

STATUS

STATE-

HOOD

DEFENSE

2/02/01

ALASKA STATE LEGISLATURE  
HOUSE RESOURCES STANDING COMMITTEE

February 2, 2001

1:10 p.m.

COMMITTEE CALENDAR

OVERVIEW: STATUS OF THE STATEHOOD DEFENSE CASES

TAPES

01-7, SIDES A & B

CALL TO ORDER

REPRESENTATIVE BEVERLY MASEK, Co-Chair, called the House Resources Standing Committee to order at 1:10 p.m.

PRESENT

Committee members present were Representatives Fate, Green, Stevens, Kapsner, McGuire, and Scalzi. Representatives Kerttula and Chenault were excused.

SUMMARY OF INFORMATION

BARBARA RITCHIE, Deputy Attorney General, Office of the Attorney General, Department of Law, told members that her department was requested to give an update of the status of state lawsuits pending. She introduced Ms. Grace.

JOANNE GRACE, Assistant Attorney General, Natural Resources Section, Civil Division (Anchorage), Department of Law, briefed committee members on the status of the three major pending lawsuits filed by the State of Alaska:

Katie John v. United States - state's right to manage its navigable waters. The state filed a notice of appeal in the Ninth Circuit Court and a decision is expected within six months. The state asserts that Congress did not intend federal agencies to usurp state sovereignty to manage state navigable waters.

State of Alaska v. United States - state's right to claim title to submerged lands in Southeast Alaska marine waters including those within Glacier Bay National Park and the Tongass National

Forest. The case will be heard in the Supreme Court and is significant, as it would affect the state's management of commercial fishing in waters within those park boundaries.

State of Alaska v. U.S. Forest Service and Department of Agriculture - Clinton Roadless Plan for Chugach and Tongass National Forests. Governor Knowles filed in the U.S. District Court on January 31, 2001. The suit seeks to permanently prevent the federal government from implementing the roadless policy, which would affect over 90 percent of the Tongass National Forest and 98.9 percent of the Chugach National Forest.

#### **ANNOUNCEMENTS**

CO-CHAIR MASEK announced that the House and Senate Resources Committees will meet jointly on February 6, 2001, at 12:15 p.m. to hear a presentation from the Alaska mining industry.

#### **COMMITTEE ACTION**

The committee took no action.

#### **ADJOURNMENT**

CO-CHAIR MASEK adjourned the House Resources Standing Committee meeting at 2:19 p.m.

NOTE: The meeting was recorded and handwritten log notes were taken. A copy of the tape(s) and log notes may be obtained by contacting the House Records Office at State Capitol, Room 3, Juneau, Alaska 99801 (mailing address), (907) 465-2214, and after adjournment of the second session of the Twenty-Second Alaska State Legislature this information may be obtained by contacting the Legislative Reference Library at (907) 465-3808.

**ALASKA STATE LEGISLATURE  
HOUSE RESOURCES STANDING COMMITTEE**

February 2, 2001

1:00 p.m.

**COMMITTEE CALENDAR**

Overview: Status of the Statehood Defense Cases

**TAPES**

01-7, SIDES 1, 2

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**PRESENT**

Committee members present were Representatives Fate, Green, Stevens, Kapsner, McGuire and Scalzi.

Representatives Kerttula and Chenault were excused.

**SUMMARY OF INFORMATION**

BARBARA RITCHIE, DEPUTY ATTORNEY GENERAL, Department of Law, told members that her department was requested to give an update of the status of state lawsuits pending and introduced Ms. Grace.

JOANNE GRACE, ASSISTANT ATTORNEY GENERAL, Department of Law, briefed committee members on the status of the three major pending lawsuits filed by the State of Alaska:

Katie John v. United States - state's right to manage its navigable waters. The state filed a notice of appeal in the Ninth Circuit Court and a decision is expected within six months. The state asserts that Congress did not intend federal agencies to usurp state sovereignty to manage state navigable waters.

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those within Glacier Bay National Park and the Tongass National Forest. The case will be heard in the Supreme Court and is significant, as it would affect the state's management of commercial fishing in waters within those park boundaries.

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#### **ANNOUNCEMENTS**

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#### **COMMITTEE ACTION**

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COMMITTEE TAPE LOG

COMMITTEE: RESOURCES

DATE: 2/2/01

TIME: \_\_\_\_\_

SUBJECT: \_\_\_\_\_

MEMBERS:

Masek (BM)      Scalzi (DS)      Fate (HF)      Green (JG)      Chenault (MC) *exc*  
 Stevens (GS)      Kapsner (MK) *116*      Kerttula (BK) *excused*      McGuire (LM)

SPEAKER	TAPE #	SIGNIFICANT INFORMATION
<del>BM</del>	01-29	SIDE A
BM	0001	call to order @ 110 - status of state cases still open - esp for new mbrs
JG	155	JAG - Barbara Ritchie Deputy AG -
BR		JA heads up statewide defence dept in Arch -
BM		Ron S here for ? -
JAG	288	- background on new - 2 imp cases K John & Bay case SEAK sub. land KJ - 1990 filed after AK out of comp w ANILCA That cases have priority to h&f on p. lands in 87 AK SC. ruled violated Const - no priority based on where person lived - for agency set up bd to reg h&f on public lands - on federal lands - not navig waters (state property) KI filed suits p.l. should apply to fed lands & navig. waters - state wd lose most of state waters - Dist Ct ruled all navig waters public - apud 94 - Ct reversed - said fed only.

COMMITTEE TAPE LOG

COMMITTEE: RESOURCES DATE: TIME:

SUBJECT:

MEMBERS: Masek Scalzi Fate Green Chenault  
 BM DS HF JG MC  
 Stevens Kapsner Kerttula McGuire  
 GS MK BK LM

SPEAKER	TAPE #	SIGNIFICANT INFORMATION
	01-	SIDE A
	0001	call to order @
		Ct ruled implication some navig waters are fed - ordered fed. agency to ID - they did over 1/2 states -
		Kapsner, at 116 - last Jan Dist Ct - appealed again last yr to 9th Cir. <sup>en banc</sup> -
		Wall 11 judges - critical stage - nearly over course - USSC more willing now than past to limit Cong authority on fed
		manet of states - violates "Clear stmt doc" not assume congress intended to take over w/o clear language - not clear on ANILCA
	1160	history 150 yrs states manage navig <sup>waters</sup> clear stmt doctrine requires Congress to make clear language - Solid water service of Cost County case - Ct of Error - Ct ruled Engr had no auth/state right -
DS	1516	good summary - ANILCA may be perceived vs. state/fed - affect other issues in other states?
JAC	1614	probably - other states concerned - fed water right would be perceived.

COMMITTEE TAPE LOG

COMMITTEE: RESOURCES DATE: TIME:

SUBJECT:

MEMBERS: Masek Scalzi Fate Green Chenault  
 BM DS HF JG MC  
 Stevens Kapsner Kerttula McGuire  
 GS MK BK LM

SPEAKER	TAPE #	SIGNIFICANT INFORMATION
	01-	SIDE A
	0001	call to order @
DS	1665	fed gov int in our water / usurping authority of state no. must now? state have beneficial interest in water rights -
JAG	1727	still more wishes for other purposes (subsidies) need to wait to see what regs promulgated for other uses (sport, comers, ) - take over only for federal subsistence -
JG	1825	any final decision date -
JAG	1851	hard to predict - need 6 mos / simple majority
JG	1935	get final worst rendering - attempt to appeal
JAG	1956	- may - option for final step -
LM	1976	any? indicate outcome guess -
JG	2004	non gamut - if prevail - p. lands would not have navigable waters in its fed. waters -
MK	2302	- our interests represent dif people in state
JG	2318	track record of 9th abnormal - heavy influence on appeal -
JAG	2365	9th so large - 28 judges - too many decisions - don't know law - but rectifying - take more on punc -

COMMITTEE TAPE LOG

COMMITTEE: RESOURCES DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

SUBJECT: \_\_\_\_\_

MEMBERS: Masek Scalzi Fate Green Chenault  
 BM DS HF JG MC  
 Stevens Kapsner Kerttula McGuire  
 GS MK BK LM

SPEAKER	TAPE #	SIGNIFICANT INFORMATION
	01-	SIDE A
	0001	call to order @
JAG	2530	SE Case U.S. Supreme Ct - original action - re. submerged lands - This case started in SC coastal boundary dispute betw state & US - both claim - filed motion Nov 94 ago - court agreed to take claim we own lands w/in (Bay Park / state says took when made park) - • Tongue Nat Forest passed automatically • Waters w/in SE are inland waters Oct. SC apptd special master - to take evidence & make recom. - Oct Greg Masses HULL Law School apptd - link to web site to case - • asked to amend to include 3rd count. state boundary 3 mi from legal coastline - mean low time line
	SIDE B	- Denton Sands 1970 -
JG	2983	if DS true inland - State got title? Post that case
JAG	1210	hard to prove - trying to prove what the SE of made of 4 bays judicial, bays -





PAT

# FEDERAL RELATIONS MATERIALS

\*Maps from Alaska v. United States, Original No. 128

\*Web site of Professor Gregory Maggs, with resumé  
and docket

\*Quarterly Report, natural resources cases

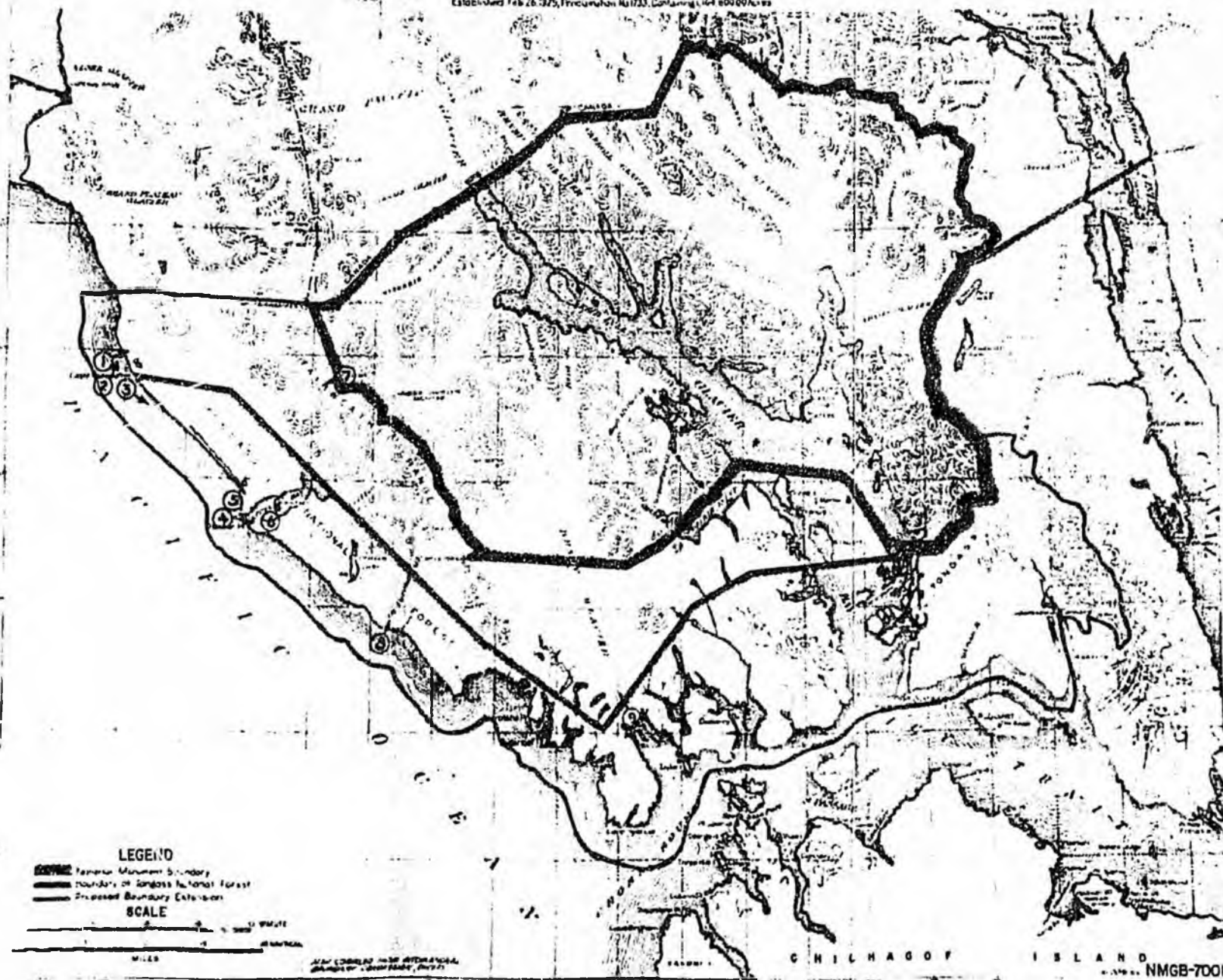
THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

DEPARTMENT OF THE INTERIOR  
Harold L. Ickes, Secretary

# GLACIER BAY NATIONAL MONUMENT ALASKA


NATIONAL PARK SERVICE  
Arno B. Coonmaker, Director

Established Feb. 26, 1925, Proclamation No. 1723, Containing 44,000,000 Acres





## EXHIBIT 1

### Historic Waters of Alexander Archipelago

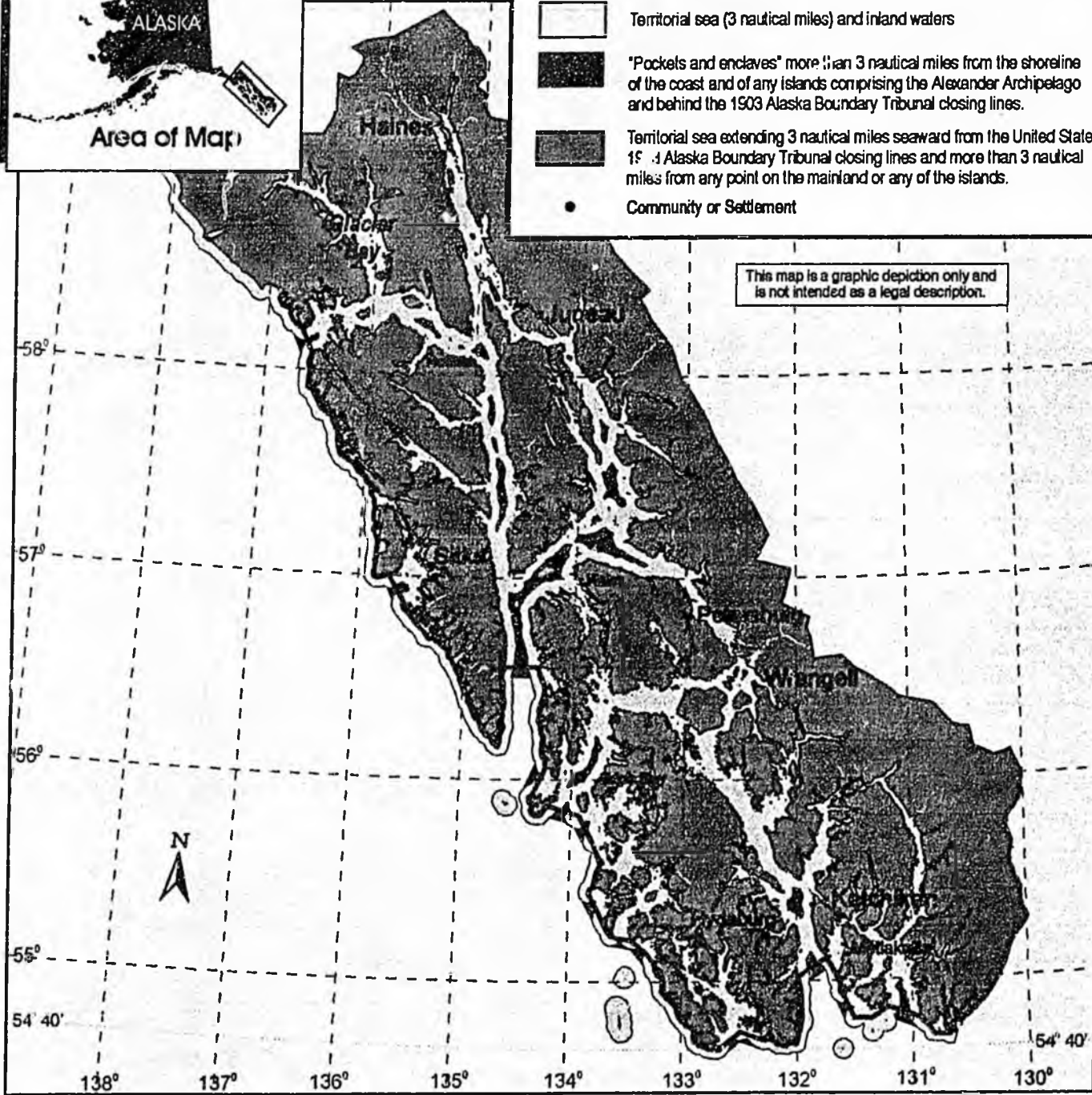
 Graphic depiction of closing lines drawn by the United States at the 1903 Boundary Tribunal to mark the seaward limits of the inland waters of the Archipelago. See *5 Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Congress, 2d Session (1903-04), Pt. I, Argument of the United States, pp. 15-16; *id.* Vol. 4, Pt. I, Counterargument of the United States, pp. 31-32.

 Territorial sea (3 nautical miles) and inland waters

 "Pockets and enclaves" more than 3 nautical miles from the shoreline of the coast and of any islands comprising the Alexander Archipelago and behind the 1903 Alaska Boundary Tribunal closing lines.

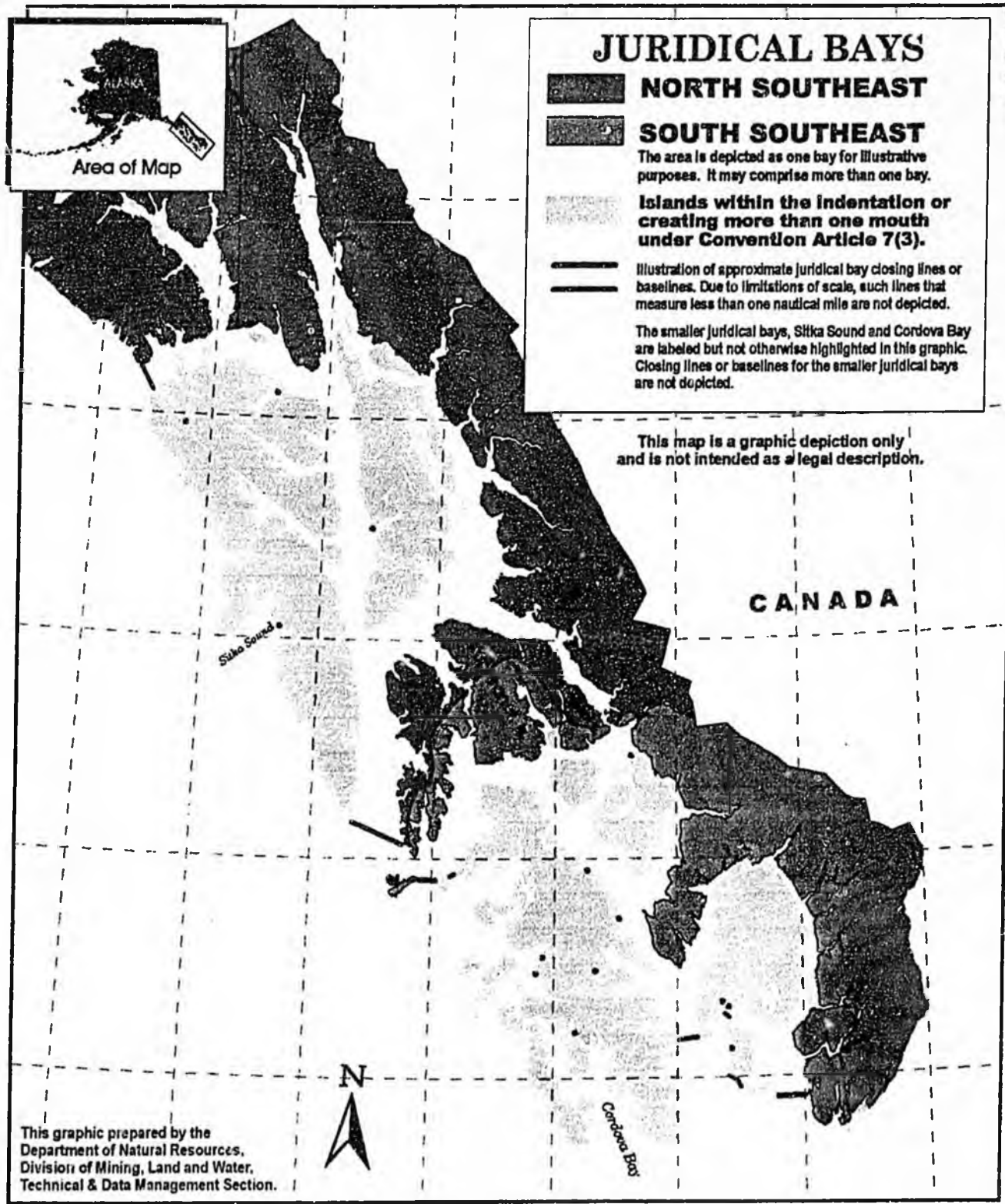
 Territorial sea extending 3 nautical miles seaward from the United States' 1903 Alaska Boundary Tribunal closing lines and more than 3 nautical miles from any point on the mainland or any of the islands.

 Community or Settlement



Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section October, 1999





# JURIDICAL BAYS

**NORTH SOUTHEAST**

**SOUTH SOUTHEAST**

The area is depicted as one bay for illustrative purposes. It may comprise more than one bay.

**Islands within the indentation or creating more than one mouth under Convention Article 7(3).**

Illustration of approximate juridical bay closing lines or baselines. Due to limitations of scale, such lines that measure less than one nautical mile are not depicted.

The smaller juridical bays, Sitka Sound and Cordova Bay are labeled but not otherwise highlighted in this graphic. Closing lines or baselines for the smaller juridical bays are not depicted.

This map is a graphic depiction only and is not intended as a legal description.

CANADA

Sitka Sound

Cordova Bay



This graphic prepared by the  
 Department of Natural Resources,  
 Division of Mining, Land and Water,  
 Technical & Data Management Section.





Gregory E. Maggs

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Telephone, Fax, and Email: Tel. (202) 994-6031 / Fax. (202) 994-5654 / [gmaggs@main.nlc.gwu.edu](mailto:gmaggs@main.nlc.gwu.edu)

Personal Information: [resume](#), [publications](#)

Courses: Constitutional Law I ([spring 2000 syllabus](#), [exams](#), [grading guides](#))

Contracts I ([fall 2000 syllabus](#), [exams](#), [grading guides](#))

Contracts II ([spring 2000 syllabus](#), [exams](#), [grading guides](#))

Commercial Paper ([fall 2000 syllabus](#), [exams](#), [grading guides](#), [review videos](#))

No. 128, Original, [Alaska v. United States](#): [docket sheets](#)

*Updated November 6, 2000*

GREGORY E. MAGGS -- Resume

PRESENT EMPLOYMENT

The George Washington University Law School, Washington, D.C.

Professor of Law (2000-present); Associate Professor of Law (1993-2000)

Subjects taught: Commercial Paper--Payment System, Constitutional Law I,  
Contracts I & II

Distinguished Faculty Service Award (1997, 1998)

Special Master, U.S. Supreme Court No. 128, Orig., Alaska v. United States

EDUCATION:

Harvard Law School, J.D., magna cum laude, 1988

Harvard Law Review (Articles Office Co-Chair)

Harvard College, A.B., summa cum laude, 1985

Phi Beta Kappa, John Harvard Scholar

Concentration: Linguistics and Applied Mathematics

PREVIOUS EMPLOYMENT:

Consultant to the Office of Independent Counsel, In re: Madison Guaranty  
Savings & Loan Ass'n (Hon. Kenneth W. Starr) (1998-2000)

Assistant Professor of Law, University of Texas School of Law, Austin, Texas

Subjects taught: Bankruptcy, Insurance Law, Payment Systems

(Fall 1991, 1992-1993)

Law clerk to Hon. Clarence Thomas, U.S. Supreme Court, Washington, D.C.  
(1991-1992)

Private practice and research with Hon. Robert H. Bork, Washington, D.C.  
(1990-1991)

Law clerk to Hon. Anthony M. Kennedy, U.S. Supreme Court, Washington, D.C.  
(1989-1990)

Law clerk to Hon. Joseph T. Sneed, U.S. Court of Appeals for the Ninth Circuit,  
San Francisco, Calif. (1988-1989)

ADMITTED TO PRACTICE:

New York, District of Columbia, Massachusetts

MILITARY:

U.S. Army Reserve, Judge Advocate General's Corps (1990-present)

FOREIGN LANGUAGE STUDY:

German, Arabic, Spanish

DOCKET SHEETS -- NO. 128, ORIGINAL, ALASKA v. UNITED STATES

Below are two docket sheets for United States Supreme Court, No. 128, Original, State of Alaska, Plaintiff v. United States of America.

The first is a copy of the official docket sheet maintained by the U.S. Supreme Court's Office of the Clerk. The second is a docket sheet prepared by the Special Master for proceedings before him.

The Special Master will post selected documents, including the final (but unsigned) versions of all of his orders, in ".pdf" format. To view and print these documents, you will need Adobe® Acrobat® Reader, &trade; which you may download for free at [www.adobe.com](http://www.adobe.com).

Gregory E. Maggs, Special Master  
George Washington University Law School  
720 20th Street, N.W.  
Washington, DC 20052  
[Special Master's Home Page](#)

*Last updated Dec. 20, 2000*

COPY OF OFFICIAL DOCKET SHEET MAINTAINED BY THE U.S. SUPREME COURT  
FROM NOVEMBER 24, 1999 UNTIL OCTOBER 16, 2000.

ENTRY	DATE	PROCEEDING AND ORDERS	PDF
1	Nov 24 1999	Motion for leave to file and bill of complaint filed.	
2	Jan 24 2000	Order extending time to file response to motion for leave to file a bill of complaint until February 28, 2000.	
3	Feb 25 2000	Order further extending time to file response to motion for leave to file a bill of complaint until March 29, 2000.	
4	Mar 29 2000	Order further extending time to file response	

		to motion for leave to file a bill of complaint until April 12, 2000.
5	Apr 12 2000	Brief for United States filed.
6	Apr 25 2000	DISTRIBUTED. May 11, 2000 (Page 16)
7	Apr 25 2000	Reply brief filed.
8	May 23 2000	REDISTRIBUTED. June 8, 2000 (Page 4)
9	Jun 9 2000	Motion for leave to file a bill of complaint is granted. The United States is allowed 60 days within which to file an answer.
10	Aug 9 2000	Order extending time to file answer to bill of complaint until August 25, 2000.
11	Aug 25 2000	Answer of United States to bill of complaint filed.
12	Sep 13 2000	DISTRIBUTED. October 6, 2000 (page 4)
13	Oct 10 2000	REDISTRIBUTED. October 13, 2000 (page 14)
14	Oct 16 2000	It is ordered that Gregory E. Maggs, Esquire, of Washington, D.C., is appointed Special Master in this case.
15	Oct 16 2000	IT IS ORDERED that Gregory E. Maggs, Esquire, of Washington, D.C., be appointed as Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

DOCKET SHEET FOR PROCEEDINGS BEFORE THE SPECIAL MASTER  
STARTING OCTOBER 25, 2000.

ENTRY	DATE	PROCEEDING AND ORDERS	PDF
1	Oct 25 2000	Case Management Order No. 1	<a href="#">cmo-1.pdf</a>
2	Nov 6 2000	Case Management Order No. 2	<a href="#">cmo-2.pdf</a>
3	Nov 10 2000	Case Management Order No. 3	<a href="#">cmo-3.pdf</a>
4	Dec 14 2000	Alaska's Unopposed Motion for Leave to File an Amended Complaint, Amended Complaint, and Brief in Support of Motion filed.	
5	Dec 20 2000	Case Management Order No. 4	<a href="#">cmo-4.pdf</a>



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*Alaska Department of Law*

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*Alaska Department of Law / Natural Resources*

Updated December 15, 2000

## Significant Natural Resources Cases

The following is a summary of many of the active subsistence, statehood defense, and other significant lawsuits being handled by the Natural Resources Section of the Alaska Department of Law.

### FEDERAL COURT CASES

1. Katie John v. U.S.
2. Stevens Village v. McVee and Rosier
3. Native Village of Quinhagak v. United States
4. Peratrovich v. United States
5. Kluti Kaah v. Alaska
6. State v. Harrison
7. State of Alaska v. United States [Southeast Alaska marine waters]
8. Confederated Tribes & Bands of the Yakama Indian Nation, et. al v. Baldrige
9. U.S. v. Washington
10. Alaska v. United States and Bruce Babbitt
11. Hyak Mining Co. v. U.S. [RS 2477]
12. Harold Kalve v. Frank Rue

### STATE COURT CASES

1. Kenaitze Indian Tribe v. State
2. Interior Airboat Ass'n v. State
3. Kachemak Bay Conservation Society, et al. v. State, DNR

4. Kashwitna Farms, Inc., Harry and Consuelo Wassink v. State
5. Koyukuk River Tribal Task Force v. Rue
6. Cigna Insurance Co. & Native Village of Mekoryuk, et al. v. Moses
7. Leuthe v. State of Alaska
8. Greenpeace, Inc. v. State
9. Greenpeace v. Alaska Dep't of Natural Resources
10. Greenpeace v. Alaska Dep't of Natural Resources
11. Cook Inlet Keepers v. State
12. Haida Corp. v. Patrick Galvin
13. Crivello v. State, CFEC
14. Kenai Peninsula Borough v. State, Dep't of Natural Resources
15. Alaska Trademark Shellfish, Zaugg, et al. v. ADF&G, et al.
16. Kenai Peninsula Borough v. State, DNR
17. The Association of Village Council Presidents, Inc., et al. v. State
18. Alaska Center for the Environment, et al. v. State of Alaska, DGC
19. Fallis, Walker v. ADF&G
20. AHTNA, Inc., et al. v. State
21. Kenneth H. Manning v. State
22. Alaska Wildlife Alliance, et al. v. Alaska Board of Game, et al.
23. Fish and Wildlife Enforcement Actions

### ADMINISTRATIVE PROCEEDINGS

1. In Re: Native Allotment Application of Donna Huff
2. In re: Native Allotment Application of Alfred Bayou
3. FPA Enforcement Actions

### FEDERAL COURT CASES

1. Katie John v. U.S. (Ninth Cir. No. 00-35121; our file no. 221-00-0474; state's attorney: Joanne Grace; plaintiffs' attorney: Heather Kendall of NARF; U.S.' attorneys: Dean Dunsmore and Elizabeth Ann Peterson). This is one of the jointly managed ANILCA subsistence cases. These cases had been stayed until October 1, 1999. The plaintiffs alleged that ANILCA requires the federal government to manage fisheries in navigable waters of

Alaska, and accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Bazulnetas.

Both the District Court and the Ninth Circuit Court of Appeals agreed in part and held that the term "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation). The court remanded the case to the Departments of Interior and Agriculture to identify those waters.

In January 1999, the Departments of Interior and Agriculture published final regulations to assume management of subsistence fisheries. The regulations cover subsistence activities on all waters within or adjacent to the exterior boundaries of 34 identified federal areas, including national parks, refuges, preserves, monuments, wild and scenic rivers, and national forests (excluding the marine waters of the Tongass and Chugach National Forests). They also extend the Federal Subsistence Board's management to some federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act until conveyed. In addition, the rules purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands. The rules became final in October 1999, and the U.S. District Court entered final judgment in the case on January 7, 2000, affirming its earlier orders and dismissing any remaining claims without prejudice. The state filed an appeal to the Ninth Circuit Court of Appeals on January 26, 2000. The court agreed to hear the appeal en banc. Oral argument will be December 20, 2000.

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2. Stevens Village v. McVee and Rosier (United States District Court No. A92-567-CV (HRH) (Judge Holland); our file no. 221-93-0123; state's attorney: Joanne Grace; plaintiffs' attorney: Carol Daniel; U.S.' attorneys: Bruce Landon and Dean Dunsmore). This is one of the jointly managed ANILCA cases.

In 1992, plaintiffs filed suit against the Federal Subsistence Board (FSB) and ADF&G, alleging they are being denied their federal subsistence priority within Game Management Unit 25(D) West. Following denial of a TRO, the federal defendants moved for a voluntary remand to the FSB. On remand, the FSB changed its regulations to accommodate plaintiffs' requests for: an extension of the season; provisions allowing a permittee to designate another person to hunt on his or her behalf; and closing federal public lands in GMU 25D West to hunting by non-local residents. The parties filed cross-motions for summary judgment on the only remaining issue: whether the FSB has authority to regulate hunting on state-managed lands adjacent to federal lands in GMU 25D West to protect subsistence uses on "public lands" in GMU 25D West. Judge Holland has characterized this as the "where II" issue.

Judge Holland tentatively indicated in the stay order that the FSB lacks authority off "public lands" because the Secretaries of Interior and Agriculture did not grant such authority in the regulations establishing the FSB. Judge Holland expressed no opinion on the question of whether the Secretaries themselves have that authority, but indicated that he would entertain further briefing on the issue. Meanwhile, the Stevens Village plaintiffs and others submitted a rulemaking petition to the Secretaries of Agriculture and Interior, requesting that they extend the FSB's authority to state and private lands. The parties agreed to stay the case while the Secretaries considered the petition.

In January 1999, the Departments of Interior and Agriculture published final regulations that purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on

state and private lands when these activities interfere with the subsistence priority on the public lands. The regulations became effective on October 1, 1999. To date, the secretaries have not attempted to restrict or eliminate moose hunting on state or private lands in GMU 25D West.

On December 16, 1999, the parties stipulated to dismissal of the case without prejudice. An order approving the stipulation was entered on January 3, 2000. The parties are now litigating attorney fees and costs.

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3. Native Village of Quinhagak v. United States (United States District Court No. A93-023-CV (HRH) (Judge Holland); Ninth Cir. No. 93-35496; our file no. 221-93-0041; state's attorney: Joanne Grace; plaintiffs' attorneys: Carol Daniel, John Starkey (AVCP); U.S.' Attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases.

The plaintiffs (the villages of Quinhagak and Goodnews Bay, the AVCP, and individual Yup'ik Natives) seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanektok and Goodnews Rivers for subsistence. The plaintiffs claim that navigable rivers are "public lands" for purposes of ANILCA, that the state has no subsistence jurisdiction over the waters of the Kanektok and Goodnews River systems, and that the federal government has the authority to regulate non-public lands and waters owned by the state when necessary to provide for subsistence uses. In September of 1994, the Ninth Circuit reversed Judge Holland's order denying the plaintiffs' motion for preliminary injunction. On remand, the court entered an order prohibiting the state and federal defendants from enforcing regulatory prohibitions on the subsistence harvest of rainbow trout while the case is pending. The plaintiffs were awarded

partial attorneys fees incurred in connection with the motion for preliminary injunction and appeal.

The regulations extending the federal subsistence program to certain navigable waters became final in October 1999. The federal district court entered final judgment in the case on January 10, 2000, affirming its earlier orders and dismissing the remaining claims without prejudice. The parties now are litigating the issue of attorneys fees.

[Back to top of page](#)

4. Peratrovich v. United States (United States District Court No. A92-734-CV (HRH) (Judge Holland); our file no. 221-93-0340; state's attorney: Joanne Grace; plaintiffs' attorneys: Thomas Luebben and Richard Young of Albuquerque, New Mexico; U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases. The case has been stayed while the United States Supreme Court hears Alaska v. United States, Orig. 128, which involves an issue similar to that raised in Peratrovich.

In an amended complaint filed on October 24, 1996, plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the marine waters of southeast Alaska as "customary trade." (The state "customary trade" regulation allows sale of up to 32 pounds of herring roe on kelp by an individual, and up to 158 pounds per household.) The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur.

Plaintiffs contend primarily that (1) the United States owns the submerged lands within the Tongass National Forest as a result of a prestatehood withdrawal, and (2) that the waters in question are "public lands" within the meaning of ANILCA, on a reserved

water rights theory.

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5. Kluti Kaah v. Alaska (United States District Court No. A90-004-CV (HRH) (Judge Holland); our file no. 221-90-0433; state's attorney: Joanne Grace; plaintiff's attorneys: Heather Kendall of the Native American Rights Fund (NARF) and Mike Walleri of Tanana Chiefs' Conference (TCC); U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases.

Plaintiffs and intervenors initially challenged state and federal regulations governing subsistence hunting of caribou in the Copper River basin. Plaintiffs claimed, among other things, that the federal regulations impermissibly fail to cover caribou located on state lands. This case has been consolidated with Arctic Regional Council v. United States. Kluti-Kaah filed an amended complaint which does not include any claims against the state. The court granted an unopposed motion by the federal government to dismiss TCC's claims against it, and the court dismissed all of TCC's claims against the state following an unopposed motion by the state.

On December 16, 1999, the parties stipulated to dismissal of the case without prejudice. An order approving the stipulation was entered on January 3, 2000. That parties are now litigating attorney fees.

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6. State v. Harrison (United States District Court No. A94-464-CV

(HRH) (Judge Holland); our file no. 221-95-0270; state's attorneys: John Baker and Robert Nauheim; private defendants' attorney: none, two successive attorneys withdrew). This action involves the state's assertion of a right-of-way for the Chickaloon River Road across the Native allotment owned by members of the Harrison family, who claim that the allotment constitutes sovereign Indian country. The Harrisons have relied on Chickaloon's inclusion on the 1993 BIA list of tribes to claim immunity from Alaska law, including charges of obstructing lawful public use of the Chickaloon River Road. The United States moved to dismiss the state's original complaint, initially arguing that the Quiet Title Act, 28 U.S.C. § 2409a, forbids any judicial inquiry into the validity of the state's right-of-way to the extent that "trust or restricted Indian land" is implicated. We amended our complaint to seek a title adjudication under 25 U.S.C. § 357, the federal condemnation statute. The Harrisons cross-claimed, alleging that the United States breached its trust obligation to the Harrisons as Natives by not defending the Harrisons' alleged ownership of the road.

In February 1997, Judge Holland dismissed the Harrisons' cross-claims against the United States and in May 1998, the court dismissed the Harrisons' counterclaims against the state. In October 1998, Judge Holland issued an order granting the state partial summary judgment on the state's claim of title to the road. On July 23, 1999, Judge Holland granted the state's further motion for summary judgment, ruling that only a 1.75-acre portion of the road, which had been realigned, had been "taken." The court also ruled that the value of the taken portion did not exceed the state's \$3,000 offer of judgment. On August 24, 1999, the court entered final judgment in favor of the state. The Harrisons appealed to the Ninth Circuit Court of Appeals, submitting a form "brief." After delays caused by motion practice to determine the status of the United States (with the court ruling the U.S. is no longer a party to the case), the state's brief was filed on June 29, 2000. On September 6, 2000 the court issued an order allowing the parties 10 days to submit reasons why oral argument should be held, an indication that the court is inclined to decide the case on the briefs. Although the Harrisons

did respond to the order, the court has not ruled on the request.

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7. State of Alaska v. United States [Southeast Alaska marine waters] (United States Supreme Court, No. 128, Original; our file nos: 221-99-0502, 221-99-791; state's attorneys: Joanne Grace and Laura Bottger, with outside counsel John Roberts, Jonathan Franklin, and Tom Koester; United States' attorneys: Jeff Minear, Mike Reed, and Bruce Landon).

The state filed a complaint against the federal government, claiming title to the lands underlying marine waters in Southeast Alaska, together with a motion requesting leave of the United States Supreme Court to file its case as an original action, in November of 1999. The suit was prompted by the Park Service's closure of commercial fishing in Glacier Bay National Park but extends to other areas of Southeast as well.

The action is based on the Submerged Lands Act and the equal footing doctrine, which grant states entering the Union title to the submerged lands within their boundaries as well as the lands underlying inland waters, including any historic waters. The state's complaint asserts the state's claim to all lands underlying marine waters in Southeast Alaska in three counts encompassing the submerged lands in Glacier Bay National Park, the Tongass National Forest, and jurisdictional "doughnut holes" more than three miles from the mainland or any islands within Southeast Alaska's inside passage.

The state filed its case as an "original action" that originates in the U.S. Supreme Court, rather than working its way through the lower courts. While the Supreme Court has jurisdiction over cases between a state and the federal government, it can decline the state's request that it take the case. The Court has appointed George Washington University Law Professor Gregory Maggs to

act as special master.

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8. [Confederated Tribes & Bands of the Yakama Indian Nation, et. al v. Malcolm Baldrige](#) (U.S. District Court for the District of Washington; state's attorney: Mike Stanley). This case has been resolved by a long term agreement in the Pacific Salmon Treaty. However, the court retains jurisdiction over the controversy.

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9. [U.S. v. Washington](#) (U.S. District Court for the Western District of Washington. [In U.S. v. Washington](#), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), Judge Boldt held that certain northwest Indian Tribes have a treaty fishing right to harvest 50 percent of the harvestable fish passing through recognized tribal fishing grounds. Under the continuing jurisdiction of the federal court, the northwest tribes now seek a ruling that their treaty rights include salmon caught in southeast Alaska that would otherwise return to tribal fishing grounds. The parties have filed a stipulation to stay the case for 10 years as a result of the 1999 amendments to the Pacific Salmon Treaty recently agreed upon by the United States and Canada.

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10. [Alaska v. United States and Bruce Babbitt \[RS 2477\]](#) (U.S. District Court No. F97-0009-CV (Judge Singleton); our file no.

221-97-0574; state's attorneys: Rob Nauheim and Laura Bottger; U.S.' attorney: Bruce Landon). On March 26, 1997, the state filed a quiet title action in federal court seeking to adjudicate an R.S. 2477 route on the Harrison Creek-Portage Creek Trail. The state has obtained entry of default against the mining claimants with claims located on the trail. The remaining parties are engaged in settlement discussions and the case has been stayed. The state recently dismissed its claim against a remaining defendant, and the state and the United States have now settled the case, recognizing a 60 foot right-of-way in the state.

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11. Hyak Mining Co. v. U.S. [RS 2477] (U.S. District Ct. No. A96-0478-CV (HRH); our file no. 221-97-0707; state's attorney: Elizabeth Barry; plaintiff's attorney: Mary Nordale; U.S.' attorney: Bruce Landon). Hyak Mining Co. sued the United States to quiet title to the Jualin Mine Road in Berner's Bay in southeast Alaska. The state is not a party to the action but state participation will be required to enable the parties to settle the case. Settlement discussions are progressing and the state has given the required 180-day notice of intent to sue to allow intervention in the case. Details regarding the means and methods of survey remain to be resolved between the parties.

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12. Harold Kalve v. Frank Rue, Commissioner of Fish and Game, William Daley, U.S. Sect'y of Commerce, Steve Penoyer (U.S. District Court, District of Alaska, No. A99-0004 (Judge Singleton) and State of Alaska v. Harold Kalve, Alaska Court of Appeals No. A-07394; our file nos. 221-99-0408, 221-00-0016,

and 221-99-0533; state's attorneys: Rob Nauheim and Lance Nelson; U.S.' attorneys: Lauren Smoker and Rick Monikowski; Kalve's attorney: Jim Brennan.) In 1998 Harold Kalve, an IFQ holder, was charged in state district court with fishing for sablefish in state waters (Resurrection Bay) after a state closure. Kalve asked the Seward District Court to continue or dismiss the criminal matter based on the suit he filed in U.S. District Court claiming that federal law and the federal Individual Fishing Quota (IFQ) program preempt the state from closing state waters when the federal waters are open. In June 1999, Magistrate Peck dismissed the state criminal case. He based his decision on the federal paramountcy doctrine – an issue that both parties agree does not apply here. The state appealed to the Alaska Court of Appeals to decide the merits of Kalve's preemption claim and whether to reinstate the criminal charge. On September 29, 2000, the Court of Appeals issued a decision reversing the District Court and reinstating the charges against Kalve. The court held that federal regulations did not preempt state regulations in state waters because federal regulations acknowledged the validity of state regulations. Kalve petitioned the Alaska Supreme Court for a hearing. The petition was recently denied.

In the federal court case, U.S. District Judge Singleton issued a favorable decision dismissing Kalve's case against ADF&G Commissioner Frank Rue on the basis that the 11th Amendment does not permit Kalve to sue the state in federal court. Judge Singleton stated that the 11th Amendment issue was a close one, and that his decision turned on an interpretation of Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261. In Coeur d'Alene the Supreme Court acknowledged the continuing validity of the Ex parte Young exception but found where a suit involves a particular interest affecting the state's sovereignty, the Ex parte Young exception does not apply and the suit is barred by the 11th Amendment. Judge Singleton held that Kalve's lawsuit "implicates the state's control of its fish and wildlife resources as well as similar sovereignty concerns" and that the Young exception should not apply. He further found that "Kalve's suit seeks to divest the state of all regulatory power over certain of the

State of Alaska's waters." Kalve amended his complaint to name the individual members of the Board of Fisheries, but after the adverse ruling in state court has agreed to stipulate to their dismissal.

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## STATE COURT CASES

1. Kenaitze Indian Tribe v. State (Alaska Superior Court No. 3AN-91-4569 Civ. (Anchorage, Judge Hensley); our file no. 223-91-0528; attorney for state: Steve White; attorney for plaintiffs: Carol Daniel). The Kenaitze tribe filed suit to challenge the Cook Inlet subsistence fishing regulations, and amended their complaint to challenge the constitutionality of the 1992 subsistence law. Other Native groups from Ninilchik, Eklutna and Knik intervened.

Judge Fabe granted summary judgment invalidating the nonsubsistence area provision of the 1992 law on the grounds that it violates the equal access provisions of the state constitution. In 1995 the Alaska Supreme Court reversed, holding that the nonsubsistence area provision is valid. However, the court found unconstitutional another provision of the 1992 subsistence law that makes the proximity of an individual's domicile a factor at the Tier II level. Regulations have been adopted to reinstate the nonsubsistence areas.

The Kenaitzes' challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage/MatSu/ Kenai Peninsula nonsubsistence area remains to be decided. The parties moved the court to stay proceedings on that claim in order to allow the Alaska legislature and Congress to take actions which would moot the case. As the legislature did not take those actions the briefing schedule has been reactivated. The tribes filed a

motion for summary judgment, the state filed an opposition, and the plaintiff's reply is due December 18, 2000.

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2. Interior Airboat Ass'n v. State (Fairbanks Superior Court No. 4FA-96-1494 Civ. (Judge Beistline); our file no. 221-97-0004; state's attorney: Kevin Saxby; Interior Airboat attorney: Lynn Levengood). The Airboaters sought to invalidate a regulation which prohibits the use of airboats for moose hunting near Nenana and another which limits aircraft use for hunting along part of the Noatak River. After briefing and oral argument, the court entered summary judgment in the state's favor, upholding the regulations. The Airboaters appealed the decision to the Alaska Supreme Court, and briefing and argument have been completed. We await the opinion.

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3. Kachemak Bay Conservation Society, et al. v. State, DNR (Alaska Superior Court No. 3AN-96-7609 Civ. (Anchorage, Judge Murphy); our file no. 221-98-0109; Intervenor-Appellee Alaska Mental Health Trust's attorney: Henry Wilson; Appellee Department of Natural Resources' attorneys: Lawrence Ostrovsky and Jeffrey Landry; Intervenor-Appellees' (Marathon Oil Co. and Union Oil Co. of California, Forcenergy, Inc., CIRI, Anadarko Corp.) attorneys: Susan Reeves and Tom Amodio, Rubini and Reeves; Appellants' attorney: Patrick Lavin, Trustees for Alaska). Kachemak Bay Conservation Society, et. al., appealed the administrative decision of DNR's Division of Oil and Gas that Oil and Gas Lease Sale 85-A was in the best interests of the state. The Alaska Mental Health Trust intervened in the litigation

because the Trust owns several of the parcels that were leased in the sale, and the Alaska Mental Health Trust Land Office had determined that the lease sale was in the best interests of the Trust, as separate from the best interests of the state as a whole. In a decision dated August 11, 2000, the Alaska Supreme Court found that Kachemak Bay Conservation Society's challenge failed in all respects, and affirmed.

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4. Kashwitna Farms, Inc., Harry and Consuelo Wassink v. State, consolidated with Hawkins v. Wassink (Alaska Superior Court No. 3AN-88-56 Civ. (Anchorage, Judge Joannides); our file no. 221-88-0853; Kashwitna Farms/Wassink's attorney: Joe Josephson; state's attorneys: Kevin Saxby and Rob Nauheim). These consolidated cases arise out of the Pt. MacKenzie Agricultural Project. The Wassinks acquired a dairy parcel and borrowed money from the Alaska Agricultural Revolving Loan Fund to develop it. When they failed to meet contractual development requirements, DNR sued them to terminate the land sale contract (Hawkins). When they defaulted on repayment of their loans, as the state was preparing to take collection action against them, they sued the state under various lender liability theories including misrepresentation, breach of fiduciary duty, and breach of the duty of good faith and fair dealings (Kashwitna Farms). The state countersued to collect the defaulted debt. In the Hawkins contract termination action, the superior court has twice granted the state summary judgment and the Alaska Supreme Court has twice reversed it, indicating that the Wassinks are entitled to a trial on their defenses that the contract should not be terminated under waiver, estoppel and contract frustration theories. The court has dismissed nearly all of the claims against the state with the affirmative defenses in Hawkins and the breach of duty of good faith and fair dealings and related issues in Kashwitna Farms remaining to be resolved. Recent efforts to

settle have been unsuccessful. Trial should be scheduled within the next several months.

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5. Koyukuk River Tribal Task Force v. Rue (Alaska Superior Court No. 4FA-99-561 and 4FA-00-777 (Fairbanks, Judge Greene); our file nos. 221-99-0630 and 221-00-0677; Koyukuk Tribal Task Force's attorney: Michael Walleri; state's attorney: Kevin Saxby). The seven village councils of the Koyukuk drainage have sued to obtain injunctive relief, requiring the Board of Game to make further findings as to the harvestable surplus and amounts reasonably necessary to provide for subsistence uses of moose, to eliminate or restrict nonsubsistence uses of moose in the area, and to require the department to implement an emergency closure of nonsubsistence uses until the desired regulatory scheme is in place. The trial court granted the state summary judgment because the tribal task force failed to exhaust administrative remedies. Following the Spring Board of Game meeting, at which Koyukuk moose issues were decided, the Tribal Task Force has filed a new, nearly identical, complaint. Summary judgment briefing is now being done.

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6. Cigna Insurance Co. & Native Village of Mekoryuk, et al. v. Moses, (Alaska Supreme Court No. S-08908/08918; state's attorney: Judy Rabinowitz; appellants' attorneys: Mark Figura & Tom Batchelor; appellee's attorney: Erling Johansen). This case is before the Alaska Supreme Court on interlocutory petitions for review of a superior court decision that the Native Village of Mekoryuk is not validly recognized as a tribal government. The

superior court reversed and remanded the Alaska Workers Compensation Board's determination that it lacked subject matter jurisdiction over a widow's workers compensation claims against the Native Village of Mekoryuk and its commercial enterprise because of the tribe's sovereign immunity from suit which had not been waived. The state filed an amicus brief in support of the petitions for review urging that the court clarify the state law on the status of federally recognized tribes in Alaska. The petitions were granted and briefing was completed. However, the parties reached a settlement and the appeal was dismissed.

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7. Leuthe v. State of Alaska (Alaska Supreme Court No. S-09343; Alaska Superior Court No. 3HO-98-62 Civ. (Judge Brown); our file no. 221-99-0173; state's attorney: John Baker; plaintiff's attorney: C. Michael Hough). Plaintiff alleges he was wrongfully denied a Cook Inlet drift gill net entry permit for commercial fishing of salmon. Plaintiff argues that his application was three years late due to "misadvice" by a state employee and therefore his application should be accepted. The state's position is that he was given good advice, not "misadvice", namely that he doesn't have enough points to qualify for a permit. The permit was, therefore, rightfully denied. Leuthe filed an opening brief and the state filed its opposition. On August 20, 1999, the superior court issued a memorandum decision upholding the CFEC, without waiting for Leuthe to file his reply brief. Leuthe appealed to the Alaska Supreme Court, and briefing was completed on August 30, 2000. As Leuthe did not request oral argument, the case is awaiting decision.

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8. Greenpeace, Inc. v. State (Anchorage Superior Court. No. 3AN-99-3350 Civ. (Judge Reese); our file no. 223-99-0408; state's attorneys: Lisa Weissler, Larry Ostrovsky, Mike Barnhill; Greenpeace's attorney: Nancy Wainwright; Intervenor BP's attorney: Jeff Feldman). Greenpeace filed an administrative appeal of the state's coastal program consistency determination for BP Exploration's Northstar Project. BP was granted intervenor status in the litigation. Briefing is complete, and oral argument was held September 7, 2000. A decision is pending.

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9. Greenpeace v. Alaska Dep't of Natural Resources (Anchorage Superior Court No. 3AN-00-3648 Civ., our file no. 221-00-0613; state's attorney: Rob Nauheim; Greenpeace attorney Nancy Wainwright). Greenpeace has appealed the Department of Natural Resources' decision to lift an automatic stay of the department's decision to issue a temporary water use permit for water used on the Northstar oil development project. Briefing will begin in December 2000.

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10. Greenpeace v. Alaska Dep't of Natural Resources (Anchorage Superior Court No. 3AN-00-3415; our file no. 221-99-0860; state's attorney: Rob Nauheim and Larry Ostrovsky; Greenpeace's attorney Nancy Wainwright. In October and November, 2000, superior court judge, pro tem, Sigurd Murpny remanded two water permits to the Department of Natural Resources for additional review. The permits had been issued to BP (Alaska) Exploration (BPXA) for oil development at the Northstar field. Judge Murphy ruled that the department must provide Greenpeace an opportunity for an administrative appeal

of the department's decisions on several legal issues related to a certificate of appropriation for oil development at Northstar. Judge Murphy also ruled that the department's issuance of a temporary water use permit to BPXA was not permissible without conducting public notice of the decision to issue the permit or conducting a review of the application under AS 46.15.080. The matter is now before the agency.

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11. Cook Inlet Keepers v. State of Alaska Office of Management and Budget, Div. of Governmental Coordination (Superior Court. No. 3AN 99-3482 Civ. (Judge Card); our file no. 223-00-0140; state's attorney: Lisa Weissler; appellant's attorney: Trustees for Alaska). Cook Inlet Keepers appealed the state's final coastal program consistency determination concurring with Forcenergy's certification that installation of an exploration drilling platform in Cook Inlet is consistent with the coastal program. The superior court ruled in favor of the state. Trustees have appealed to the Alaska Supreme Court. Appellant's brief is due December 22, 2000.

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12. Haida Corp. v. Patrick Galvin, Director, Division of Governmental Coordination, Office of Management and Budget, Office of the Governor, State of Alaska (Superior Court. No. 3AN 99-3455 Civ. (Judge Souter); our file no. 223-00-0052; state's attorney: Lisa Weissler; appellant's attorney: Cynthia Pickering Christianson). Haida Corporation appealed the state's final consistency determination that imposed stipulations on Haida's proposed hydroelectric project in Southeast Alaska. Haida objects to two of the stipulations, one related to screen size and the other to instream flow requirements. Haida has requested a

stay of the appeal pending issuance of the FERC license. The FERC license issued October 24, 2000. Haide is requesting another stay pending issuance and agency administrative appeals of state permits.

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13. Crivello v. State, CFEC (Kenai Superior Court No. 3HO-99-159 Civ. (Judge Brown), our file no. 221-00-0144; state's attorney: John Baker; appellant's attorney: C. Michael Hough). In this Rule 601 Administrative Appeal, Crivello claims the CFEC erred in denying him a limited entry permit for the Bristol Bay drift gill net salmon fishery. The appellant alleges that the CFEC improperly measured his "income dependence" on the fishery, and denied him due process by ruling, on reconsideration, to grant a third hearing on his claims. On August 21, 2000, the Superior Court affirmed the Commission's decision in all respects. On September 18, Crivello appealed to the Alaska Supreme Court. The briefing schedule is pending.

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14. Kenai Peninsula Borough v. State, Dep't of Natural Resources (Superior Court No. 3KN-00-30 Civ. (Judge Neville); our file no. 221-00-0444; state's attorney: Rob Nauheim; borough attorney: Holly Montague). The Kenai Borough challenges the state's reporting of the Quartz Creek Trail to the state legislature as a qualifying RS 2477 route under AS 19.30.400(b). The parties are engaged in settlement discussions and have moved the court for a stay until December 2000.

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15. Alaska Trademark Shellfish, Zaugg, et al. v. ADF&G, Commissioner Rue, and various ADF&G employees (Alaska Superior Court No. 1KE-00-211 Civ. (Judge Thompson); our file no. 223-01-0122; state's attorneys: Shannon O'Fallon and Steve White; appellants' attorneys: Bruce Weyhrauch and Clifford Smith). ATS sued for injunctive relief and damages over the Department of Fish and Game's alleged refusal to issue a decision on pending aquatic farm operating permits to geoduck farmers. Given the complicated nature of the issues involved with permitting aquatic farms in areas where there were large quantities of wild geoduck clams, ADF&G wanted to promulgate regulations before acting on the permits. ATS and the state reached an agreement for a date certain for issuing a decision which halted the original action. The department developed principles for issuing permits and drafted permits for the applicants to sign, but the aquatic farmers were not willing to abide by the permit conditions, leaving the Commissioner no choice but to deny the applications. ATS and five other applicants appealed to the superior court and the cases were consolidated. The issues on appeal are (1) how the department interprets the statute regarding conflicting uses at a proposed farm site; and (2) whether the department is correct that the law does not allow a farmer to harvest and sell wild resources off a farm site prior to engaging in any farming activity. ATS has filed its brief and the state is awaiting the other appellants' brief, before filing its response brief. In meantime, the promulgation of regulations is proceeding.

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16. Kenai Peninsula Borough v. State, DNR (Alaska Superior Court No. 3KN-00-257 Civ. (Judge Neville, pro tem); our file no: 221-00-0645; state's attorney: John Baker; KPB's attorney:

Collette Thompson). The Kenai Peninsula Borough, at the direction of newly-elected Borough Mayor Dale Bagley, filed an administrative appeal of the final Kenai Area Plan. The plan was prepared by DNR through an exhaustive 10-year planning process in which KPB participated actively. KPB asserts among its numerous points on appeal: that classifications under the plan threaten vested Borough selection rights under Title 29; that the DNR did not allow KPB sufficient participation in the planning process; that DNR classified land arbitrarily and capriciously, without adequate factual support; and that DNR was under a duty to provide selections of similar value to those KPB was forced to relinquish as a result of the Mental Health Trust land litigation. On June 30, 2000 the parties reached a settlement and signed a stipulation for dismissal of the case with prejudice. In return for the dismissal of KPB's claims, the state will expedite processing of KPB's remaining selections and facilitate the reclassification of certain lands currently managed by DOT under Interagency Land Management Agreements. DNR will also allow KPB a "first right of refusal" to select lands, if any, that become available due to reclassification within 10 years from the date of settlement.

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17. The Association of Village Council Presidents, Inc., et al. v. State of Alaska, Division of Governmental Coordination (Bethel Superior Court No. 4BE-00-263 Civ. (Judge Curda); our file no. 223-01-0153; state's attorney: Lisa Weissler; appellant's attorney: Scott Jay Sidell). AVCP appealed the state's coastal program consistency determination for the U.S. Postal Service's proposal to deliver mail via Hovercraft in the Yukon-Kuskokwim. The record was due December 11, 2000.

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18. Alaska Center for the Environment, et al. v. State of Alaska,

Division of Governmental Coordination (Anchorage Superior Court No. 3AN-00-3737 Civ. (Judge Tan); our file no. 223-01-0146; state's attorneys: Lisa Weissler, representing DGC and Jim Cantor, representing DOT, AIA; appellant's attorney; Trustees for Alaska). ACE appealed the state's coastal program consistency determination for the Corps of Engineers' ten-year wetland fill permit to be issued to the Anchorage International Airport. The record is due December 25, 2000.

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19. Fallis, Walker v. ADF&G (1JU-00-551 Civ. (Judge Weeks); our file no. 223-00-0341; state's attorney: Shannon O'Fallon; plaintiffs' attorney: Robert Reges). Plaintiffs filed suit for injunctive relief and damages after ADF&G found the expansion of their trailer park project inconsistent with the ACMP. Plaintiffs needed a stream crossing permit to cross an anadromous stream, which is what triggered ACMP review. The catalogued stream is alleged to be an artificially dug drainage ditch that over time has attracted rearing juvenile coho salmon. Plaintiffs challenged ADF&G's authority to regulate an artificial stream, and on partial summary judgment, Judge Weeks agreed, though he found there were material facts as to whether this stream was artificial or natural. The Judge also found there were open questions regarding how the stream had been catalogued and how it was mapped. The outstanding claims are inverse condemnation, trespass, and interference with prospective business relations. The claimed damages are approximately \$850,000 in lost profits. The case is set for trial in September 2001, but the parties are working toward a mutually agreeable resolution of the case.

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20. AHTNA, Inc., et al. v. State, (Alaska Superior Court No. 3PA-00-916 Civ. (Judge Beverly Cutler) our file no. 221-01-0195,

state's attorneys, Kevin Saxby and Lance Nelson; AHTNA, et al., attorneys, Patrick Anderson and James Brennan). AHTNA, et al., are suing to invalidate regulations which authorize the hunting of the Copper River Bison Herd, under the theory that the regulations cause trespass on Native Corp. lands in the area. The court denied preliminary injunctive relief; and a motion to dismiss filed by the state is now pending.

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21. Kenneth H. Manning v. State (Alaska Superior Court No. 3AN-00-8814 Civ. (Judge Sen Tan); our file nos. 221-01-0056 and 221-01-0235; state's attorney, Kevin Saxby; Ken Manning, pro se). Suit challenging Tier II hunting permit application scoring process and seeking to halt Nelchina Caribou Herd hunt until re-scoring is complete. Arguments are that the scoring decisions unconstitutionally take place of residence into account. The superior court denied preliminary injunctive relief, and the plaintiff immediately appealed to the state supreme court. After the appeal was dismissed because no final judgment had yet been entered by the trial court, litigation has again focused at the superior court level. A trial setting conference was held on December 7.

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22. Alaska Wildlife Alliance, et al. v. Alaska Board of Game, et al. (Alaska Superior Court No. 3AN-00-12369 Civ.; (Judge Peter Michalski); state's attorneys: Kevin Saxby and Sabrina Fernandez; plaintiffs' attorney: Tom Meacham). Alaska Wildlife Alliance, et al. have sued seeking declaratory relief and orders requiring that the Board of Game be disbanded, that its powers be vested in the commissioner of the Department of Fish and Game, and that the Board then be reconstituted to include

nonconsumptive use advocates. They claim that the Board historically and currently represents only hunting, trapping and guiding interests and so does not represent the views of a majority of Alaskans, thus violating the Board's enabling act and several state constitutional provisions. The state's answer is due in approximately a month.

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### 23. Fish and Wildlife Enforcement Actions

Several attorneys in our section pursue various actions against those persons and companies that commit serious violations of the state's fish and game laws. These attorneys work closely with the Division of Fish and Wildlife Protection and the Department of Fish and Game. Some of their cases involve seizure of vessels and equipment and subsequent forfeiture actions. Other cases involve claims for damages for the value of illegally taken fish, or damages for injury or loss to the fishery resources of the state. In addition, as time allows, these attorneys provide briefing, consultation, and other back-up assistance to the District Attorney's Offices around the state in criminal cases involving violations of state fish and game laws. Monetary recoveries in these cases amount to several million dollars over the last few years, with part of that money going to the Fish and Game Fund and the remainder to the state's general fund.

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## ADMINISTRATIVE PROCEEDINGS

1. In Re: Native Allotment Application of Donna Huff (BLM Serial

No. AA-8185 (Hearing Officer: Elizabeth Carew); state's attorney: Laura C. Bottger; applicant's attorney: Alaska Legal Services Corp.). On September 26-27, 1996, an Aguilar hearing was conducted in Anchorage before the BLM hearing officer to determine whether Donna Huff's use of a 110 acre parcel of land situated in Kachemak Bay State Park satisfied the requirements of the Native Allotment Act. The state selected the land claimed in the application on June 13, 1962. At the hearing, Donna Huff testified on her own behalf while the state presented six witnesses to contest Ms. Huff's claim of qualifying use and occupancy. Each of the state's witnesses had either fished off the shore of the claimed parcel or otherwise occupied adjacent homestead property at the critical time. Briefing has been completed.

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2. In re: Native Allotment Application of Alfred Bayou (BLM Serial No. A-023839 (Hearing Officer: Elizabeth Carew); state's attorney: John Baker; applicant's attorney: Bart Garber). The applicant claims a 160-acre Native allotment located on Kachemak Bay outside of Seldovia. The heirs of the applicant claim use and occupancy of this parcel dating from 1943. At a hearing held in Seldovia on September 17, 1996, the state put on evidence that the applicant only made sporadic, intermittent and non-exclusive use of the parcel, not satisfying the standards of the Native Allotment Act. Post-hearing briefs have been filed and the parties are awaiting a decision from the hearing officer.

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3. FPA Enforcement Actions

Kevin Saxby represents DNR in various administrative actions involving violations of Alaska's Forest Practices Act. The cases often involve assessing liability for illegal harvest within riparian buffer zones, illegal bridge or stream crossings, anadromous waterbody classifications, and similar issues.

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