3/14/12 CONFIRMATION HEARING: ATTORNEY GENERAL MICHAEL GERAGHTY

<TARGET><BILL></BILL><SUBJECT>3-14-12 CONFIRMATION HEARING ATTORNEY GENERAL MICHAEL GERAGHTY</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3·14·12

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointment be forwarded to a joint session for consideration:

Attorney General – Department of Law
Michael C. Geraghty

This does not reflect an intent by any of the members to vote for or against the confirmation of the individual during any further sessions.

Signature:	**Printed Last Name**
	Wielechowski
	Coghill
	Paskvan
	McGuire
Chair:	French

Please return to the Senate Secretary's Office (Room 213).

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

1. Describe your law school experience. Where and when did you attend law school? Did you receive any honors? Did you participate in your school's law review? Moot court? Legal aid clinic? Any other details about that time in your life?

2. Describe your legal employment after law school. What subject areas have you practiced in? How many other lawyers did you practice with? How many jury trials have you completed? How many appearances have you made before the Alaska Supreme Court? Before the Ninth Circuit Court of Appeals? Have you published in any legal journals?

3. What do you see as the primary mission of the Attorney General?

4. What is the biggest challenge facing the civil division? What actions do you plan to take in reaction to that challenge?

5. What is the biggest challenge facing the criminal division? What actions do you plan to take in reaction to that challenge?

6. Are you satisfied with the turnover rates in the criminal division? If not, what actions do you plan to take to lower the turnover rates?

7. Alaska suffers from some of the highest sex assault and sex abuse rates in the nation. Are prosecutions of this crime increasing? Are trials on these charges increasing? Please provide some statistics on this subject. What actions do you plan to take in this area?

8. What will be your Department's approach to the issues of tribes and tribal sovereignty in Alaska? For instance, at the 2012 Crime Summit, Walt Monegan, CEO of the Alaska Native Justice Center suggested the creation of a pilot project creating tribal or community courts in villages that are currently not served by the state court systems. What is your view on cooperative ventures such as this?

9. The State challenged the listing of polar bears and beluga whales, as well as recent protections for stellar sea lions as threatened species under the Endangered Species Act. These challenges have failed. Do you foresee continued challenges of this sort, given the state's record?

10. Recent news articles discussed a Department of Fish and Game initiative that would give special hunting privileges to some private landowners. The story noted the involvement of an assistant Attorney General in developing this proposal. The Alaska constitution provides that all state resources, including wildlife, are "reserved to the people for common use". Tell us your thoughts regarding the constitution's provision of common use versus the provision of special hunting permits for landowners.

11. State leases for oil and gas development require the operator of the lease to drill wells when "a reasonable profit" can be made. How does law and case law define "a reasonable profit" under these leases?

Geraghty, Michael
State of Alaska Attorney General

MICHAEL C. GERAGHTY

mgeraghty@dmgz.com

PROFILE

Since he joined the firm in 1979, Mr. Geraghty's work has been devoted exclusively to litigation and trial practice before state and federal courts. He has assumed lead counsel responsibilities in all of his trials, which have included both civil and criminal law, as well as proceedings before the OSHA Review Board, the Alaska State Commission on Human Rights and the U.S. Land Commission. He has tried cases before juries in Fairbanks, Anchorage, Barrow, Kenai and Dillingham. Mr. Geraghty has been selected in The Best Lawyers in America in the specialties of Construction Law and Personal Injury Litigation since 2007 and he has also been recognized as a "Superlawyer" by Washington Law & Politics magazine since 2008. In 2005 he was appointed by the Governor to serve Alaska as a Uniform Law Commissioner to the National Conference of Commissioners on Uniform State Laws. In 2007 he was honored by his peers when he received the Board of Governors Professionalism Award "in recognition of exemplary conduct in his association with the public, his colleagues and the legal community." In 2011, he was elected to the Fellows of the American Bar Foundation "in recognition of outstanding dedication to the welfare of the community, the traditions of the profession and the advancement of the objectives of the American Bar Association."

PRACTICE DESCRIPTION

Born and raised in Alaska, Mr. Geraghty's practice has focused on industries and areas that reflect this state's growth and history, including natural resources, oil and gas and construction. He has been involved in numerous complex litigations, including class actions and anti-trust. Many, if not most, of these cases pose

unique challenges in terms of developing orderly plans for discovery, document production, depositions of witnesses and experts, and other related matters.

He has handled approximately 20 appeals to the Alaska Supreme Court in the areas of sovereign immunity, administrative law, insurance and bad faith, attorney-client privilege, OSHA regulations, personal injury, products liability and premises-landowner liability. His reported cases include:

- Harris v. Ahtna Government Services Corp., 193 P.3d 300 (Alaska 2008)
- Kirk v. Demientieff, 145 P.3d 512 (Alaska 2006)
- Halliburton Energy Services v. State of Alaska, Department of Labor Division of Labor Standards and Safety, Occupational Safety and Health Section, 2 P.3d 41 (Alaska 2000)
- McCubbins v. State of Alaska, Department of Natural Resources, Division of Parks and Recreation, 973 P.2d 588 (Alaska 1999)
- State of Alaska v. State Farm, 939 P.2d 788 (Alaska 1997)
- State of Alaska v. Sanders, 944 P.2d 453 (Alaska 1997)
- City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271 (Alaska 1994)
- Central Constr. Co. v. The Home Indem. Co., 794 P.2d 595 (Alaska 1990)
- Lake v. Constr. Mach., Inc., 787 P.2d 1027 (Alaska 1990)
- Myers v. Snow White Cleaners, 770 P.2d 750 (Alaska 1989)
- Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988)
- Wade Oilfield Serv. Co. v. Providence Washington Ins. Co., 759 P.2d 1302 (Alaska 1988)
- Cheeks v. Wismer & Becker, 742 P.2d 239 (Alaska 1987)
- Exxon Corp. v. Alvey, 690 P.2d 733 (Alaska 1984)
- Miller v. Northside Danzi Constr. Co., 629 P.2d 1389 (Alaska 1981)
- Black v. Universal Services, Inc., 627 P.2d 1073 (Alaska 1981)
- Ribar v. H & S Earthmovers, 618 P.2d 582 (Alaska 1980)
- Board of Educ. v. Ewig, 609 P.2d 10 (Alaska 1980)

Michael's approach is client-focused, solution-driven and premised on providing timely and superior service.

PROFESSIONAL AND COMMUNITY ACTIVITIES

- Uniform Law Commissioner, National Conference of Commissioners on Uniform State Laws
- American Bar Association Litigation Section and Construction Industry Forum
- Federation of Defense and Corporate Counsel (FDCC)
- Fellow, American Bar Foundation

EDUCATION

- University of Santa Clara, J.D., *Cum Laude*, 1978
- University of Hawaii, B.A., Political Science, 1974

BAR AND COURT ADMISSIONS

- Alaska Bar Association
- United States District Court for the District of Alaska
- United States Court of Appeals for the Ninth Circuit

Attorneys At Law
DMGZ
DeLisio Moran Geraghty & Zobel, P.C.

 | 943 West 6th Avenue • Anchorage, AK 99501
Phone: 907.279.9574 • Fax: 907.276.4231 | Site Map

POFD Form

Completed

Submission Date: **02/26/2012**

Filer Information

First Name: **Michael**
Last Name: **Geraghty**
Address: **6761 Reklas Cir.**
City, State Zip: **Anchorage, Alaska 99502**
Contact Phone: **907. 248.4057**
Alternate Phone: **907.269.3787**
Fax (Optional): **none**
Email: **mcgeraghty@gci.net**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Ruth Mishel geraghty**
Dependent Children: **4**
Non-Dependent Children: **0**

Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Executive**
Position: **Commissioner**
Department: **Department of Law**
Report Type: **Initial**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	DeLisio Moran geraghty & Zobel, P.C. 943 W. 6th Ave. Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 01/31/2012 Time Worked: typically Mon-Friday, 8:30 to 5 pm or thereabouts	Partner in law firm bearing my name	**$200,000 - $500,000**
Others	Rental	Tenant: Golat Inc.d/b/a North Star Auto Sales		**$5,000 - $10,000**
Filer	Dividend or Interest	PFD and family investment entities		**$5,000 - $10,000**
		Delisio, Moran, Geraghty & Zobel PC Hourly From: 01/01/2011 Through 12/31/2011 Time Worked: 12 months	Legal Services	**$200,000 - $500,000**

Client Names	Client Addresses	Client Amount
Ahtna Government Services Corporation	c/o 943 W. 6th Avenue, Anchorage, AK 99502	$200,000 - $500,000
Alaska Pacific Environmental Services	c/o 943 W. 6th Avenue, Anchorage, AK 99502	$20,000 - $50,000
Alaska Airlines	c/0 943 W. 6th Avenue, Anchorage, Ak 99502	$2,000 - $5,000
Alaska Public Entity Insurance	Pending	$10,000 - $20,000
Alaska National Insurance	Pending	$5,000 - $10,000
Alaska Timber Insurance Exchange	Pending	$50,000 - $100,000
Alaska USA Federal Credit Union	Pending	$2,000 - $5,000
American Interstate Insurance	Pending	$20,000 - $50,000

Anchorage School District	Pending	$20,000 - $50,000
ANPI, LLC	Pending	$2,000 - $5,000
Aramark	Pending	$20,000 - $50,000
ESIS Portland Claims	Pending	$5,000 - $10,000
Arctic Slope Regional Corporation	Pending	$100,000 - $200,000
ASTAC	Pending	$50,000 - $100,000
WH Pacific	Pending	$20,000 - $50,000
ASEA Legal Services Trust	Pending	$1,000 - $2,000
ASRC Energy Services	Pending	$100,000 - $200,000
Atigun, Inc	Pending	$20,000 - $50,000
Auto Owners Insurance Company	Pending	$2,000 - $5,000
Barrett & Associates Insurance	Pending	$1,000 - $2,000
Bombardier Aerospace	Pending	$1,000 - $2,000
Bristol Bay Borough	Pending	$5,000 - $10,000
Broadspire	Pending	$20,000 - $50,000
Mr. and Mrs. C.R. Foss	Pending	$5,000 - $10,000
The Center for Community	Pending	$2,000 - $5,000
CH2M Hill Constructors, Inc	Pending	$100,000 - $200,000
Chuck Slagle	Pending	$2,000 - $5,000
Church Mutual Insurance Co.	Pending	$5,000 - $10,000
Claim Professional Liability	Pending	$1,000 - $2,000
CNA Ins.	Pending	$2,000 - $5,000
Common Point, LLC	Pending	$2,000 - $5,000

Filer	Self Employment	~~Conam Construction Co.~~	~~Pending~~	~~$1,000 - $2,000~~
		Constitution State Services	Pending	$10,000 - $20,000
		Crawford Integrated Services	Pending	$10,000 - $20,000
		Crawford & Company	Pending	$10,000 - $20,000
		Dock Street Building Corporation	Pending	$1,000 - $2,000
		Electric Power Systems, Inc.	Pending	$5,000 - $10,000
		Enstar Group	Pending	$1,000 - $2,000
		Era Helicopters	Pending	$1,000 - $2,000
		First Bank	Pending	$50,000 - $100,000
		First Citizens Bank and Trust	Pending	$2,000 - $5,000
		First National Bank of Alaska	Pending	$200,000 - $500,000
		GCI Inc.	Pending	$10,000 - $20,000
		Haines Sanitation, Inc.	Pending	$2,000 - $5,000
		Harland Financial Solutions	Pending	$5,000 - $10,000
		Hudson Cook - Omni Financial	Pending	$5,000 - $10,000
		JL Properties Inc.	Pending	$5,000 - $10,000
		Kinross Gold U.S.A. Inc.	Pending	$2,000 - $5,000
		Lloyd Kompkoff	Pending	$1,000 - $2,000
		Firstgroup America	Pending	$2,000 - $5,000
		Laker Electric, Inc.	Pending	$1,000 - $2,000
		Liberty Mutual Insurance	Pending	$20,000 - $50,000
		Liberty Northwest	Pending	$100,000 - $200,000
		Little Red Services	Pending	$5,000 - $10,000
		Livingreen	Pending	$1,000 - $2,000
		Lowe's Inc.	Pending	$5,000 - $10,000

Marsha L. Marke	Pending	$2,000 - $5,000
Matanuska Valley Federal Credit Union	Pending	$1,000 - $2,000
McKinley Fence Company of Alaska	Pending	$10,000 - $20,000
Theodore Meiners	Pending	$2,000 - $5,000
Midland Loan Services Inc.	Pending	$1,000 - $2,000
Juris Mindenbergs	Pending	$1,000 - $2,000
Morris Engineering Group	Pending	$5,000 - $10,000
NANA Management Services	Pending	$10,000 - $20,000
Northern Adjusters	Pending	$2,000 - $5,000
Northrim Bank	Pending	$20,000 - $50,000
Novapro Risk Solutions	Pending	$10,000 - $20,000
Ocwen Loan Services, Inc.	Pending	$2,000 - $5,000
OTZ Telephone Cooperative	Pending	$2,000 - $5,000
Petro Star	Pending	$20,000 - $50,000
Platinum Jaxx, Inc.	Pending	$1,000 - $2,000
Providence Washington Insurance	Pending	$1,000 - $2,000
PTP Management, Inc.	pending	$5,000 - $10,000
Q-1 Corporation	Pending	$20,000 - $50,000
Resort Associates	Pending	$1,000 - $2,000
Dean Rickerson	Pending	$2,000 - $5,000
Kenneth V. Schaefer	Pending	$2,000 - $5,000
Ballard Smith	Pending	$10,000 - $20,000
Sedgwick	Pending	$20,000 - $50,000
Specialty Risk Services	Pending	$50,000 - $100,000

		Stokes, Roberts & Wagner	Pending	$5,000 - $10,000
		Tanacross, Inc.	Pending	$5,000 - $10,000
		Trans-Pac Alaska, Limited	Pending	$2,000 - $5,000
		Tyonek Contractors, LLC	Pending	$10,000 - $20,000
		Ukpeagvik Inupiat Corporation	Pending	$5,000 - $10,000
		Unique Machine, LLC	Pending	$1,000 - $2,000
		University of Alaska	Pending	$20,000 - $50,000
		Hal K. Ward	Pending	$2,000 - $5,000
		Washington Capital	Pending	$20,000 - $50,000
		Waterfall Group	Pending	$20,000 - $50,000
		Wausau Insurance Companies	Pending	$20,000 - $50,000
		Wells Fargo Bank N.A.	Pending	$10,000 - $20,000
		Wilton Adjustment Services	Pending	$20,000 - $50,000
		Zurich International	Pending	$5,000 - $10,000
		Marvin and Hue McConnell	pending	$10,000 - $20,000
		ARECA Ins. Exchange	pending	$2,000 - $5,000

INTERESTS

Owner	Type	Detail	Description	Interest
Filer	Business	Business Name: Geraghty Bros. LLC 6761 Reklas Cir. Fairbanks, Alaska 99707	Business owned w/ my brother; owns real estate in Fairbanks.	Position / Type: member/owner
		Business Name: Angela Geraghty Family Ltd. Partnership	Family-owned business that holds various real estate and	Position / Type:

Filer	Business	6761 Reklas Cir. Anchorage, Alaska 99502	securities.	General and limited partner
Filer	Real Property	Metro Industrial Park and other property in Fairbanks,Alaska Fairbanks, Alaska 99701	Ownership Interest: Geraghty Bros., LLC owns 4-6 parcels of ground in Fairbanks, including a recreational cabin at Harding Lake.	
Filer	Beneficial	Managed By: Fidelity	Delisio Moran Geraghty & Zobel Profit-Sharing Trust	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer	Lender	Wells Fargo home mortgage
Filer	Lender	Wells Fargo pers. line of credit secured by primary residence
Filer	Lender	Toyota Financial Services auto loan

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

Dubious relocation of Anchorage, Mat-Su moose makes no sense

Begich: Exempt Native hunters from duck-stamp fee, charge others more

Brace for impact: Solar flare could mean brilliant northern lights, electrical disruption

Arctic

Judge delivers 'bittersweet' polar bear ruling

Amanda Coyne | Oct 17, 2011

In a ruling that both environmentalists and Alaska Rep. Don Young can applaud, U.S. District Judge Emmet Sullivan threw out a key section of an Interior Department rule that declared global warming is threatening the survival of the polar bear, making regulations of greenhouse gases mandatory.

Sullivan said that Fish and Wildlife Service failed to conduct a proper environmental review when creating the protections for the polar bear. The agency must now go back and conduct an environmental assessment of the outcome of the rule, and consider other options.

In other words, according to **Politico,** "the Obama administration can't be forced to use endangered species law to regulate greenhouse gases . . . but it can't ignore the idea either."

Politico quotes the judge as writing the following:

> The question at the heart of this litigation — whether the ESA is an effective or appropriate tool to address the threat of climate change — is not a question that this court can decide based upon its own independent assessment, particularly in the abstract. The answer to that question will ultimately be grounded in science and policy determinations that are beyond the purview of this court.

In keeping with his optimistic disposition, Young all but declared victory:

> Today's decision by a federal judge that the Fish and Wildlife Service cannot use the Endangered Species Act to regulate greenhouse gas emissions is the right one. The lawsuits to list the polar bear as endangered were never about protecting polar bears. Instead they were nothing more than a back door approach to regulate CO2 and stop responsible development from moving forward. This is a good decision, not only for Alaska but for this nation as we look to become more energy independent.

A press release sent by the groups who brought the case to court -- Center for Biological Diversity, Natural Resources Defense Council, Greenpeace and Defenders of Wildlife -- said that today's ruling "does not limit the applicability of the ESA to greenhouse gas emissions affecting species listed as endangered under the Act or to other threatened species for which Interior has not issued a specific exemption."

It called the ruling, "bittersweet."

Sullivan is the same judge who presided over the corruption trail of the late **Sen. Ted Stevens**, and who subsequently threw out his conviction.

*Contact Amanda Coyne at **amanda(at)alaskadispatch.com***

Dubious relocation of Anchorage, Mat-Su moose makes no sense

Begich: Exempt Native hunters from duck-stamp fee, charge others more

Brace for impact: Solar flare could mean brilliant northern lights, electrical disruption

EARTHJUSTICE
Because the earth needs a good lawyer

Steller Sea Lion Protections in Aleutian Islands Upheld

Alaska, industry groups' challenge to fishery restrictions rebuffed
January 20, 2012
Juneau, AK —
Alaska, industry groups' challenge to fishery restrictions rebuffed
Juneau, AK
Contact:
Colin O'Brien, Earthjustice, (907) 500-7134
Michael LeVine, Oceana, (907) 723-0136
January 20, 2012

Today, the United States District Court for the District of Alaska upheld protections for the Western Population of Steller sea lions. The new measures were put in place by the National Marine Fisheries Service (NMFS) to reduce competition between large-scale commercial fisheries and endangered Steller sea lions in the Aleutian Islands.

The ruling came after the State of Alaska and industry groups sued to have the sea lion protections thrown out.


Steller sea lions are powerful, playful creatures that are gracefully adept at moving through icy waters. (NOAA)

"It's a good day for our oceans," said Susan Murray, Oceana's Senior Director, Pacific. "This decision shows that responsible management requires steps to

protect healthy ocean ecosystems including sustainable fisheries and vibrant communities. We are moving away from managing single species money fish and toward ecosystem-based management that takes into account the needs of apex predators in our oceans."

The court found that the agency based its decision on good science and, with one exception, followed appropriate process. According to the court, the agency did not comply with the law in failing to prepare a full environmental impact statement.

"Today's decision validates the agency's use of the best science to protect our oceans," said Colin O'Brien, staff attorney at Earthjustice, "The next step is a full evaluation of the impacts of fisheries on ocean ecosystems, including Steller sea lions."

Oceana and Greenpeace, represented by Earthjustice, intervened in the lawsuit to defend the new measures.

The parties will submit briefing on the scope of the new environmental impact statement by February 8.

Contact:
Colin O'Brien, Earthjustice, (907) 500-7134
Michael LeVine, Oceana, (907) 723-0136

URL: http://earthjustice.org/news/press/2012/steller-sea-lion-protections-in-aleutian-islands-upheld

adn.com
Anchorage Daily News

Federal judge backs listing of Inlet belugas as endangered

ENDANGERED: State failed on all points, federal judge rules.

By RICHARD MAUER

(11/22/11 16:54:57)

For the second time in less than six months, a federal judge on Monday threw out a lawsuit by the Parnell administration challenging an endangered species listing, this time involving Cook Inlet's beluga whales.

In the latest ruling, the chief judge of the Washington, D.C., District Court, Royce Lamberth, said the state failed on all its points to show that the National Marine Fisheries Service improperly designated belugas as endangered in the Cook Inlet region.

That follows a similar decision in June by another federal judge in Washington, Emmet Sullivan, who said the U.S. Fish and Wildlife Service properly designated polar bears as endangered. The state is appealing that decision.

Bob Shavelson of Cook Inletkeeper, one of the organizations that intervened in the beluga case in support of the federal fisheries service, said the ruling demonstrated that the state's lawsuit was "a waste of taxpayer money."

"The state would be better served paying scientists instead of lawyers and letting the scientists do science and not be handcuffed by politics," said Shavelson. He was referring in part to a Parnell administration order, issued in connection with beluga recovery efforts, that barred state scientists from publicly disagreeing with administration policy.

In a prepared statement, Alaska Attorney General John Burns expressed disappointment with the ruling.

State officials say they are concerned that recovery efforts for belugas,

if too strict, could threaten oil and gas development and shipping in the Inlet. Escopeta Oil Co., which recently announced a major gas discovery in Cook Inlet, had intervened in the lawsuit on the side of the state.

"We maintain that the listing process was defective because it did not sufficiently involve the state or consider the conservation measures already in place to protect Cook Inlet belugas," Burns said. "We are reviewing the decision and considering further options."

But in his ruling, Lamberth, a Reagan appointee, took note of the state's conservation measures and rejected them as inadequate.

"Ultimately, whatever conservation efforts were already being made by the state ... clearly had not demonstrated a degree of effectiveness sufficient to alleviate concern over the small population size in Cook Inlet, since the population had shown no signs of recovery and was indeed continuing to decline," Lamberth wrote in his decision.

The failure of the state to renew its coastal management program -- bills to do so died this year in the Alaska Legislature -- "certainly does not help (Alaska's) argument that the (National Marine Fisheries) Service somehow overlooked an important state-sponsored conservation effort," the judge wrote in his 25-page decision.

Lamberth also rejected the state's contention that its objections weren't adequately heard by the federal government.

"But the record reflects that the Service held four public hearings -- three in Alaska and one in Maryland -- and received approximately 180,000 public comments on the Proposed Rule," Lamberth wrote. "In any event, plaintiffs' argument that the opportunity for public comment was somehow not 'full' borders on the absurd."

Instead, he said, the National Marine Fisheries Service "considered -- and thoroughly responded to -- each of Alaska's objections to the Proposed Rule."

While beluga populations around the Northern Hemisphere are generally healthy, the subspecies in Cook Inlet begin sliding in the 1980s, then declined dramatically from 1994 to 1998 in a

"catastrophic spree of subsistence whaling," Lamberth wrote.

"Aided by modern technology, Alaska Natives decimated the beluga population in Cook Inlet, harvesting nearly half of the remaining 650 whales in only four years," Lamberth said.

New rules put a moratorium on the hunt. The federal government declined to list belugas as endangered in 2000, predicting the population would bounce back. Instead, Lamberth said, whale numbers continued to decline an average of more than 1 percent a year.

The 1973 Endangered Species Act has five criteria for determining whether a species should be listed. While any one would have been adequate, Lamberth said, Cook Inlet belugas met all five. On April 20, 2007, the fisheries service proposed listing belugas and scheduled a public comment period. It issued its final ruling Oct. 28, 2008, in the waning days of the Bush administration.

In February, the fisheries service designated more than 3,000 square miles of Cook Inlet shoreline and marine area as critical habitat for belugas, leading some state officials and development advocates to complain that the local economy could be stifled. Federal officials urged more cautious reactions, saying they had no plans to turn the Inlet into an exclusive zone for whales, which in any event had coexisted with offshore oil drilling and shipping for decades.

Among a dozen parties to the lawsuit, initially brought by Alaska on June 4, 2010, were the whales themselves, represented by four attorneys from environmental organizations. Lamberth took over the case after another judge allowed the famed white whales to join the lawsuit as an intervenor defendant. He described that status as a "noble gesture" with "no legal significance."

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adn.com
Anchorage Daily News

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Alaska joins appeal of ruling on polar bear 'threatened' status

By RICHARD MAUER
rmauer@adn.com
(08/27/11 13:21:10)

The Parnell administration on Friday joined a parade of parties appealing the June decision by a federal judge in Washington, D.C., that the government correctly listed polar bears as a threatened species.

On Thursday, 35 plaintiffs and intervenors, some working together, filed three separate notices that they were appealing U.S. District Judge Emmet Sullivan's decision in favor of the U.S. Fish and Wildlife Service's listing of polar bears under the Endangered Species Act. Most of the parties support or engage in trophy hunting, though they also include an organization of California cattlemen.

The fourth notice of appeal, to the District of Columbia Circuit Court of Appeals, belongs to the State of Alaska. It was filed this morning by one of four non-state lawyers who have represented the state in the case -- Boise, Idaho-based Murray Feldman of the western states law firm Holland & Hart.

The state had been one of many plaintiffs to sue against the 2008 listing. The Parnell Administration said the listing was inappropriate because polar bear populations were healthy.

Environmental organizations also sued or intervened in District Court, saying the listing wasn't strong enough -- it should have been "endangered," they said, which would provide more protections than "threatened." None of the environmental groups have appealed yet.

The Fish and Wildlife Service agrees that the polar bear numbers are

strong today in most of their locations, but listed them because of threats to their habitat caused by global warming.

Polar bears spend much of their lives hunting seals from sea ice. Biologists say that as the sea ice melts away, bears will have to swim tremendous distances between rest stops. At the same time, their food supply will become harder to find. The stress is likely to cause deaths from drowning and reduce their ability to reproduce, the biologists say.

Over the last three decades, Arctic sea ice has melted at rates unprecedented in recorded history. A recent study by climate scientists with the National Center for Atmospheric Research concluded that half the melting was due to greenhouse gases produced by human activity, such as the burning of fossil fuel for energy production.

Parnell administration officials say that polar bears survived prehistoric periods of global warming and there's no reason to believe they wouldn't again. The state lawsuit doesn't deny the world is undergoing climate change, but it says the Endangered Species Act shouldn't be used in a "speculative" situation before an animal population actually shows signs of serious decline. State officials say they fear the listing could impede oil and gas development in the Arctic Ocean, though that is also speculative -- no development has been blocked yet by the listing.

The Fish and Wildlife Service argued successfully that the listing was well within the law, since it allows for special management of polar bears and their habitat to keep them from facing extinction.

When he ruled in June, Sullivan said the agency followed proper procedures and met the standards of "rationality" in making the listing.

Reach Richard Mauer at rmauer@adn.com or 257-4345.

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U.S. Fish & Wildlife Service

Marine Mammals Management

Alaska Region

Search

Endangered Species Act

- Listing
- Critical Habitat
- Recovery Plan

Listing

Final Rule Listing the Polar Bear as a Threatened Species Under the Endangered Species Act (May 15, 2008)

On May 15, 2008, the Service published a *Final Rule* in the Federal Register listing the polar bear as a threatened species under the Endangered Species Act (ESA). This listing is based on the best available science, which shows that loss of sea ice threatens and will likely continue to threaten polar bear habitat. Any significant changes in the abundance, distribution, or existence of sea ice will have effects on the number and behavior of these animals and their prey. This loss of habitat puts polar bears at risk of becoming endangered in the foreseeable future, the standard established by the ESA for designating a threatened species. A species can be listed under the ESA under one of two categories, endangered or threatened. An endangered species is likely to go extinct within all or a significant portion of its range in the foreseeable future. The polar bear was petitioned to be listed as a threatened species, defined as a species likely to become endangered in the

foreseeable future. The Service also published on May 15, 2008, an *Interim Final Rule* for the polar bear under Section 4(d) of the ESA.

Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act Press Release
Frequently Asked Questions About the Listing of the Polar Bear as a Threatened Species (pdf)
Final Rule May 15, 2008
Literature Citation (pdf) for the Final Rule.

Reissuance of Interim Special Rule for the Polar Bear. 1/30/12

The U.S. Fish and Wildlife Service (Service) announces a notice that codifies the November 18, 2011, court-ordered reinstatement of an interim final special rule governing management of polar bears under the Endangered Species Act (ESA). In its ruling, the court stated that the Service was required to review potential environmental impacts of its December 16, 2008, final special rule for the polar bear under the National Environmental Policy Act (NEPA), and that the May 15, 2008 (73 FR 28306), interim final special rule will be in effect until this is done.

Interim Special Rule
Bulletin
Talking Points

Official announcement of the Polar Bear 4(d) from the Department of the Interior. 12/12/08

News Release
Special Rule
Questions and Answers

Previous Actions

- **April 28, 2008 -** The United States District Court for the Northern District of California orders the Department of Interior and US Fish and Wildlife Service to make a final decision on whether or not add the polar bear to the list of threatened and endangered species by May 15, 2008.
- **January 7, 2008 -** To allow additional time for Service biologists to adequately evaluate and

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Anchorage Daily News

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Hawker opposes giving special hunt rights to landowners

He calls giving rights to private landowners a terrible policy.

By LISA DEMER

(03/06/12 00:14:50)

JUNEAU -- State Rep. Mike Hawker said Monday that the idea of creating special hunting rights for private landowners is terrible policy, and he would oppose anything like that if it materialized in the Legislature.

Hawker, along with House Speaker Mike Chenault and Rules Chairman Craig Johnson, appeared before news reporters Monday morning for a weekly House Republican-led majority press conference.

They were asked about a proposal being circulated within the Parnell administration to give special hunting privileges to private landowners in exchange for improving habitat for species such as moose, killing predators, or allowing others to hunt on their land. A Sunday Daily News story detailed the project, which Wildlife Division Director Corey Rossi was quietly pursuing before he was charged with misdemeanor game violations and lost his job in January. Other picked up the project, though no legislation has been filed.

While Chenault said he wasn't familiar with the project, Hawker didn't mince words. Hawker, R-Anchorage, is an avid gun collector who enjoys target shooting but says he doesn't hunt much anymore.

"It just doesn't make any sense to be essentially exempting private landowners from any and all state fish and game regulation," Hawker said.

"I don't know where that idea came from but it's certainly not one I would have supported in the legislative process," Hawker said.

Told it came from Rossi, Hawker said he didn't know him and had

never talked to him. Had Rossi asked, "I would have told him it was pretty foolish," Hawker said.

"Alaska's wildlife ought to be managed as a public resource, not a private individual's chattel," Hawker said later.

Reach Lisa Demer at ldemer@adn.com or (907) 500-7388.

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Anchorage Daily News

Our View: Drop it with one shot

Kill notion to let landowners play by different hunting rules

(03/07/12 00:27:27)

Rep. Mike Hawker is right about this one.

The Anchorage Republican said this week he has no use for an idea in the works at the state Department of Fish and Game that would allow private landownwers special permits to take big game on their lands -- or sell those permits -- possibly outside the usual hunting seasons.

In return, landownwers would be expected to improve habitat for certain big game animals on their land, allow access to other hunters and/or kill predators like bears and wolves.

Hawker's response?

"Alaska's wildlife ought to be managed as a public resource, not a private individual's chattel."

The Alaska Constitution defines Alaska's resources as public, reserved for the common use of the people of Alaska. And while one senior assistant attorney general says such a program could be made constitutional, it's practical effect would be to privatize some game management in Alaska for the sake of the few. Hunting is already expensive. Given the likely cost of auctioned permits, any open-access argument would crumble in the face of the reality that state policy would be improving access only for the few who could afford such permits.

The idea also appears to be a way to incentivize private landowners to kill bears and wolves to increase populations of moose and caribou. Such a notion takes Alaska closer to the game farm ideal of some hunters. At its extreme, that ideal says ecosystems be damned -- we need to be sure there's a moose for everyone who wants to shoot one.

Not just needs, but wants.

This is wildlife management with all the knowledge, expertise and awareness of the 19th century.

The private hunting rights project was driven by Corey Rossi, the former Division of Wildlife Conservation director for the Parnell administration. Rossi has been described by dozens of Alaska professional fish and game biologists as highly unqualified. He resigned in January after being charged with a dozen misdemeanor offenses in the taking of black bears on a hunt he guided in 2008. He has pleaded not guilty. His case has not yet been tried.

Rossi's pet project should have gone out the door with him, but apparently it's still a work in progress at Fish and Game.

So it's time for a clean, one-shot kill from Gov. Sean Parnell. One phone call to the commissioner of Fish and Game and this un-Alaskan notion goes away.

What say you, governor?

BOTTOM LINE: Private hunting rights? Let them do it Outside if they like. Not in Alaska.

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Cindy Smith <2cindysmith@gmail.com>

Richard Mauer: Hunting rights for landowners weighed; KFSK: Seine permit buyback meetings planned for Southeast; Russell Stigall/Empire: Meeting of the SE purse seiners; Alan Austerman: Ruling on Charter Halibut Limited Entry; Cordova Times: Salmon bycatch is topic for federal-state fisheries meeting; Ed Schoenfeld: Fish board rejects Taku River fishery changes; Compromise helps troilers, protects anglers; Journal of Commerce: State paid travel bills for board chairman in hometown; ADFG granted waivers allowing travel expenses for board chairman; Cordova Times: IPHC seeks nominations for two commissioners

Christopher Clark <cgcalaska@yahoo.com> **Mon, Mar 5, 2012 at 8:04 AM**

Reply-To: Christopher Clark <cgcalaska@yahoo.com>

Hunting rights for landowners weighed
Large landowners would get special permits to big game.
By RICHARD MAUER
Anchorage Daily News
Published: March 3rd, 2012 10:50 PM
Last Modified: March 3rd, 2012 10:51 PM

Six weeks before he learned he was under criminal investigation for violating his department's hunting rules, state Wildlife Division Director Corey Rossi told his staff about a pet project -- **unprecedented in Alaska -- to give private landowners special rights to hunt big game, even out of season, and to be able to sell**

those rights to whomever they want.
Rossi lost his job in January with the filing of a criminal complaint that cited him for 12 misdemeanor violations during a 2008 bear hunt. He has pleaded not guilty and his case is moving through District Court in Anchorage.
But his project to privatize some of Alaska's game lives on in the Parnell administration. At least one deputy commissioner is still working on the landowner permit project. Rossi's replacement, Doug Vincent-Lang, says it remains under active consideration, though he needs time to review it.
"We don't waste time on ideas that have absolutely no merit," Vincent-Lang said.
The idea that wild game is a public resource and not the property of a landowner is a long-held doctrine in Alaska and most of North America. But that idea is being challenged, at least on a limited basis, by advocates of intensive game management, who argue that granting special game rights to property owners will encourage them to make life easier for big game on their land. One of the leading advocates of that position is the organization Sportsmen for Fish and Wildlife, in which Rossi was an active member before taking over the Wildlife Division.
According to Rossi's minutes of the Nov. 1-2 meeting of Wildlife Division leaders and others in Fish and Game, **the attorney general's office was already drafting a new law that would implement the project**.
A budget was under development to manage the project with new staff positions, Rossi wrote.
"There is initial draft language, and the governor's office has asked for a full legal review," Rossi wrote.
Rossi's minutes were distributed this month by Vincent-Lang. A copy was leaked to the Daily News.

Owning hunting rights
The proposal would encourage owners of large private tracts to increase "public-interest benefits" on their land. They could do that by allowing access to hunters, improving habitat for species such as moose, or killing predators, Rossi wrote.
In return, landowners would get special hunting permits "that the landowner would be allowed to use or sell, perhaps with special authorizations such as the ability to hunt outside normal hunting seasons on their lands."
The proposal is modeled on similar programs in western states like Utah and Colorado, where it has been promoted by chapters of the advocacy group Sportsmen for Fish and Wildlife and its sister organization Sportsmen for Habitat. The organization has a big expo in Salt Lake City every year where it auctions special permits.
In the West, large landowners are mainly ranchers. In Alaska, Rossi noted in his minutes, they are Alaska Native corporations.
Mark Richards, co-chairman of the grassroots organization Alaska Backcountry Hunters and Anglers, said Alaska hunters wouldn't be the beneficiaries of Rossi's proposal.
"It doesn't take a rocket scientist to figure out who would win by privatizing more hunts in Alaska," Richards said in an email from his remote Interior cabin some 60 miles north of Eagle. "It would be the orgs that get the permits to auction off, and the wealthy hunters who could afford to buy them."
Sportsmen for Fish and Wildlife and similar organizations would also get "more power and influence to further game the system," Richards asserted.
Rossi has a strong connection to Sportsmen for Fish and Wildlife. In 2007, he was one of three founders of its Alaska chapter.
He was also a big-game guide. He was working as a guide for three out-of-state bear hunters in 2008 when he lied on his post-hunt reports to the state and failed to properly seal bear hides, according to the charges.
The June bear hunt took place about six months before he was brought into the Fish and Game department by then-Gov. Sarah Palin. She created a new position for him, assistant commissioner for "abundance management" -- the idea of managing moose and caribou to provide the greatest possible number of animals for hunters.
In 2010, Gov. Sean Parnell elevated Rossi to wildlife director, the official in charge of managing hunting and big-game habitat in Alaska. It was a controversial appointment because Rossi lacked a college degree and scientific training. But he was an expert at killing predators and vermin and had the backing of hunters who wanted fewer bears and wolves and more moose.
"With Director Rossi at the wheel, we at SFW look forward to some real positive changes within the Department that are long overdue!" executive director Dane Crowley of Sportsmen for Fish and Wildlife Alaska wrote at the time.

Constitution an obstacle?
In the minutes from the meeting in November, Rossi said the private-hunting project **would require the Legislature to create a new kind of "landowner permit."** He wanted the authority to dole out such permits

at the department's discretion.
"Some discussions have occurred with various Native groups who have expressed strong interest in the concept, though at least one has firmly said it is not interested in providing hunter access," he wrote. "It is expected that **for the program to move forward, the legislature would need to provide specific funding for the program, and new staff positions would be needed. There are many details still to be worked out, but the idea is moving forward**."
One obstacle could be the Alaska Constitution. The Constitution provides that all resources, including wildlife, are "reserved to the people for common use." In the landmark 1989 McDowell decision, the Alaska Supreme Court threw out a law that violated the equal access provision by giving rural residents priority over urban dwellers to fish and game.
Given that history, would it be possible for landowners to get more rights to game than others?
"Could a constitutional law be written? Yeah, sure it could," said Kevin Saxby, a senior assistant attorney general who advises the department on hunting issues. "The goal of the law would be to open up more access for more Alaskans, I presume, so that would serve the common use and the equal access provisions in Article 8 of the Constitution."
Saxby said he has only done "a tiny bit of work" on the initiative and wouldn't say whether that included writing a draft version of a bill. "Anything more is confidential until the governor makes a decision" to take the issue to the Legislature, he said.
Byron Bateman, president of Sportsmen for Fish and Wildlife in South Weber, Utah, said in a telephone interview that landowner permits in his state have "increased the opportunity for the ordinary citizen to be able to hunt some of these private lands that they would not have been able to afford."
He described Utah's hunting and landowner programs as an example for other states to follow.
"Utah has been a model as to we how we manage all of our wildlife in the West. We've increased a lot of different populations," he said.
Sportsmen for Fish and Wildlife, along with the like-minded Mule Deer Foundation, hosts the Western Hunting and Conservation Expo in Salt Lake City, where special permits from around the West are auctioned. Among the hundreds auctioned over the weekend of Feb. 9-12 were about a dozen private landowner permits from Utah.
Bateman said those permits sold in the range of $9,000 to $18,500 each. Another indication of the value of permits appeared on Sportsmen for Fish and Wildlife's 2010 nonprofit tax returns, the most recent available. The returns show the organization raised $2.4 million from selling permits, though it didn't break down how much of those were landowner permits. It did report how much it spent buying landowner permits: $563,000. The returns show Sportsmen for Fish and Wildlife spent $1.1 million on conventions and conferences -- nearly as much as the $1.4 million it spent on big-game habitat improvements, conservation, moving wildlife and studies.

To end hunting 'socialism'
Rossi's move to give landowners special rights to the wildlife on their property coincides with the ideology of Don Peay, a Utah guide and founder of Sportsmen for Fish and Wildlife.
Peay, who stressed that the Utah chapter isn't trying to push its view in Alaska or even with the Alaska chapter, said it's time to revisit the widely accepted principle in the United States and Canada that game is a public resource. Peay described that egalitarian doctrine, found in Alaska's state constitution and laws throughout the West, as "socialism." It offers no economic incentive for landowners to kill predators, improve big game habitat and even provide food and water for target species.
"We understand the North American model where wildlife belongs to the people, but we're also seeing dramatic reductions in game populations in the western United States under that model," he said. Population pressure, habitat loss from development and the rise of environmental organizations opposed to predator control have put pressure on game herds that weren't envisioned when the laws were written a century or more ago, he said.
"When wildlife is a very highly valued asset, people want more of it and they'll invest additional funds to make sure it's abundant," Peay said.
The same is true of professional guides and outfitters, he added. "They tend to be more involved to make sure there's abundant game herds than a lot of guys who just buy their license the day before the hunt starts and then, when game disappears, the masses tend to complain -- but what did they do to allow that situation to happen and why weren't they more involved to fix it?"
Valerie Conner, conservation director for the Alaska Center for the Environment, said she doubted most Alaskans were ready to abandon or modify the concept of wildlife as a public resource. And managing wildlife to promote just moose and caribou for the benefit of guides and some sportsmen "is draconian," she said.
"It's an ecosystem out there, and the bears and wolves and other predators play a really vital role. They're just

leading us down this path to eliminate as many predators as they can and create a game farm," she said. "If you're really concerned about managing on an ecosystem-wide basis, you wouldn't be taking out all the bears and wolves and incentivizing landowners to kill all the predators on their land. It's insane."
With the Alaska Board of Game and, increasingly, the Department of Fish and Game, representing primarily trappers, guides and abundance hunters, Conner said, there's almost no one speaking out for tourism and wildlife viewing in an official capacity.
"Diversity is equally as important as abundance," she said. "There's nobody on that board who represents the thousands of Alaskans who simply appreciate wildlife for its intrinsic value or to go look at it."

Reach Richard Mauer at rmauer@adn.com or 257-4345.

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Seine permit buyback meetings planned for Southeast
by **Joe Viechnicki**, KFSK
March 1, 2012 2:01 pm

The National Marine Fisheries Service will be holding informational meetings in three Southeast Alaska communities this month on a purse seine buyback program.
The agency is holding the meetings in preparation for a vote by permit holders on whether to go ahead with the fleet reduction. **Owners of the 379 Southeast seine permits will be deciding this spring on a loan to buy 64 of those permits and remove them from the fishery. The loan would be repaid by the remaining fleet members with a fee imposed on future landings**.
Supporters of the buyback say it will reduce the capacity of a fleet that's grown much more efficient at catching salmon since the limited-entry fishery started. Opponents don't see a point in reducing fleet numbers and say it will mean fewer deckhand jobs and a reduced political voice for the fleet.
NMFS has published a notice in the Federal Register with a list of all eligible permit holders and is taking public comment on that list until March 16th.
NFMS plans to hold four meetings March 5th-7th and will field comments and questions about the buyback program. The first will be at Fishermens Terminal in Seattle Monday March 5th.
A meeting is planned in Petersburg at the city council chambers Tuesday, March 6th from noon to 2 p.m. Another session will be Wednesday, March 7th from 10 to noon at the Ted Ferry Civic Center in Ketchikan and a meeting will be held later that day from 7-9 p.m. at the Northern Southeast Regional Aquaculture Association in Sitka.
Here's the notice from the Federal Register:
Eligible Voters and Meeting FR Notice 03 01 12 11
To hear an earlier story on the buyback proposal, click here.

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Meeting of the SE purse seiners
NMFS holds public meetings to discuss capacity reduction
Posted: March 4, 2012 - 12:07am
By By RUSSELL STIGALL
JUNEAU EMPIRE

The National Oceanographic and Atmospheric Association National Marine Fisheries Service has scheduled a series of public informational meetings in Seattle and southeast Alaska to discuss capacity reduction and other topics on the southeast Alaska purse seine salmon fishery.
The Southeast Revitalization Association submitted a capacity reduction plan to determine the industry's willingness to repay a fishing capacity reduction loan to purchase the permits identified in the reduction plan. Marine Fisheries approved that plan.
As of late Feb., 379 permits in the fishery designated as S01A. Marine Fisheries continues to update this number. These permanent permit holders are eligible to vote in the referendum, according to NMFS.

Meetings
• Seattle - Nordby Conference Center at Fishermen's Terminal, 3919 18th Avenue West on March 5, 10 am to noon.
• Petersburg - City Council Chambers, Municipal Building, No. 12 South Nordic Drive on March 6, noon to 2

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Office of the Commissioner

Sean Parnell, Governor
Emil Notti, Commissioner

April 29, 2010

The Honorable Daniel S. Sullivan
Attorney General
State of Alaska
Department of Law
P. O. Box 110300
Juneau, Alaska 99811-0300

Re: Arctic Marine Pilotage

Dear Mr. Sullivan:

As you know, there is tremendous national and international interest in the Arctic region. Continued reduction of the Arctic ice cover is expected to allow increased access to the region. The Arctic region is rich in natural resources, including fish, marine mammals, seabirds, oil, gas, and other minerals.

Over the last couple of years the Alaska Board of Marine Pilots (Board) has been discussing the extension of mandatory marine pilotage waters from those set out in 12 AAC 56.090 and 12 AAC 56.100 to encompass large areas of the Chukchi and Beaufort Seas. The boundaries of the proposed new mandatory marine pilotage waters include the outer continental shelf oil and gas lease areas where exploratory drilling is expected to occur this summer.

The Board is seeking advice from your office regarding the extent of the Board's authority under existing state and federal laws to adopt regulations that extend the state's mandatory marine pilotage waters to include large areas of the Chukchi and Beaufort Seas. Some background follows.

Like other U.S. maritime states,[1] Alaska requires foreign vessels and U.S. "registered vessels" heading for its ports, or transiting inland waters, to employ a state-

[1] *See generally*, A. Parks, The Law of Tug, Tow, and Pilotage 991-1003 (3rd ed. 1994).

P.O. Box 110800, Juneau, Alaska 99811-0800
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licensed marine pilot.[2] The marine pilot boards the foreign vessel and guides it into and out of port, or through navigational hazards in inland waters.

The seven-person Board of Marine Pilots regulates marine pilotage in Alaska.[3] Under AS 08.62.040(a)(1) - (3), the Board must "provide for the maintenance of efficient and competent pilotage service", regulate the training, examination, and licensure of marine pilots, and "keep a register of licensed pilots, licensed deputy pilots, and agents". AS 08.62.040(a)(1) requires the Board to adopt regulations to "assure the protection of shipping, the safety of human life and property, and the protection of the marine environment" on the "inland and coastal water of and adjacent to the state".
AS 08.62.160 requires the Board to "define the mandatory pilotage water of the state", and requires a vessel subject to AS 08.62 to employ a state-licensed marine pilot while "navigating the inland or coastal water of or adjacent to the state".[4] Violation of this requirement is a misdemeanor crime.[5]

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[2] AS 08.62.160. The federal government has authority over commerce and shipping, but federal statutes grant authority for marine pilotage laws to the states.
46 U.S.C.A. sec. 8501(a) states: "[e]xcept as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States." Under 46 U.S.C.A. sec. 8502(a) vessels licensed under U.S. laws engaged in domestic or coastwise trade fall under the jurisdiction of the U.S. Coast Guard, and are not subject to state pilotage laws. These are commonly referred to as "enrolled vessels". *Hochstetler v. Board of Pilot Commissioners*, 8 Cal. Rptr. 2d 403, 407 (Cal. App. 1 Dist. 1992). Foreign vessels and U.S. licensed vessels "sailing on registry" must comply with state pilotage laws. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 159-160 (1978), T. Schoenbaum, 2 Admiralty and Maritime Law, sec. 13-1 (4th ed. 2004). These are commonly referred to as "registered vessels". *Hochstetler v. Board of Pilot Commissioners*, 8 Cal. Rptr. 2d 403, 407 (Cal. App. 1 Dist. 1992).

[3] AS 08.62.040. The Board consists of two licensed marine pilots, two registered vessel agents, two members of the public, and the commissioner of DCCED or the commissioner's designee; AS 08.62.010.

[4] State waters are not defined in AS 08.62, but under AS 44.03.010 the state asserts jurisdiction over "water offshore from the coast of the state", including (1) the "marginal sea", (2) the high seas claimed by the United States, and (3) the submerged lands under that water.

[5] AS 08.62.190.

The boundaries of those areas where use of a state-licensed marine pilot is mandatory are set out in 12 AAC 56.090 and 12 AAC 56.100. 12 AAC 56.090 is a general provision. In 2008[6] 12 AAC 56.090 provided, in part: "[p]ilotage is compulsory at all entrances from seaward to Alaska bays, sounds, rivers, straits where the passage is within three nautical miles of this state, or other estuaries for which specific boundaries are not otherwise described in this chapter."

The boundaries of mandatory pilotage waters in specific locations are set out in 12 AAC 56.100. 12 AAC 56.100(14) describes the mandatory pilotage waters along the coast of the Chukchi Sea and in Kotzebue Sound.

During a public comment period at a Board meeting held on January 22-23, 2008, a licensed marine pilot asked the Board to consider the adoption of a Board regulation to extend the compulsory (mandatory) pilotage waters from those set out in 12 AAC 56.090 and 12 AAC 56.100. The marine pilot suggested that the compulsory pilotage waters be extended out into the Chukchi and Beaufort Seas to an area roughly concurrent to outer continental shelf oil and gas lease areas.[7]

As originally proposed, pilotage would be compulsory for all vessels subject to AS 08.62 "engaged in commercial activities" within the designated waters of the Chukchi and Beaufort Seas. As proposed, the pilotage requirements would not have been restricted to vessels entering state ports, rivers, sounds, etc., but would have applied to all commercial vessels moving through the specified waters (including oil exploration and drilling vessels).

By a vote of four to three, the Board members voted to accept the marine pilot's suggestion for a proposed regulation to extend compulsory pilotage waters into the Chukchi and Beaufort Seas. A public notice of the proposed amendment to 12 AAC 56.100(14), requesting public comment on the proposed language, was issued on March 13, 2008.[8]

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[6] As explained later in this memorandum, 12 AAC 56.090 has been amended slightly, effective November 4, 2009, Register 192.

[7] These leases are under the authority of the U.S. Department of the Interior, Minerals Management Service.

[8] This is a necessary first step in the adoption of an administrative regulation under AS 44.62.020--300 (Administrative Procedure Act); AS 44.62.190, 44.62.200.

Significant public comment on the proposed amendment was received, both in support of and in opposition to the proposal. The Board held a public hearing on the proposal at a meeting on April 18, 2008. Many of those who commented supported the proposed expansion of compulsory pilotage waters, citing the need to protect the fragile Arctic ecosystem, fish and wildlife, and indigenous peoples. Other commentators expressed concern that such a significant expansion of compulsory pilotage waters might be interpreted to apply to vessels not bound for Alaska ports, but merely passing through the lease areas, and would exceed the Board's authority. Oil companies interested in resource development in the Arctic, including ConocoPhilips, Shell Oil, and BP, were generally opposed to the proposed expansion of compulsory pilotage waters.

The Board voted to revise the proposed language in response to some of the comments received, including clarification of the right to "innocent passage".[9] The Board requested public comment on the revised version in a supplemental notice issued on June 23, 2008. The revised version also contained some technical clarifications to other existing regulations. The revised version included a new cross-reference in 12 AAC 56.090, the revised boundaries in 12 AAC 56.100(14), some technical amendments in 12 AAC 56.990(a)(5) and (8), and added a definition of the state's coastline in 12 AAC 56.990(a)(39).

A second public hearing was held at a Board meeting on October 1, 2008. The Board again considered testimony and several written comments received. The proposed amendments were further revised, and a second supplemental public notice requesting comments was issued on February 18, 2009.

A third public hearing was held at a Board meeting on April 15, 2009. At that hearing the Board decided to adopt the remaining proposed language changes dealing with the general boundaries of compulsory marine pilotage waters and definitions, but not to adopt the proposed new compulsory marine pilotage areas in the Chukchi and Beaufort Seas. These adopted regulations contain changes only to 12 AAC 56.090 and 12 AAC 56.990(a)(5) and (8), and the new definition in 12 AAC 56.990(a)(39). By the addition of the words "inlets, harbors, ports" and "adjacent to Alaska" the revised regulations are intended to make the scope of the regulations identical to the legislature's

[9] The right of innocent passage refers to the right to navigation through the territorial sea by ships of all nations, to traverse the area without entering internal waters or proceeding to or from internal waters or a port. *See* U.N. Convention on the Law of the Sea, Arts. 17 & 18 (1982).

grant of jurisdictional authority to the Board in AS 08.62.040(a)(1). These regulation changes took effect on November 4, 2009.

The Board concluded that further consideration was needed on some aspects of the Arctic pilotage proposal. A Board subcommittee was appointed to study the issue in more detail. At a Board meeting on January 28, 2010, the chair of the Board subcommittee reported his conclusion that the subcommittee likely would be unable to resolve the concerns expressed about the proposed expansion of compulsory marine pilotage into Arctic waters. Some subcommittee members questioned whether the Board possessed the legal authority to adopt the proposed regulation changes.

At a meeting held on April 28, 2010, the Board decided to ask your office for assistance in determining the scope of the Board's authority in this area.
AS 08.62.040(a)(1) requires the Board to regulate marine pilotage "on the inland and coastal water of *and adjacent to* the state" (emphasis added). By its own terms, this legislative grant of authority to the Board appears to contemplate marine pilotage requirements extending beyond state waters.[10]

But how far outside of state waters may the Board extend state marine pilotage requirements? Are special navigational factors (such as shallow waters, or extreme ice conditions) necessary to justify this extension? May the Board impose pilotage requirements on vessels subject to AS 08.62 that do not intend to enter state ports, rivers, or sounds, or even to enter state waters at all? May the Board impose pilotage requirements upon vessels subject to AS 08.62 intending to moor along stationary structures such as a drilling platform? What about drilling platforms that are located outside of state waters? Are amendments in state law needed to authorize the Board to adopt the measures it has discussed? What limits do federal laws place on the Board's authority in this area?

The Board requests advice from your office addressing the above questions, and the extent of the Board's legal authority to adopt the proposed mandatory pilotage

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[10] Maritime zones recognized under international law include: internal waters (3 nautical miles), territorial sea (12 nautical miles), contiguous zone (24 nautical miles), exclusive economic zone (200 nautical miles), and the high seas. Courts have approved mandatory marine pilotage requirements imposed by state law on vessels located many miles outside of state waters. *See, e.g., Gillis v. Louisiana*; 294 F.3d 755 (5th Cir. 2002).

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Office of the Commissioner

Sean Parnell, Governor
Emil Notti, Commissioner

requirements described above. Thank you for your assistance to the Board on this important legal issue.

Sincerely,

EMIL NOTTI
Commissioner

By:
Curtis Thayer, Chair
AK Board of Marine Pilots

CT/eeh

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Telephone: (907) 465-2500 Fax: (907) 465-5442 Text Telephone: (907) 465-5437
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members, Plaintiffs, v. STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity of Commission of the Alaska Department of Revenue and JOHN MALLONEE, in his official capacity of Director of the Alaska Child Support Services Division, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Oct 25, 2011 Case No. 1JU-10-376 CI

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, the Central Council of Tlingit and Haida Indian Tribes of Alaska ("Tribe") is a federally recognized Indian Tribe. This case presents important questions concerning the Tribe's jurisdiction to adjudicate child support in its tribal court. The Tribe seeks injunctive and declaratory relief finding that its tribal court has subject matter jurisdiction over child support cases concerning tribal member children, and requiring the State of Alaska to give recognition to tribal child support orders in such cases.

Both parties move for summary judgment. The facts are generally not in dispute; the motions present questions of law. Having considered the parties' memoranda and exhibits, and the arguments of counsel presented at oral argument, the Tribe's motion for summary

judgment is granted, and the State's motion for summary judgment is denied, for the reasons set forth below.[1]

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and a party is entitled to a judgment as a matter of law.[2] The party moving for summary judgment "has the initial burden of offering admissible evidence showing both the absence of any genuine dispute of fact and the legal right to a judgment."[3] Once that burden is satisfied, the non-moving party, in order to prevent the entry of summary judgment, must produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence.[4]

B. Child Support

As society changed during the nineteenth and early twentieth century, American courts created, for the first time in Anglo-American common law, a legally enforceable duty on the part of parents to financially support their children.[5] This development stemmed from a

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[1] Plaintiff's request for the court to take judicial notice of the briefing in *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) is denied. The briefing in *Tanana* does not establish any fact which would bring it within Evidence Rule 201, nor is it legal authority within the scope of Rule 202. Judicial notice is, therefore, inappropriate. However, these materials are the sort of persuasive matter which parties routinely – and quite appropriately – submit in support of legal arguments. These materials are entirely appropriate to submit for the court's consideration, and they will be made a part of the record without any need to resort to judicial notice. Defendant's motion to strike is denied for the same reasons.

[2] Alaska Rule of Civil Procedure 56.

[3] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

[4] *Id.*

[5] *See generally*, 108 Yale L.J. 1123, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law* (1999).

recognition of the correlation between divorce, poverty, and dependency on the part of children of divorcing families (or, more generally, families involving a parent absent from the home).[6]

With the advent of modern welfare programs later in the twentieth century came a realization that the failure of noncustodial parents (often fathers) to provide financial support to their children drove those children into poverty and inflated the welfare rolls. By 1974 it could be said that:

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving [Aid to Families with Dependent Children], 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.[7]

Until then, child support establishment, collection, and enforcement had largely been left to the States.[8]

In 1974, Congress adopted Title IV-D of the Social Security Act, which required each state, as a condition of receiving federal funds for its welfare program, to create a child support enforcement system available both to welfare recipients and non-recipients.[9] The federal government, through its IV-D reimbursement plan, pays most of the cost of this system.

As part of this federal program, participating child support enforcement agencies are overseen by the federal Office of Child Support Enforcement ("OSCE"). Federal law establishes a variety of requirements that states are required to comply with in order to receive federal IV-D funding.

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[6] *Id.*
[7] *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565 (11th Cir. 1989), *quoting* Social Services Amendments of 1974, S. Rep. 93-1356, 93rd Congress, 2d Session 42 (1974).
[8] *See, e.g.*, 73 Mich. Bar Journal 660, *Federalization of Child Support: Twenty Years and Counting* (July 1994).
[9] P.L. 93-647; 42 USC §§661-665.

In 1996, as part of the federal welfare reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), states were required to adopt the Uniform Interstate Family Support Act ("UIFSA"), which sets out procedures for recognition of child support orders from other states.

UIFSA was initially promulgated by the National Conference of Commissioners on Uniform State Laws in 1992, and was adopted in Alaska in 1995.[10] The purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders, and to eliminate the problem of multiple child support orders from different jurisdictions.[11]

The UIFSA requires states to recognize child support orders from other "states." Although the uniform act included Indian tribes within the definition of "states," the language including Indian tribes was omitted by the Alaska legislature when it adopted UIFSA in 1997.[12]

When Congress enacted PRWORA in 1996, it required states to enact the official version of UIFSA, which includes Indian tribes within the definition of "states."[13] The State of Alaska twice requested an exemption from this requirement in 2008, but each request was rejected by the federal Department of Health & Human Services.[14] After the second denial, the State was warned that continued failure to enact a conforming statute risked loss of over $60

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[10] AS 25.25.101 *et seq.*; SLA 1995, ch. 57.
[11] Am Jur 2d Desertion, §73 (2011); *Hamilton v. Foster*, 620 N.W.2d 103 (Neb. 2000); *Linn v. Delaware Child Support Enforcement*, 736 A.2d 954 (Del. 1999). *See also*, *Bartlett v. State, Dept. of Revenue*, 125 P.3d 328, 331 (Alaska 2005) (UIFSA requires states to enforce other state's judgments "in order to create uniformity in interstate judgments.").
[12] SLA 1995, ch. 57 §4.
[13] 42 USC §666(f).
[14] Exhibit 4 to Plaintiff's Motion for Summary Judgment.

million in federal funds for IV-D and Temporary Assistance to Needy Families ("TANF") programs (the successor program to Aid to Families with Dependent Children).[15]

Faced with this threat, the Alaska Legislature amended UIFSA in 2009 to conform to the definition of "states" in the official text.[16] In doing so, the Legislature adopted intent language clarifying that it was not the Legislature's intention to confer additional jurisdiction on tribal courts:

> (a) It is the intent of the legislature that, in order to bring Alaska into conformity with the nationwide Uniform Interstate Family Support Act (UIFSA), as approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of that date by the National Conference of Commissioners on Uniform State Laws, it is necessary to amend AS 25.25.101 to include "an Indian tribe" and "the United States Virgin Islands" in the definition of "state."
>
> (b) The proposed changes made in AS 25.25.101(19) under sec. 3 of this Act are conforming amendments that will result in procedural changes in Alaska for enforcement and modification of child support orders from other jurisdictions. UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order. In adopting UIFSA conforming amendments, the legislative intent is
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> > (1) to remain neutral on the issue of the underlying child support jurisdiction, if any, for the entities listed in the amended definition of "state";
> >
> > (2) not to expand or restrict the child support jurisdiction, if any, of the listed "state" entities in the amended definition; and
> >
> > (3) not to assume or express any opinion about whether those entities have child support jurisdiction in fact or in law.[17]

UIFSA requires a tribunal of this state to recognize the "continuing, exclusive jurisdiction" of a tribunal of another state that has issued a child support order under a law

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[15] *Id.*
[16] AS 25.25.101(19), amended by SLA 2009, ch. 45 §3.
[17] 2009 SLA ch. 45 §1.

substantially similar to UIFSA.[18] Article 5 of UIFSA requires Alaska's Child Support Services Division ("CSSD") to take steps to administratively enforce child support orders from other states without the need to file an independent court action in an Alaska court.[19] If an order from another state is contested in Alaska, UIFSA provides that CSSD "shall" register the order in an Alaska court under the procedures set forth in article 6 of UIFSA.[20] Resort to the registration procedure avoids the need to file an independent court action in Alaska to seek recognition of a foreign judgment as a matter of comity.[21]

The State correctly points out that the ability to use these UIFSA procedures for a tribal court support order depends upon whether the tribal court has jurisdiction to issue child support orders. UIFSA does not confer jurisdiction on tribal courts; it merely requires recognition of tribal court support orders if the tribal court has jurisdiction.

Thus the outcome of this case hinges on the basic question of jurisdiction: does the Tlingit Haida tribal court have jurisdiction to enter child support orders concerning children who are tribal members?

C. Tribal Court Jurisdiction – *John v. Baker*

Indian tribes possess inherent powers of self-government which predate the arrival of European settlers and the founding of the United States.[22] Tribes "retain those fundamental

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[18] AS 25.25.205(d).
[19] AS 25.25.501-507.
[20] AS 25.25.507(b); AS 25.25.601-614.
[21] *See generally,* Exhibit 3 to Plaintiff's Motion for Summary Judgment, SOA pp. 0115-0116 (Steinberg letter).
[22] *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status."[23]

While tribal sovereignty is not absolute, "until Congress acts, . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[24] The United States Supreme Court has articulated a "core set of sovereign powers that remain intact even though Indian nations are dependent under federal law; in particular, internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers."[25]

These principles are well established in the context of an Indian tribe occupying a reservation in the lower 48 states. Indian tribes possess broad sovereignty in Indian country. In Alaska, however, the Alaska Native Claims Settlement Act ("ANCSA") largely extinguished Indian country.[26]

In *John v. Baker*, the Alaska Supreme Court held that Alaska tribes retain the power to adjudicate custody disputes concerning tribal member children "by virtue of their inherent powers as sovereign nations."[27] The court in *John v. Baker* found that this power does not depend upon the existence of Indian country, but rather stems from the tribe's interest in "preserving and protecting the Indian family as the wellspring of its own future."[28] As such,

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[23] *Merrion v. Jicarilla Apace Tribe*, 455 U.S. 130, 146 (1982).
[24] *Merrion*, 435 U.S. at 323.
[25] *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).
[26] *Alaska v. Native Village of Venetie Tribal Government (Venetie II)*, 522 U.S. 520 (1998).
[27] 982 P.2d at 748-49.
[28] *Id.* at 752.

the power to adjudicate custody disputes over Alaska Native children is necessary "to protect tribal self-government or to control internal relations."[29]

It was unclear from the Supreme Court's first *John v. Baker* opinion (*John v. Baker I*) whether the holding extended to the question of whether Alaska Native tribes have authority to decide child support as well as child custody. In its third opinion in *John v. Baker* (*John III*), the Supreme Court clarified that it did not intend to decide this question in *John v. Baker I*. The court in *John III* declined, for procedural reasons, to reach the question presented in this case – whether tribal courts have jurisdiction over child support issues.[30] This is, therefore, a question of first impression.

D. Child Custody and Child Support

It is clear under Alaska law and procedure that the issues of child custody and child support are closely intertwined. The Supreme Court emphasized this point in *McCaffery v. Green*,[31] a case dealing with interstate child support jurisdiction.

Ms. McCaffery and Mr. Green were divorced in Texas. The Texas court awarded McCaffery custody of the children and ordered Green to pay child support. Four years later, McCaffery moved to Alaska with the children. Green moved to Oregon. Neither parent retained connections to Texas.

Three years after moving to Alaska, McCaffery moved in an Alaska court to modify the visitation and child support provisions of the Texas decree. Green objected on the basis of jurisdiction.

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[29] *Id.*
[30] *John v. Baker*, 125 P.3d 323 (Alaska 2005).
[31] 931 P.2d 407 (Alaska 1997).

The trial court found that it had jurisdiction to modify the Texas decree as to custody and visitation under the statute then in effect, the Uniform Child Custody Jurisdiction Act ("UCCJA"), but found that the court was without jurisdiction as to child support.

The Supreme Court reversed, holding that the court had jurisdiction to consider both custody or visitation, and child support. In doing so, the court noted that it "simply makes sense" for a court that has jurisdiction to consider custody and visitation to also have jurisdiction to consider child support:

> An Alaska court is already deciding issues of custody and visitation. A visitation determination inherently affects the amount of child support owed by the obligor parent. Alaska Civil Rule 90.3(a)(3) specifically links the two issues: a court may allow an obligor parent to reduce child support payments up to fifty percent for any period in which that parent has extended visitation of over twenty-seven consecutive days. This rule recognizes that a parent's own expenses are greater (and the other parent's expenses less) when that parent exercises visitation rights. To decide custody and visitation issues without being able to make the logically concomitant support modification could result in an imbalance between visitation allowed and support owed.[32]

The court went on to note that issues of support and custody are intertwined, quoting the view of one commentator on this point:

> Dissolution of marriage determines status and does not carry with it any inevitable consequences. The parties are not presumed to have any ongoing obligation to one another. Therefore, in a divorce action it is conceptually justifiable to sever the economic issues from the status issues and require personal jurisdiction to resolve the former. In contrast, divorce does not extinguish a parent's obligation to his or her children. While the amount of monthly payments is certainly a subject of frequent dispute, the fact remains that the noncustodial parent can reasonably anticipate being liable for some amount of child support. The parent's obligation to support the child is not merely related to the status determination; it is an inevitable concomitant of custody decisions.[33]

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[32] 931 P.2d at 413-14 (emphasis added).
[33] *Id.* at 414, *quoting* Monica J. Allen, Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions, 26 Fam. L. Q. 293, 307 (1992).

Additionally, Alaska's court rules require the court to consider child support any time it makes a custody decision. Civil Rule 90.3(e) requires all parents seeking to litigate custody issues to file information regarding their income for child support purposes. Child support depends not upon the amount of time the child actually spends with each parent, but rather upon what is in the custody order.[34]

The court in *John v. Baker* clearly established that the tribal court has jurisdiction to decide issues of custody and visitation as to children who are members of the tribe. It would be an odd result if a state court which was called upon to decide custody were required to decide child support, but a tribal court deciding custody were barred from deciding support for lack of jurisdiction. But that would be the result of the State's position. This result would provide a substantial deterrent for parents to bring custody disputes to tribal courts, since tribal courts could not decide all of the issues in the case. It would also open the door to procedural manipulation, since a parent wanting to adjudicate custody without risking an adverse child support order could file in tribal court.

Parents have a broad range of rights and responsibilities with respect to their children. The duty to provide financial support for one's children is just one of a parent's responsibilities. Parents have a duty to keep their children safe, to provide them with food, clothing, shelter, and medical care, and to ensure that they go to school.

A court deciding child custody may make decisions that affect the full range of each parent's rights and duties. A court may enter orders in a custody case having to do with all of the parents' duties, including but not limited to child support. A court may order a parent to

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[34] *Turinsky v. Long*, 910 P.2d 590, 595 (Alaska 1996).

take the child to school, or to the doctor, or to see a counselor, or to church. A parent may be prohibited from exercising some of the duties of a parent, or may be required in a custody order to exercise those duties.

According to the State's position, a tribal court has the jurisdiction to adjudicate each and every one of the rights and responsibilities of the parents of a tribal member child, except for the parents' duty to provide monetary support for the child. Under this argument, child support is merely a debt between the parents, which has no relation to any tribal interest. This position fails to recognize the "paramount duty" of parents to support their children.[35] This duty is not simply a debt to the other parent, but is integral to the statutory and common-law duty parents have to their children.[36]

In arguing that child support is merely a social welfare program, the State views this question only through the lens of administrative child support enforcement. This argument views child support as only a way for governments to recoup welfare payments from noncustodial parents.[37] But the duty to pay child support long predates enactment of social welfare legislation. This duty is integral to the parent child relationship. The ability to ensure that noncustodial parents support their children may be the only thing keeping those children out of grinding poverty. This duty cannot be characterized as merely a debt between parents. Nor can it be characterized only as an after-effect of the enactment of social welfare legislation in the twentieth century.

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[35] *See, e.g., Kestner v. Clark*, 182 P.3d 1117, 1122-23 (Alaska 2008).
[36] *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987).
[37] State's memorandum in opposition to summary judgment and in support of cross-motion for summary judgment at 6-8, 12 (". . . child support developed as a broad, national social welfare program.").

The determination and enforcement of the duty of parents to support a child who happens to be a tribal member is no less a part of the tribe's internal domestic relations than the decision as to which parent the child will live with, which school the child will attend, or any of the other important decisions that custody courts make every day. Ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe – like that of any society – requires no less.

In my view, the determination of child support is an integral part of a custody determination. To the extent that the Supreme Court found in *John v. Baker* that tribes have jurisdiction over custody determinations, I conclude that this jurisdiction, to be meaningful, must extend to adjudication of child support.

To the extent that the State argues that the holding of *John v. Baker* is in question as a result of subsequent federal decisions, that argument was undercut by the Alaska Supreme Court's decision in *State v. Native Village of Tanana*,[38] in which the court reaffirmed *John v. Baker*'s "foundational holding" that a sovereign tribe's inherent powers of self-government include "inherent authority to regulate internal domestic relations among its members," and that this authority was not divested by ANCSA's elimination of Indian country in Alaska.[39] It is not for this court to reject the Supreme Court's holding in *John v. Baker*.[40]

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[38] 249 P.3d 734 (Alaska 2011).
[39] *Id.* at 750.
[40] I am not persuaded that *Montana v. United States*, 450 U.S. 544 (1981), a case having to do with a tribe's authority to regulate the activities of non-members on private land, calls the Alaska Supreme Court's later holding in *John v. Baker* into question. *Montana* has to do with a tribe's authority to regulate the conduct of non-members, and does not delineate a tribe's authority to adjudicate domestic relations cases involving children who are members of the tribe. I find *Montana* to be distinguishable.

Here, of course, the tribal court seeks to decide only child support and not custody. The fact that a court has chosen not to exercise the full extent of its jurisdiction, however, does not divest the court of jurisdiction. In my view, *John v. Baker* confers jurisdiction on the tribal court to decide both custody and support. The tribal court does not forfeit its jurisdiction merely because it chooses not to decide issues of custody.

E. Personal Jurisdiction

I have concluded that the tribal court has subject matter jurisdiction over issues of child support as to children who are members of the tribe (or eligible for membership). This case does not require the court to decide the issue of personal jurisdiction, which must be decided on a case by case basis.

The United States Supreme Court held in *Kulko v. Superior Court*[41] that the Due Process clause of the Fourteenth Amendment was violated when a California court heard a custody modification and child support claim against a father who lived in New York, when that father did not have the "minimum contacts" with the State of California which are required under *International Shoe Co. v. Washington.*[42]

Statutes such as the UCCJEA or UIFSA impose geographical limitations on the jurisdiction of state courts. Reservation boundaries impose geographical limitations on the jurisdiction of tribal courts in the lower 48 states. Because of the extinguishment of Indian country in Alaska, the Tlingit Haida Tribal court has no such geographical limitation on its jurisdiction. The tribe claims jurisdiction based solely on the child's membership. Under this framework, the tribal court could claim jurisdiction to enter a support order for a tribal member

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[41] 436 U.S. 84 (1978).
[42] 326 U.S. 310, 316 (1945).

child, against a nonmember parent, even in a case in which neither the parents nor the child have ever been to Alaska or set foot on the Tribe's traditional lands.

One could imagine a hypothetical case in which both parents live in a far away state, and all the necessary witnesses as to the issue of child support would be located in the parents' state of residence. The obligor parent would have to defend himself or herself in a far away court with which he or she has no connections. In such a hypothetical case, the exercise of jurisdiction by the tribal court may well violate due process, based on the holding in *Kulko*.

It is not necessary to decide the precise outer limits of the court's jurisdiction to decide this case. There is no suggestion that any of the particular cases at issue here involve a claim of jurisdiction that would run afoul of *Kulko*.

F. Other Practical Difficulties

The State has identified a number of practical problems with concurrent state and tribal jurisdiction. I recognize the validity of many of these concerns. These practical complications are inevitable with a system of dual sovereignty. I further recognize that many of these problems will be difficult to solve. Because I believe the conclusions reached in this decision are a necessary consequence of the Supreme Court's holding in *John v. Baker*, however, I believe the solution to these problems lies somewhere other than in this court.

G. Remedies

Based on the foregoing conclusions, I find that the Tribe is entitled to summary judgment on its first, second, and third causes of action, and I will enter a declaratory judgment declaring that the Tribe possesses inherent rights of self-governance that include subject matter jurisdiction to adjudicate child support for children who are members of the Tribe or eligible

for membership in the Tribe, and an injunction requiring the State of Alaska, Child Support Services Department to comply with UIFSA and applicable federal and state regulations.

There are several issues that require additional briefing. The first is whether these conclusions require summary judgment on the constitutional and §1983 claims set out in plaintiff's fourth and fifth causes of action. And the second is the precise language of the injunctive relief that should be granted. In particular, how broadly should the injunction be phrased as to future cases.

In addressing this second question, I would ask the parties to specifically address the question of how (or whether) to address possible questions about personal jurisdiction, under *Kulko* or other authority, in crafting an injunction.

Finally, the parties should address the question of whether, based on the conclusions set out in this order, the court should enter final judgment in this case. If so, the parties should state their positions on what that judgment should be (consistent with the conclusions reached in this order).

The plaintiff should submit a memorandum on these points, along with a proposed form of order, in thirty (30) days. The defendant should submit its memorandum thirty (30) days form the date of service of the plaintiff's memorandum. The plaintiff may submit a reply memorandum fifteen (15) days from the date of service of the defendant's memorandum.

III. CONCLUSION

As discussed above, I find that the Tlingit Haida Tribal court has subject matter jurisdiction to enter child support orders concerning tribal member children. The plaintiff's

motion for summary judgment is, therefore, GRANTED. The State's cross motion for summary judgment is DENIED.

Entered at Juneau, Alaska this 25 day of October, 2011.

Philip M. Pallenberg
Superior Court Judge

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 25th day of October, 2011.

Holly Handler	Mary Ann Lundquist
☒ Court box	☒ Court box

Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg

New Attorney General Plans to 'Fight the Good Fight'

By Dave Donaldson, APRN - Juneau | February 16, 2012 - 3:29 pm

Newly appointed Attorney General Michael Geraghty made his first appearance before legislators today to talk about the budget, pending litigation – and what he calls the state's "proactive" role in state's rights litigation.

The lawmakers will determine the level of funding for the Department of Law in the budget they are now writing.

Along with Deputy Attorney General James Cantor, Geraghty gave the House Finance Subcommittee an update on thirteen major non-oil lawsuits the state has been involved in this year. He presented cases ranging from corporate income taxes to the Kasuylie and Moore education suits that were settled recently.

Geraghty also addressed what he called the states' rights cases – from Beluga Whales to Polar Bears to the roadless rule in the Tongass National Forest, to the question of jurisdiction over navigable waters within federal conservation areas.

> From my perspective, this is an insidious encroachment on states' rights. It doesn't seem like much in a particular case, a particular example – you are going to be talking about endangered species, that's another example of where we're losing control over our wildlife. And it's just an insidious process and we have to fight the good fight.

He also said the state should take care to be proactive — to pick cases it can win throughout the judicial process. He said Alaska will have "tough sledding" by being a part of the "Liberal" Ninth Circuit Court of Appeals, But he said with the right cases, Alaska can get before a "somewhat sympathetic U-S Supreme Court."

Geraghty agreed with Anchorage Democrat Lindsey Holmes –a member of the subcommittee – who said she struggles with the good intentions versus the misuse of the Endangered Species Act and the National Environmental Policy Act.

> In the Polar Bear for example, they're modeling in Global Warming – which in itself tends to be a controversial subject with many people, but that's .... The modeling is going out well into the future and they're trying to take into account Global Warming as well. It just seems like it's gotten away from good science and species that are threatened into these projections. I mean, who can tell the future a hundred years out. It just boggles the mind.

Geraghty was appointed January 12th to head the Department of Law – and he will go through the legislative confirmation process before the end of the session.

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House panel advances Parnell's AG pick to vote

Geraghty still faces a hearing before Senate Judiciary Committee.

By BECKY BOHRER

(02/29/12 18:12:29)

JUNEAU -- The House Judiciary Committee on Wednesday advanced Gov. Sean Parnell's pick for attorney general to a confirmation vote.

Michael Geraghty faced friendly questioning during his confirmation hearing before the committee. He was asked, among other things, how he views his role both as a political appointee of the governor and as someone chosen to represent the public interest.

Geraghty said it's a hypothetical situation, the idea that agencies or the governor wouldn't follow his legal advice. He said he serves the office of governor, not an individual, and as long as the governor's views support the law -- and he said he has confidence they will -- then this won't be an issue.

He said attorneys general and governors come and go, but the integrity of institutions and the independence of his office are critical to the proper function of government.

He noted that he has no qualms about Parnell's ethics or commitment to Alaska.

Geraghty was a partner at an Anchorage law firm when he was appointed, and he has been practicing law for more than 30 years. His experience includes trial work in state and federal courts.

Geraghty also has served as an independent counsel to the State Personnel Board. His work as such has raised some concerns, though none was voiced at Wednesday's hearing.

Lynn Willis, of Eagle River, in a letter to the Senate and House

Judiciary chairs included in the hearing packet, said Geraghty's performance in an ethics complaint he filed against the governor raised doubts about whether Geraghty could effectively serve "all Alaskans" as attorney general.

"I am not contesting Mr. Geraghty's decision," he wrote. "What concerns me is the manner in which he executed his duties."

Willis declined to go into much more detail when contacted by The Associated Press on Wednesday, citing confidentiality surrounding ethics complaints and uncertainty about what he could discuss.

Geraghty still faces a confirmation hearing before the Senate Judiciary Committee. He must be confirmed by the full Legislature.

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AG nominee urges challenges to 'federal encroachments'

Michael Geraghty talks state's rights in confirmation hearing

Posted: March 1, 2012 - 12:10am

By Pat Forgey

JUNEAU EMPIRE

Gov. Sean Parnell's nominee for the position of attorney general got a warm reception from legislators Wednesday during a confirmation hearing, suggesting the long-time Fairbanks attorney will have little difficulty winning confirmation from the full Legislature.

Michael Geraghty, 59, said he's looking forward to working on cases important to Alaska, including fighting what he called "federal encroachment" on Alaska's rights.

That's a key part of the Parnell administration's stance, including fighting Endangered Species Act listings in Alaska and other actions.

Before the House Judiciary Committee on Wednesday and in other legislative testimony, Geraghty talked of his interest in fighting those battles on behalf of the state, and hopefully getting past the "somewhat liberal" 9th Circuit Court of Appeals, and into a "somewhat sympathetic" U.S. Supreme Court.

Geraghty said the polar bear endangered species listing action is based on modeling of the future effects of global warming, and questioned the validity of the science behind it.

"I mean, who can tell 100 years out," he said. "It just boggles the mind."

He called global warming itself a controversial subject, and said the listing process had "gotten away from good science."

Geraghty on Wednesday defended a decision not to continue state involvement in the case of Jim Wild, who was arrested following a Yukon River confrontation with federal authorities.

The Fairbanks News-Miner described Wild as a "crusty 71-year old who cursed out National Park Service Rangers."

Geraghty said he was still interested in establishing the state's control of navigable waters in conservation areas under the Alaska National Interest Land Conservation Act, but that the Wild case was not a "clean" case on which to mount an appeal as Wild had some "behavior issues."

"There were some disputed issues that clouded to some extent the ANILCA issues, the issues that were of concern to the state," Geraghty said.

The state will pursue its interests in asserting control of navigable waters in conservation areas with other cases, he said.

Geraghty has described his philosophy as "looking for vehicles to attack and resist this encroachment."

Almost no gubernatorial appointments are rejected by the Legislature, and the confirmation process had become almost routine until a few years ago when then-Gov. Sarah Palin drew controversy with her choice for the AG's slot, Wayne Anthony Ross.

Ross made history in what turned out to be the closing days of the Palin administration when a Legislature dominated by Republicans rejected the Republican governor's appointment to the state's top law enforcement position. Ross was the first nominee to Alaska's attorney general post to be refused confirmation.

Geraghty has so far received mostly praise from legislators, especially those advocating for an aggressive state role in challenging federal actions.

Prior to being named attorney general in January, Geraghty's law firm worked for the state Personnel Board investigating ethics complaints.

One of those that has been made public was his recommendation to dismiss a claim of an ethics violation stemming from a state press release announcing Palin's selection as running mate for John McCain.

Confirmations are generally taken up in the last days of the legislative sessions by the full House and Senate.

• Contact reporter Pat Forgey at 523-2250 or at patrick.forgey@juneauempire.com.

Cindy Smith

From: Soukup, Michael D (GOV) <michael.soukup@alaska.gov>
Sent: Friday, February 17, 2012 3:35 PM
To: sharon.leighow@alaska.gov
Cc: michael.soukup@alaska.gov
Subject: DoL PR State Requesting to Intervene in Ninth Circuit NEPA Case 021712
Attachments: DoL PR State Requesting to Intervene in Ninth Circuit NEPA Case 021712.pdf

Press Release ATTORNEY GENERAL'S OFFICE

FOR IMMEDIATE RELEASE **February 17, 2012**

State Requesting to Intervene in Ninth Circuit NEPA Case

February 17, 2012, Anchorage, Alaska - Attorney General Michael Geraghty today filed a motion to intervene in a case challenging the adequacy of the environmental review of the Port MacKenzie rail line extension. The rail line will improve the state's transportation system by allowing freight to be transported to and from the Interior and Port MacKenzie.

On November 11, 2011, the U.S. Department of Transportation's Surface Transportation Board authorized the construction and operation of a 35-mile railroad connecting Port MacKenzie and the Alaska Railroad Corporation's (ARRC) main line north of Willow.

The rail line will allow more efficient shipments of bulk commodities (logs, sand/gravel, coal, and cement), vehicles and heavy equipment, and mobile and modular buildings. The state previously appropriated $75 million for the project. The board concluded that the environmental analysis completed under the National Environmental Policy Act (NEPA) was sufficient and that ARRC may construct the preferred alternative outlined in the environmental document. On January 20, 2012, various project opponents, including the Sierra Club, filed suit in the Ninth Circuit on the grounds that the board violated NEPA and the federal Administrative Procedure Act.

Alaska is seeking to intervene in order to protect the state's interests. General Geraghty maintains the board followed the law, and a reversal of the board's decision would result in unnecessary delays and increased costs, which is not in the best interest of Alaska or its citizens.

"Not only does the State of Alaska have a direct financial stake in the project, but we need to protect our ability to responsibly develop Alaska's infrastructure and natural resources," Attorney General Michael Geraghty said.

For more information about the case, please contact Assistant Attorney General Sean Lynch at (907) 465-3600.

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Cindy Smith

From: Badgley, Cori M (LAW) <cori.badgley@alaska.gov>
Sent: Monday, February 13, 2012 3:30 PM
To: Cindy Smith
Subject: RE: AG Confirmation Hearing

That's great! I was starting to get worried about how to fit it all in.

The 14th would be best for us, but the 16th is also available.

Thanks Cindy.

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, February 13, 2012 3:16 PM
To: Badgley, Cori M (LAW)
Subject: RE: AG Confirmation Hearing

Corey,

We've always held this hearing separately. These tend to be substantive hearings and it's just too hard to do with 12 legislators.

But really, there's lots of time. How about the middle of March? We can do the 12th, the 14th, the 16th, or the 19th. Let me know what will work for the Attorney General.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Badgley, Cori M (LAW) [mailto:cori.badgley@alaska.gov]
Sent: Monday, February 13, 2012 2:58 PM
To: Cindy Smith
Subject: AG Confirmation Hearing

Cindy,

Senator French said we should talk with you about getting the confirmation hearing scheduled. In talking with Senator French about confirmation, it sounded like he was looking at doing the confirmation hearing before things got too busy. I am currently in discussions with the House Judiciary Committee about doing the confirmation hearing on Wednesday, February 29, the week before energy week.

I was wondering if there was any possibility to hold a joint confirmation hearing? The reason being that the attorney general will be leaving for a conference at the end of that week, and we are trying to adhere to Senator French's desire to not hold off too long on the confirmation, while still allowing Mr. Geraghty time to meet the legislators and become comfortable with the Department of Law and the various issues it has to address.

If that is not a possibility, we can discuss a better time and date.

Thanks in advance for your help! Its greatly appreciated.

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

Cindy Smith

From: LynnWillis <akwillis@gci.net>
Sent: Wednesday, March 14, 2012 8:36 PM
To: Cindy Smith
Cc: Sen. Joe Paskvan; Sen. Bill Wielechowski; Sen. Hollis French; Sen. Lesil McGuire; Sen. John Coghill
Subject: Re: your letter and testimony

Ms.Smith,

I am sorry that I didn't read your email until this evening when I got home. You sent it this morning and the hearing was held this afternoon. So my testimony was not included in the hearing documents.

I suppose you could have called me as my phone number was on the original letter I sent your office on February 17th. However you chose not to do so. I know my question was complicated or else I wouldn't have asked it. But what does a citizen know?

I was able to listen to the hearing today. Now I understand why Mr. Geraghty was not challenged about his performance as an independent counsel and why he never admitted that he had worked as a contract attorney for the State Personnel Board.

I truly am disgusted with the Alaska governmental process reserved for use by only the privileged few. This whole episode has been characterized by delays and abuses that have only seemed to serve the agenda of those of you who control this system. Now you can do what you want with my testimony. It was not included with the hearing documents and so it has been lost. You and your ilk win again.

Lynn Willis
Eagle River, Alaska

----- Original Message -----
From: Cindy Smith
To: akwillis@gci.net
Cc: Melanie Lesh
Sent: Wednesday, March 14, 2012 9:37 AM
Subject: your letter and testimony

I have looked into your question regarding whether you can discuss your ethics complaint publicly, and whether if you did you would be subject to sanction. I apologize for taking as long as I did but your question was more complicated than it appeared!

Here is what I have found: as you said in your letter, the law says that unless a complaint reached the reaches the public phase with an accusation, the complaint has to be kept confidential.

However, in an opinion issued by the Attorney General in August, 2009, the specific issue was addressed and he concluded " Because public dialogue about government action is speech at the core of the First Amendment, **we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection."**

You can read the opinion here:

http://law.alaska.gov/pdf/opinions/opinions_2009/09-008_AN2009102807.pdf

The language I am citing starts on page 8.

Given this, would you like to have your testimony distributed to the committee?

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

August 5, 2009

Mike Nizich
Chief of Staff, Office of the Governor
550 West 7th Avenue, Suite 1700
Anchorage, AK 99501

Re: Analysis and Recommendations Concerning the Alaska Executive Branch Ethics Act

Dear Mr. Nizich,

We provide this legal analysis in response to questions about how to best implement the Alaska Executive Branch Ethics Act's goals to encourage high moral and ethical conduct and to improve public service, with a particular focus on (1) effective ways in which to minimize the disruptive effects of breaches of confidentiality, and (2) whether and how the state may defend public officers charged with ethics violations.

I. Summary

These are important issues for the state. They require consideration of laws that promote ethical conduct for public officials, the balance between First Amendment rights and a fair process for those accused of ethics violations, and holding public officials accountable while also encouraging qualified citizens to serve in state government. Because these issues have broader implications for public policy, I am issuing this analysis and advice as an attorney general's opinion.

Our analysis, conclusions, and recommendations fall into two categories. First, the confidentiality of the Ethics Act investigative process can be better protected in the future. As drafted, the Act provides an unnecessary opportunity

for a complainant to publicize a confidential report at a sensitive stage of the process. In addition, it imposes no consequences for citizens who abuse the Act by filing frequent, frivolous complaints, or filing complaints in bad faith. With statutory amendments, the ethics procedures can be changed in a manner that protects both the public interest in holding public officials accountable and the integrity of the process. We do not, however, recommend amendments that would impose sanctions for a citizen's disclosure of an ethics complaint that he or she has filed.

Second, the state has a well-established general policy of either defending or reimbursing executive and judicial branch officials for their legal defense when they are accused of inappropriate conduct or wrongdoing. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly and therefore should be defended by the state against allegations to the contrary. Reimbursing the reasonable expenses that exonerated public officers incur in successfully defending against ethics complaints is consistent with this policy and balances the state's interests in discouraging misconduct by public officers and encouraging public service.

Drawing on previous legal advice we have provided, we conclude that executive branch agencies have authority to pay or reimburse the legal expenses public officers incur in defending against ethics complaints, if four conditions are met: (1) the public officers are exonerated of violations of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred are reasonable; and (4) appropriate sources of funds are available to the agencies to pay the expenses. Where those four conditions exist, reimbursing officers for those expenses clearly serves a public purpose and the public interest.

II. Background – the Ethics Act Process

Under the Ethics Act, anyone—including the attorney general or a member of the public—may file a complaint against a public officer.[1] For most ethics complaints, the attorney general is responsible for investigating the allegations and,

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[1] AS 39.52.310. "Public officers" include executive branch employees and officers, members of state boards and commissions, and state trustees. AS 39.52.960(20) and (21).

if appropriate, prosecuting the accused.[2] However, for ethics complaints against the governor, lieutenant governor, or attorney general, the attorney general is recused from involvement in the proceedings and the personnel board appoints independent counsel to act in place of the attorney general.[3] The attorney general is also charged with adopting regulations "necessary to interpret and implement" the Ethics Act.[4]

An Ethics Act investigation often results in the dismissal or settlement of the complaint. When it does not, the attorney general or independent counsel issues a public accusation against the subject officer, followed by an evidentiary hearing before the personnel board to determine whether a violation occurred and what remedies are appropriate.[5] In that hearing, the attorney general or independent counsel prosecutes the ethics charges against the public officer.[6]

A public officer accused of ethics violations is not required to have a lawyer represent him in ethics proceedings. But even a public officer who is confident he acted properly may decide that he does not want to handle the ethics complaint procedures on his own – especially given that the potential penalties include substantial fines, removal from office, or discharge from state employment.[7] A wrongly accused public officer might worry that, without a lawyer representing him in the process, the attorney general or independent counsel might misconstrue the officer's actions or misinterpret the Ethics Act. An accused public officer might also want a lawyer's advice on how to respond to media inquiries about an ethics complaint if the complaint prematurely becomes public knowledge.

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2 AS 39.52.310 – 39.52.390.

3 AS 39.52.310(c).

4 AS 39.52.950.

5 AS 39.52.350 – 39.52.370.

6 AS 39.52.360(c).

7 *See* AS 39.52.410 – 39.52.460.

The Ethics Act designates as confidential an ethics complaint and all other documents and information regarding an ethics investigation unless (1) the accused waives confidentiality in writing or (2) the attorney general or independent counsel initiates formal proceedings by issuing a public accusation.[8] The Act also provides other ways in which confidential information from the proceedings can be made public.[9]

III. Preventing Breaches of Confidentiality

Despite the Ethics Act's confidentiality provisions, over the past several months complaints against public officers regularly have been provided to the news media. In addition, a confidential recommendation by the personnel board's independent counsel recently was disclosed to the press, undermining the process by which ethics complaints are resolved. The Ethics Act does not grant the state authority to punish citizens who violate the confidentiality requirement, however, nor would that be advisable in many circumstances.[10] We conclude that the appropriate manner to prevent disclosure of information that may be harmful to the process of ethics investigations and the subject of the complaint is to improve protections to the process and to implement safeguards to prevent abuse of the Ethics Act.

A. The State Can Take Steps to Protect the Integrity of the Process of Resolving an Ethics Act Complaint

Confidentiality is important to the process of investigating and resolving an ethics complaint. The investigation may involve sensitive information about personnel matters that should be protected from the public eye. Further,

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8 AS 39.52.340(a), (c).

9 *See, e.g.*, AS 39.52.335(c), (f)-(h).

10 The confidentiality provision is enforceable against state officers who are part of the process of evaluating, investigating, and deciding Ethics Act complaints. *See, e.g., Dixon v. Kirkpatrick*, 553 F.3d 1294, 1306 (10th Cir. 2009) (holding that disclosure by a clerical employee of information about an ongoing investigation by state veterinary board was a constitutionally sufficient basis for dismissal).

publicizing information may interfere with the investigator's ability to find witnesses willing to cooperate, invite retaliation, threaten the independence of the investigation, and prejudice the right of the subject to a fair process. The public does not have a right to access information about the evidence or course of an investigation as it proceeds.[11]

The state can protect its interest in the integrity of Ethics Act investigations by creating "careful internal procedures to protect the confidentiality of [the] proceedings."[12] Thus we recommend improving Ethics Act procedures to prevent a breach of confidentiality that could prejudice the subject of a complaint and interfere with the state's ability to judiciously resolve ethics matters.

For example, the Ethics Act provides that when the attorney general finds probable cause to believe that a past action has violated, or an anticipated action would violate the Ethics Act, but determines that a hearing is unwarranted, he recommends corrective or preventive action in a confidential report. The Ethics Act currently requires the attorney general to provide copies of this confidential report to both the complainant and the accused officer. The accused officer who receives a report of recommended action from the attorney general may want to negotiate an alternative corrective action or settlement with the state. In this situation, giving the recommendations to the complainant is unnecessary. The complainant has no role in negotiations and should not be permitted to interfere

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[11] The right of access to information is far narrower than the free speech right to publish information once it is received. *See First Amendment Coal. v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 472 (3rd Cir. 1986) ("[T]he right of publication is the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may properly be denied.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

[12] *Providence Journal Co. v. Newton,* 723 F. Supp. 846, 857 (D.R.I. 1989) (citing *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *see also R.M. v. Supreme Court of N.J.*, 883 A.2d 369, 380 (N.J. 2005) (holding that state's interest in enabling disciplinary authorities to make a full and fair investigation can be more narrowly met by the use of subpoenas and the imposition of criminal sanctions for witness tampering, destruction of evidence, and attempts to unduly pressure officials).

with or undermine discussions by publishing the report. This would compromise the proceedings at a critical stage. The complainant can be informed of the disposition of the case when the matter is resolved, corrective action is taken under AS 39.52.330, or an accusation is filed under AS 39.52.350. Thus, we recommend the Ethics Act be amended to eliminate the requirement that the attorney general serve the complainant with his predispositional recommendations, and to delay notification to the complainant until the matter is concluded.

B. The State Can Take Steps to Prevent Abuse of the Ethics Act

The Ethics Act process also could be changed to prevent another potential harm—abuse of the process. Some Alaskans have argued that the Ethics Act has been used inappropriately in some circumstances to politically damage the subject of the complaint.[13] This opinion does not examine or decide whether or to what extent citizens may have abused the Ethics Act process in the past. We focus instead on statutory changes that could provide a disincentive to abuse the Act in the future.

Our first suggested addition to the Ethics Act is a provision that is simple and commonly used in other jurisdictions. We recommend giving the personnel board authority to order reimbursement of fees and costs from a person who has filed a complaint in bad faith. The reimbursement could extend both to the subject of the complaint, for attorney's fees and costs of defending against the accusation, and to the state, for its actual costs associated with processing and investigating the complaint. The precise standard for ordering reimbursement is a policy decision beyond the scope of this opinion, but as a general matter the standard should not discourage speech protected by the First Amendment. A brief analysis of different standards used by other states follows.

Some state codes make knowingly false complaints subject to both reimbursement orders and criminal prosecution.[14] Others have similar provisions

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[13] *See, e.g.,* "Our View: Abuse of Ethics Complaints Turns Good Law Into Bad Politics," Anchorage Daily News, May 3, 2009.

[14] *See, e.g.*, Ala. Code § 36-25-27(a)(4) ("Any person who knowingly makes or transmits a false report or complaint pursuant to this chapter shall, upon conviction, be guilty of a Class A misdemeanor and shall be liable for the actual legal expenses incurred by the respondent against whom the false report or

but without criminal penalties, whereby reimbursement is warranted when the complainant knew that he or she was falsely alleging misconduct or providing false information.[15] In still other states, a less rigorous standard applies. Missouri law provides, for example, that "[a]ny person who submits a frivolous complaint shall be liable for actual and compensatory damages to the alleged violator for holding the alleged violator before the public in a false light."[16] The same statute defines "frivolous" to mean "a complaint clearly lacking any basis in fact or law." An even looser standard would be to assess the subject's attorney's fees against the complainant whenever a subject is found not to have violated the Ethics Act, regardless of the complainant's knowledge or intent. We have found no state that applies such a standard, however, most likely because it would discourage most ethics complaints and undermine an important element of ethics laws.

We also recommend consideration of another safeguard to discourage habitual complaint filers who use the Ethics Act process to harass executive branch employees. Statutory amendments could provide authority to the personnel board to decline to process further complaints filed by a person who has abused the Act in this way. Again, the precise parameters of this authority would be a policy

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complaint was filed."); *see also* 5 Ill. Comp. Stat. 430/50-5(d) ("Any person who intentionally makes a false report alleging a violation of any provision of this Act to an ethics commission, an inspector general, the State Police, a State's Attorney, the Attorney General, or any other law enforcement official is guilty of a Class A misdemeanor.").

15 In West Virginia, for example, a person who files an ethics complaint in good faith "is immune from any civil liability that otherwise might result," but a person who is found, by clear and convincing evidence, to have filed a complaint knowing that material statements are untrue can be ordered to reimburse both the subject and the ethics commission for costs and fees. W. Va. Code § 6B-2-4(u)(1)-(2); *see also* Fla. Stat. § 112.317(7) (giving ethics commission authority to require reimbursement of costs and fees "[i]n any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee … with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part.").

16 Mo. Ann. Stat. § 105.957 (4).

matter. One model is the provision for "Multiple complaints by a single complainant" in the Rules for Judicial Council and Judicial Disability, which govern the United States Court of Appeals for the Ninth Circuit. These rules provide that a complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints.[17] The rule allows the complainant an opportunity to demonstrate why the judicial council should not limit the complainant's right to file further complaints, and gives the council authority to prohibit, restrict, or impose conditions on the complainant's future use of the procedure.[18]

We believe that these recommendations for changes to the Ethics Act maintain an appropriate balance between protecting the integrity of the process and encouraging responsible use of the Act to expose and correct unethical conduct. As discussed further below, we do not suggest any changes that might inhibit public discussion, debate, or criticism of the government.

C. The State Should Not Discourage Public Discourse on Government Actions

Creating safeguards to keep Ethics Act investigations confidential is categorically different than restricting citizens from speaking out about government conduct. Because public dialogue about government actions is speech at the core of the First Amendment, we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection. The United States Supreme Court has adhered to the bedrock principle that expression on public issues rests "on the highest rung of the hierarchy of First Amendment values,"[19] and thus that "debate on public issues should be uninhibited, robust, and

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17 U. S. Ct. of App. 9th Cir. Jud Miscon, Rule 10(a) (2008).

18 *Id.* West Virginia's ethics act contains a similar provision, *see* W. Va. Code § 6B-2-4(u)(2)(C) ("[T]he commission may decline to process any further complaints by the complainant, the initiator of the investigation, or the informant.").

19 *Carey v. Brown*, 447 U.S. 455, 467 (1979).

wide-open."[20] The Supreme Court has also made clear that protected political speech goes far beyond intellectual argument about political theory; it includes vigorous debate about the qualifications and official conduct of public officials.[21] Open discussion of official conduct is accorded the broadest protection available in our political system despite the fact "that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[22]

Alaska's Ethics Act does not inhibit this type of debate, because it does not impose penalties on individuals who are not engaged in the investigative or decision-making process. As we have considered ways to protect the confidentiality of the ethics investigations, we have been mindful that penalizing public discourse about the actions of government officials might threaten First Amendment rights. Courts have consistently found that confidentiality provisions applicable to ethics complaints restrict the content of speech.[23] Because they

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20 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

21 *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. at 268 (citing with approval *Beauhamais v. Illinois*, 343 U.S. 250 (1952) ("public men, are, as it were, public property" and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled")).

22 *Id.* at 270.

23 "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Cases finding the confidentiality provisions of ethics laws to impose content-based restrictions include *Lind v. Grimmer,* 30 F.3d 1115, 1118 (9th Cir. 1994) (holding unconstitutional the confidentiality provision applicable to investigations conducted by Hawaii's campaign spending commission); *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 444 (4th Cir. 1990) (finding that confidentiality requirement of Hawaii's Judicial Inquiry and Review Commission was not content-neutral and remanding for further analysis under strict scrutiny); *Doe v. State of Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520, 1525 (S.D.

govern the content of speech, these restrictions will survive scrutiny only if narrowly drawn and necessary to serve a compelling state interest.[24] Courts generally have rejected states' interests in ethics code confidentiality provisions as insufficient to justify restrictions on citizens' speech.[25]

IV. As a General Policy, the State Either Defends or Reimburses Public Officers for Their Legal Expenses When They are Accused of Inappropriate Conduct or Wrongdoing

The state routinely defends public officers against claims of inappropriate conduct or wrongdoing. For example, unless engaged in willful misconduct or gross negligence, the state defends public officers against claims that they violated others' constitutional rights while acting within the course and scope of their official duties.[26] Similarly, the Department of Law offers in-house legal

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Fla. 1990) (invalidating confidentiality provision of Florida Constitution, applicable to complaints against judges); *Providence Journal Co. v. Newton,* 723 F. Supp. at 853 (invalidating confidentiality provision of Rhode Island Ethics Commission); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) (finding confidentiality provision of Florida State Ethics Commission unconstitutional); *In re Warner*, ___ So.3d ___, 2009 WL 1025823 at *9 (La. 2009) (invalidating confidentiality requirement in attorney disciplinary proceedings).

[24] *Boos v. Barry,* 485 U.S. 312, 321 (1988).

[25] *See Lind v. Grimmer*, 30 F.3d at 1119-20; *Stilp v. Contino*, __F. Supp.2d __, 2009 WL 1842087 at *6-11 (M.D. Pa. 2009); *Providence Journal Co. v. Newton*, 723 F. Supp. at 856-57; *S.D. v. Supreme Court of Florida*, 723 F. Supp. 690, 693-94 (S.D. Fla. 1988); *In re Warner*, 2009 WL 1025823 at *22-27; *R.M. v. Supreme Court of New Jersey*, 883 A.2d 369, 377-78 (N.J. 2005); *Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004); *Petition of Brooks*, 678 A.2d 140, 144-45 (N.H. 1996).

[26] *See, e.g., Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 577 (Alaska 2007). The Department of Law recently—and successfully—defended three Alaska State Troopers against claims under 42 U.S.C. § 1983, which provides, in part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

representation to its attorneys when complaints of professional misconduct are filed against them with the Alaska Bar Association.[27] The Department of Law represents its attorneys so long as the allegations of misconduct arise in the course and scope of their official duties and the attorneys did not engage in willful misconduct or gross negligence.[28]

In some cases, when the Department of Law does not defend public officers against claims of inappropriate conduct, the state will instead reimburse them for the legal expenses they incur in successfully defending themselves. For example, if a Department of Law attorney hires private counsel to defend against professional misconduct claims before the Alaska Bar Association, the department may reimburse the attorney for costs and fees incurred if the attorney successfully defends against the claims and the claims arise out of the course and scope of the attorney's work with the department.[29] The state also reimburses Alaska judges and judicial officers for legal expenses they incur in disciplinary proceedings before the Alaska Commission on Judicial Conduct.[30] This commission serves a function for the judicial branch that is analogous to the personnel board's function for the executive branch under the Ethics Act.

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be liable to the party injured in an action at law." This statute therefore authorizes a person to bring a civil action for a public official's putative violation of the person's constitutional rights. The department also is defending former Governor Palin in a § 1983 action involving a clerical error in the Governor's Office that resulted in the failure to issue a proclamation.

27 Memorandum from Attorney General Bruce Botelho at 2 (Nov. 8, 2002) (announcing the department's policy on reimbursement and defense of employees).

28 *Id.*

29 *Id.*

30 Letter of Agreement between the State of Alaska, Dep't of Admin., Div. of Risk Mgmt. and the Alaska Ct. Sys. at 2 (undated). The state also has agreed to reimburse state employees for legal defense of allegations of wrongdoing in occupational licensing investigations before the Board of Psychologists and the State Medical Board, if the employees are exonerated.

More generally, the Department of Law was recently asked whether a state agency may reimburse a public officer for legal expenses incurred in defending against a complaint that the officer violated the professional code of conduct covering his duties and responsibilities. We concluded that the agency could reimburse such legal expenses if: (1) a decision exonerates the officer of any violations of the law or any wrongdoing; (2) the officer acted within the course and scope of his office or employment; (3) the attorney's fees are reasonable; and (4) an appropriate source of funds is available for that purpose.[31]

As these examples show, the state adheres to a general policy of either defending or reimbursing public officers for their legal expenses when they are accused of inappropriate conduct or wrongdoing, particularly when such accusations are unfounded. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly,[32] and therefore should be defended by the state against allegations to the contrary.

V. May the State May Defend or Cover the Legal Expenses of Public Officers in Ethics Proceedings

Despite this widespread practice of defending or reimbursing public officials when accused of wrongdoing, the state apparently has never defended or covered the legal expenses of an accused officer in an Ethics Act proceeding. Alaska

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[31] Confidential Letter from Acting Attorney General Richard Svobodny (May 4, 2009).

[32] *See, e.g., AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) ("[a]dministrative agency personnel are presumed to be honest"); *Earth Resources Co. v. State, Dep't of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983) ("agency personnel and procedures are presumed to be honest and impartial").

statutes are silent on this issue with regard to ethics proceedings.[33] But existing law provides ample authority and guidance for covering these legal expenses without the need for statutory changes.

A. A Public Purpose is Critical

The state may not spend public money for public officers' defense in ethics matters unless doing so serves a public purpose and appropriations exist for the expenditures.[34] Defending officers accused of ethics violations or covering their legal expenses when they are exonerated clearly has a public purpose: citizens may be reluctant to serve in state government—or be inhibited in performing their

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[33] We concluded in an informal 1994 opinion that defense or indemnification of public officers for expenses or penalties incurred in ethics proceedings was unavailable in part because a complaint under the Ethics Act is not a suit for money damages. 1994 Inf. Op. Att'y Gen. at 2 (June 3; 663-94-0289). To the extent that the informal 1994 opinion emphasizes that public officers are not legally entitled to defense and indemnification of fines levied against them in ethics proceedings, the reasoning of this informal opinion is sound, particularly for public officers found guilty of wrongdoing. To the extent that the opinion suggests that the state may not pay the legal expenses of exonerated public officers, it is inconsistent with the state's practice in other contexts and with the public interest. While ethics proceedings are not suits for money damages, ethics allegations usually arise out of public officers' performance of their official duties, and penalties for violating the Ethics Act may include monetary fines. *See* AS 39.52.440 – 39.52.450. Moreover, the potential damage to a public officer's reputation is a cost to the individual, and recent experience demonstrates that public officers may incur substantial legal expenses even with regard to meritless ethics complaints.

[34] *See* Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made, or public property transferred, . . . except for a public purpose."); Alaska Const. art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law."); *see also* AS 37.07.080(d) ("A state agency may not increase the salaries of its employees . . . or expend money or incur obligations except in accordance with law and [a] properly approved operations plan.").

official duties—if they must bear the cost of defending themselves against unfounded ethics charges related to their state duties.[35] Indeed, the Ethics Act itself underscores the importance of ensuring that the Act not only encourages "high moral and ethical standards among public officers in the executive branch," but also "improve[s] standards of public service."[36] Public service should not subject public officers, who are assumed by law to be acting ethically, to personal financial liabilities when ethics proceedings confirm that they acted appropriately. Therefore, in examining whether the state may defend or pay the legal expenses for public officers in ethics proceedings, the critical question is whether there is an approach that ensures that a public purpose is advanced while at the same time encouraging compliance with the Ethics Act by public officers. This question is examined in more detail below.

B. A Policy of Payment or Reimbursement After Exoneration Would Best Balance the Public Interest in Encouraging Public Service and Compliance with the Ethics Act

A policy allowing payment of legal expenses of exonerated public officers who hire private lawyers to defend them against ethics complaints would promote and "improve standards of public service"[37] while encouraging compliance with the Ethics Act. The public purpose for paying legal expenses is clearest for those

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35 *See, e.g., Snowden v. Anne Arundel County*, 456 A.2d 380, 385 (Md. 1983) (upholding an ordinance allowing reimbursement of fees and recognizing that reimbursement serves the public interest in encouraging the recruitment and retention of high-risk officers, maintaining morale, and providing necessary protection to those whose line of work exposes them to the financial burdens of defending baseless criminal charges); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (holding that Florida common law requires publicly paid legal representation for public officials defending against litigation arising from their performance of official duties while serving a public purpose; the requirement's purpose "is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently") (citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. Dist. Ct. App. 1981)).

36 AS 39.52.010 (a)(1) and (a)(2)(B).

37 AS 39.52.010(a)(2)(B).

who are exonerated.[38] As noted above, the reimbursement of legal fees for those who are exonerated in ethics matters also is consistent with the state's general practice in other contexts. Those situations, all of which concern professional ethics codes, involve issues very similar to Ethics Act matters. Such an approach also appears to be the common practice among the majority of state governments in the country.[39]

The recent advice we provided to an executive branch agency on reimbursement of legal expenses in code-of-conduct proceedings offers an appropriate model for payment of legal expenses in Ethics Act matters. Based on that model, public officers may have expenses they incur in defending against ethics complaints covered if
(1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds to pay the expenses.[40] As we stated in that opinion, "these conditions ensure that the spending will serve a public purpose."[41]

Although agencies could wait and reimburse public officers for their legal expenses once the ethics complaints against them are resolved, allowing state

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38 *See Snowden*, 456 A.2d at 385.

39 *See* Letter from James McPherson, Executive Director of the National Association of Attorneys General 2 (July 31, 2009) ("In conclusion, the reimbursement for reasonable attorney's fees and costs incurred by state officials during the course of an investigation or adjudication of alleged ethics violations where those allegations were found unsubstantiated or unfounded appears to be a common practice among a majority of the states. Such common practice, while not specifically provided by any state statutory or regulatory scheme, is premised upon a broad interpretation of risk management programs, formal ethics programs, or sound public policy protecting state officials from frivolous lawsuits which could discourage citizens from engaging in public service or seeking elected office.").

40 Confidential Letter from Acting Attorney General Richard Svobodny, *supra* n.31.

41 *Id.*

officers the option of having their legal expenses paid as they are incurred helps serve the public interest of not discouraging public service. Logistically, reimbursement may be simpler. But if public officers must shoulder the financial burden of legal expenses while they await resolution of unfounded complaints against them, qualified individuals may be reluctant to accept positions in state service and public officers may be inhibited in carrying out their duties. Public officers must agree, however, to repay any amounts they receive if they are not exonerated. [42]

The Alaska Supreme Court has not addressed the issue of reimbursement, but other court decisions suggest that this approach strikes an appropriate balance between the public's interest in encouraging individuals to accept positions in state

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[42] Pursuant to AS 39.52.950, the Department of Law will soon promulgate regulations addressing procedures for payment of expenses incurred in Ethics Act proceedings.

service and its interest in holding public officials accountable and discouraging misconduct under the Ethics Act.[43]

C. Conflict of Interest Issues Prevent the Department of Law from Directly Representing State Officials in Ethics Act Proceedings

Another possible approach would be to have the Department of Law defend public officers against ethics complaints. As noted above, the Department of Law regularly defends public officials when they are accused of wrongdoing under federal civil rights statutes. However, having the Department of Law directly defend public officers against ethics complaints could present conflict-of-interest

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[43] *See, e.g., Guenzel-Handlos v. County of Lancaster*, 655 N.W.2d 384, 389-90 (Neb. 2003) (concluding that, absent specific legislative authorization, public bodies are not obligated to pay attorney's fees their officials incur in successfully defending against criminal charges arising out of performance of their official duties); *Triplett v. Town of Oxford*, 791 N.E.2d 310, 315-16 (Mass. 2003) (same); *Hart v. County of Sagadahoc*, 609 A.2d 282, 283-84 (Me. 1992) (concluding that the common law permits, but does not require, a public body to pay fees its officials incur in those circumstances); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (recognizing a common law duty of a governmental body to pay attorney's fees that its officials incur in defending against litigation arising out of performance of their official duties while serving a public purpose); *Chavez v. City of Tampa*, 560 So.2d 1214, 1214-19 (Fla. Dist. Ct. App. 1990) (holding that, where a city council member received advice from the city attorney that voting on a matter involving her personal interest would be a conflict of interest but nonetheless voted on that matter to break a tie vote, she was not entitled by statute or common law to reimbursement of the legal expenses she incurred in successfully defending against related charges before the state ethics commission); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. Dist. Ct. App. 1981) (upholding the use of public funds to pay attorney's fees that a county appraiser incurred in successfully defending against charges of official misconduct before the state ethics commission); *Bd. of Chosen Freeholders of Burlington v. Conda*, 396 A.2d 613, 615, 620 (N.J. Super. Ct. Law Div. 1978) (holding that a county had neither the duty nor the authority to reimburse a county surrogate for legal fees incurred in defending against disciplinary proceedings before an advisory committee on judicial conduct, where the proceedings led to censure of the surrogate as a judicial officer).

challenges because of the attorney general's role in interpreting, enforcing, and prosecuting violations of the Ethics Act. If the Department of Law directly defended public officers in Ethics Act proceedings, the result would be that—for ethics complaints against most public officers—the defense counsel and the lawyer investigating and prosecuting the complaint would be in the same department and be supervised by the same attorney general and, perhaps the same deputy attorney general. In essence, the attorney general, through attorneys in the Department of Law, would be both prosecuting and defending against the ethics complaints. That could not only create an appearance of impropriety, but could also prejudice the interests of the accused officers and diminish the officers' confidence in the representation they receive. It could also create difficulties under the Alaska Rules of Professional Conduct because of the conflicting obligations of the state attorneys and their supervisors.[44]

Those conflict difficulties would not exist if the Department of Law represented only the governor, lieutenant governor, and attorney general against ethics complaints, because the attorney general is recused from investigating and prosecuting complaints against those three officers.[45] But Department of Law representation of even those three officers would still raise significant concerns.[46]

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[44] *See* Alaska R. Prof'l Conduct 1.7, 1.10 (providing that a lawyer should generally not represent a client if the representation of that client will be directly adverse to another client of that lawyer or the lawyer's firm). *But see* Alaska R. Prof'l Conduct 1.7 cmt. ("government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.").

[45] AS 39.52.310(c).

[46] As a general rule, the Ethics Act makes clear that the attorney general has no role in the investigation and prosecution of an ethics complaint against the governor, lieutenant governor, or attorney general. In all other situations involving the Ethics Act, the role of the attorney general and Department of Law is to interpret, implement, and enforce the Act, with the goal of promoting the Act's purposes. But if the Department of Law were defending an individual officer against an ethics complaint, the goal would be different: to defend that officer zealously, regardless of the implications for the long-term implementation of the Ethics Act. For example, zealous representation of an accused officer might involve asserting that a provision of the Ethics Act is unconstitutional—an

Please contact me if we can be of further assistance with this matter.

Sincerely,

Daniel S. Sullivan
Attorney General

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assertion that the Department of Law would likely resist in carrying out its general responsibility to implement and enforce the Ethics Act. Defending individual officers against ethics complaints would therefore create an unacceptable conflict between the Department of Law's duty to provide them zealous representation and its general duty to promote the purposes of the Ethics Act in interpreting, implementing, and enforcing the Act.

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March 2, 2012

Senator Hollis French
State Capitol Building – Room 417
Juneau, Alaska 99801

Re: Testimony concerning appointment of Attorney General.

Senator French,

Approaching the Alaska Legislature is a difficult task. I asked for guidance relating to submitting testimony that relates to a confidential matter in a letter dated February 17, 2012 addressed to both you and Representative Gatto as chairs of the Judiciary Committees. I have not been provided with that information yet my letter of inquiry was included in public testimony for the House hearing. That is not what I requested.

Because I feel this is important, I will now submit detailed testimony for the Senate Judiciary hearing on the confirmation of Mr. Michael Geraghty for Attorney General with this caveat. If my statement violates the law regarding disclosure of information relating to a complaint under the Executive Ethics Act and would subject me to sanctions then I do not want my testimony submitted.

I was sent a letter from the Department of Law dated June 14, 2010 acknowledging receipt of my ethics complaint. The letter contained the following statement: "Please also be advised that ethics complaints and any related investigations are confidential under AS 39.52.340, unless the subject of the investigation fully waives confidentiality or the proceedings reach the public phase with the issuance of a public accusation." I assumed that I would be accountable for maintaining the confidential nature of my efforts and could, in fact, face punishment or my complaint would be dismissed if I violated that restriction by discussing my complaint with anyone. I am still not sure I can legally discuss this issue including this testimony.

Re: Testimony concerning appointment of Attorney General, March 2, 2012

I have pursued this question of my being able to talk about this complaint. In October 2010 I requested and received an opinion through my State Representative from the Legislative Legal Office regarding this confidentially restriction that states;" Note, however, that the remedies for violating the provisions of AS 39.52.340 **seem** (emphasis added) to apply only to a public employee. Also; "While a person who files a compliant is required to treat the existence of and information about the complaint as confidential, **there may be** (emphasis added) no statutory remedy if the person fails to abide by this requirement.

As stated, I deem my testimony important. However since the legislature has created such ambiguity in the law, while retaining the power of the State to pursue a perceived breach of this law, I am not willing to expose myself to the costs of a legal defense. Senator French if, in your opinion, my statement is not legal I demand that it not be submitted. Thank you.

Mr. Lynn Willis

March 1, 2012

To: Senate Judiciary Committee

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.

I do not support the appointment of Mr. Geraghty as the next Alaska Attorney General. My opinion is based on my experience with Mr. Geraghty when he acted as an independent counsel for the state personnel board following my submitting an ethics complaint against the Governor. This testimony is not intended to argue the merits of my complaint or contest the outcome. I am concerned about how Mr. Geraghty conducted his review of my complaint. My specific concern is if Mr. Geraghty posseses the ability to function independently from the Governor who appointed him.

My complaint concerned the ethics of violating the State Constitution to create a position for a sitting legislator. I was and am very much concerned about the actions of the Governor and the appearance of unethical behavior especially in light of the recent scandals involving Alaska Legislators.

I filed my complaint on June 12, 2010. I had never filed an ethics complaint. My complaint was then "forgotten" for over 90 days. I now assume my complaint would have remained "forgotten" had I not called the Department of Law in September asking for the status of my complaint.

I received a letter on September 29, 2010 from the Alaska State Personnel Board Chair, Debra English. In that letter Ms. English apologized for the delay. The letter included the following statement, "I received your filing on June 14th via email at my work address. I forgot about you filing and failed to assign it to independent counsel. I did not recall your case until I was contacted by Nicki Neal for a status update on September 21st." Also Ms English wrote; "When Nicki contacted me I reached out to the Board's independent counsel and Mr. Geraghty agreed to take the case and review it immediately."

Did my case not receive an adequate review because of Mr. Geraghty's agreement to have the review done immediately? Mr. Geraghty concluded his review and published his report on September 28, 2010. He never contacted me.

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.
March 1, 2012

Mr. Geraghty's review included his charge; "A complaint filed under the Executive Branch Ethics Act requires independent counsel retained by the personnel board to determine whether the conduct alleged, if true, would constitute a violation of the Act. If counsel determines that the allegations in the complaint do not warrant an investigation, counsel shall dismiss the complaint with notice to the complainant and the subject of the complaint."

I believe Mr. Geraghty didn't search for a probable violation of the act. He instead searched for justification to exonerate the Governor - which he did. Mr. Geraghty obviously didn't believe that this issue warranted further investigating despite the fact that this particular issue had generated editorials and much public discourse regarding the appearance of the Governor's actions and the fate of those he appointed. However, Mr. Geraghty chose not to mention any of those facts. Mr. Geraghty shared the opinion of the then Attorney General that the Governor's action had not been found to be irrefutably illegal and therefore was not unethical either. I personally believe that behavior can be legal yet also unethical. Mr. Geraghty apparently does not. He refused to deal with the appearance of suspect behavior which, to me, is the difference between a breach of law and a breach of ethics.

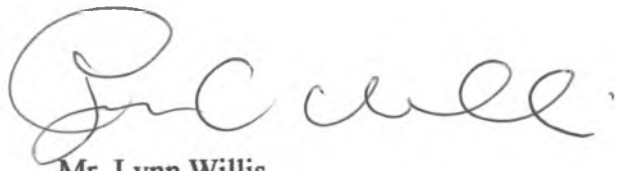
Mr. Geraghty apparently did not understand that he was to render the final and irreversible decision on this matter of pursuing a further investigation. In his September 28th report, he concludes, "It is my opinion that the allegations contained in Mr. Willis' (sic) complaint do not constitute conduct in violation of the Ethics Act and the complaint **should be** (emphasis added) dismissed." Didn't Mr. Geraghty understand that he wasn't supposed to be recommending anything? He was supposed to decide the issue. I believe his argument was written as if he would be advocating for a dismissal to another authority.

I asked the Department of Law if the statute had changed so that Mr. Geraghty was not going to make the final decision concerning a further investigation and who would be acting on Mr. Geraghty's recommendation.

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.
March 1, 2012

The Department of Law must have also asked Mr. Geraghty for clarification because I was then sent another letter on October 21, 2010 from Mr. Geraghty informing me that he had, in fact, dismissed my complaint.

Between the negligence of those who "forgot" my complaint, the self imposed necessity to complete the review quickly, and the narrow scope of the review, I feel that I was subjected to a process, including the contribution of Mr. Geraghty, more designed to quash ethics complaints from individual citizens than to determine the validity of those complaints. Therefore, based on my experience with Mr. Geraghty, I very much question his ability to maintain an independent, objective approach to situations involving conflicting issues which demand impartiality. Thank you.



Mr. Lynn Willis

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February 17, 2012

Senator Hollis French, Chair, Senate Judiciary Committee
Representative Carl Gatto, Chair, House Judiciary Committee

Sirs,

I would like to submit testimony regarding the appointment of Mr. Michael G. Geraghty as Attorney General. After contacting the Anchorage LIO who referred me to the offices of the President of the Senate and the Speaker of the House of Representatives I understand that the hearings on Mr. Geraghty's appointment have not been held. I also understand that both Legislative Judiciary Committees will be involved in this process.

This concerns Mr. Geraghty's performance as an independent counsel in regard to an ethics complaint I filed against the Governor. I am not contesting Mr. Geraghty's decision. What concerns me is the manner in which he executed his duties. Based on my experience, I very much doubt if Mr. Geraghty could effectively serve all Alaskans as Attorney General.

I understand that the facts concerning my complaint might want to be treated as confidential. Therefore I am asking for guidance regarding how to submit my testimony. Thank you.

Lynn C. Willis