the Governor's Office is May 31, 2011. In 2010, forty-three additional and separate public records requests were directed to the DOL. This process includes privilege reviews and deliberative protections.

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ATTORNEY GENERAL BURNS said the challenges in FY12 will be essentially the same, and DOL will continue to focus on its mission and core objectives. In addition, DOL will have increased involvement with federal agencies such as BLM, EPA, U.S. Fish and Wildlife, and ESA on issues related to natural resource development. This is a clear recognition that the State of Alaska must dialog early-on to address the issues and be involved in the public process as opposed to litigating. DOL will continue to work with ADF&G, DNR, and other stakeholders to work with the federal government and to collectively address responsible development. While there's been some uncertainty about the federal government's objective related to natural resource development, it's a misperception that the State of Alaska is anti federal government because the relationship has got to be symbiotic. However, when the federal government's policy is unclear, it creates uncertainty within the arena of development generally. For example, federal involvement in the planning process for the NPRA and the ANWAR Coastal Plain study could lead to a recommendation of Wilderness designation effectively precluding development. Also, the BLM recent notice of wetlands and wilderness policy for evaluating lands under its management could have impact. The new ocean zoning and possible incursion into what traditionally has been state water resource management. Likewise, the federal policy on the Tongass National Forest appears to be changing.

The federal government owns 60 percent of the land in the state of Alaska and has a right to do what it is doing. But the state

also has a significant interest because it receives revenue sharing when resources are developed. The state received nearly 105 million acres in conjunction with the Statehood Act, but the federal government permitting policies are impacting the state's ability to develop those resources. The EPA's Clean Water Act Section 404(c) designation, for example, is significant.

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Examples of successful state-federal cooperation include the DEC air permitting program for facility and construction operation, except OCS; DEC assumption of the National Pollutant Discharge Elimination System (NPDES) permit program under the federal Clean Water Act; and the cleanups at federal facilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Clearly, the relationship is not always adversarial. The state is trying to engage proactively and maximize opportunities of good science benefitting good science.

Specific examples of state cooperation with federal programs include the defense of the Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings, allowing Kensington Mine to open; work with EPA to incorporate revised DEC regulations into the Red Dog Mine Clean Water Act permit; support for the U.S. Forest Service authorization of the Logjam timber sale; and Outer Continental Shelf (OCS) challenges.

Areas where the state is challenging federal overreach include the critical habitat designations under the Endangered Species Act; the Clean Water Act Section 404(c) fill permit elevated scrutiny of the CD-5 Pebble permit and the Tanana River Bridge; the EPA intervention under the Clean Air Act on Shell Oil Beaufort Sea drilling plans; Wilderness and "Wild Lands" and the constitutionality of the Patient Protection and Affordable Care Act.

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DOL is working to address these issues by developing a comprehensive 5-year interdepartmental plan. The executive agencies will also collaborate with tribes, Native organizations, and attorneys general in other states.

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CHAIR GATTO asked if the 2477 access was different or essentially the same as it was in 2003.

ATTORNEY GENERAL BURNS said he wasn't part of any decisions in 2003, but DOL is working with DNR to evaluate and identify the

areas that qualify for 2477 access and prioritize the benefits of access and potential success. There is no sense in spending lots of money on 2477 if the probability of proving up is minimal.

REPRESENTATIVE GRUENBERG said that for some time he had been interested in a lawsuit in which a number of attorneys general joined to help the owners of unclaimed WW II bonds regain their property. The suit, which is worth millions upon millions nationally, alleges that the war bonds went unclaimed because the federal government neglected to notify owners of their existence. Alaska didn't join that claim, but assistant attorney general Chris Poag is looking at the potential for commencing a new lawsuit. Alaska is one of the four jurisdictions where this could be done. He suggested the committee ask for a written status report on this issue.

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ATTORNEY GENERAL BURNS said he understands that no decision has been made, but it will be evaluated further and he would get a response.

REPRESENTATIVE GRUENBERG said he had also been working with Mr. Poag to deal with the fact that there is no statutory mechanism for the state to follow up to ensure that grants are administered properly and that people don't take advantage of unsophisticated grantees.

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SENATOR PASKVAN said the state provides a 20 percent capital credit for capital expenditures and he believes it's important for the state in its analysis of the statute of limitations issue to find out what is being deducted as a capital expenditure. This is a significant issue right now because the state doesn't know if the billions of dollars that are being spent as capital expenditures are for ordinary maintenance.

ATTORNEY GENERAL BURNS said okay.

CHAIR GATTO thanked Attorney General Burns for the presentation.

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There being no further business to come before the committee, Chair Gatto adjourned the meeting at 2:33 p.m.